
CHAMBERS GLOBAL PRACTICE GUIDES

Trade Secrets 2023

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China: Law & Practice

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CCPIT Patent and Trademark Law Office



CHINA

Law and Practice

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CCPIT Patent and Trademark Law Office is the oldest and one of the largest full-service intellectual property law firms in China. The firm has more than 320 patent and trade mark attorneys, among whom more than 100 are qualified as attorneys-at-law. It provides consultation, prosecution, mediation, administrative enforcement and litigation services relating to patents, trade marks, copyrights, domain names, trade secrets, trade dress, unfair competition and other

intellectual property-related matters. Headquartered in Beijing, the firm has branch offices in New York, Silicon Valley, Tokyo, Madrid, Hong Kong, Guangzhou, Shenzhen and Shanghai. The mission of the firm is to render tailored qualified, efficient and reliable services to clients in a cost-effective manner. The clients represent every sector of industry and commerce, ranging from start-up businesses to multinational giants.

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**CCPIT PATENT & TRADEMARK
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1. Legal Framework

1.1 Sources of Legal Protection for Trade Secrets

Unlike patents, trade marks and copyrights, there is no separate Trade Secret Law in China. But instead, a trade secret protection system based on the Anti-Unfair Competition Law, supplemented by the Civil Code (which integrates the former General Principles of the Civil Law and the Contract Law), the Law on Promoting the Transformation of Scientific and Technological Achievements, the Labour Contract Law, the Company Law, the Civil Procedure Law, and the Criminal Law. In the Civil Code passed in May 2020, trade secrets are, for the first time, explicitly classified as a type of intellectual property rights. The types and infringement acts of trade secrets are stipulated in Article 9 of the Anti-Unfair Competition Law. According to this provision:

- obtaining right-holder's trade secrets by theft, bribery, intimidation, electronic intrusion or other improper means;
- disclosing, using, or allowing others to use right-holder's trade secrets obtained by the means mentioned in the preceding paragraph;
- disclosing, using or allowing others to use right-holder's trade secrets in violation of confidentiality obligations or the right-holder's requirements on keeping such trade secrets confidential; and
- obtaining, disclosing, using or allowing any other party to use right-holder's trade secrets by instigating, tempting or helping any other party to violate the confidentiality obligations or the right-holder's requirements on keeping such trade secrets confidential.

At the same time, according to Article 219 of the Criminal Law, the first three acts are subject to criminal punishment when the circumstances are serious.

1.2 What Is Protectable as a Trade Secret

According to Article 9 of the Anti-Unfair Competition Law, commercial information such as technical and business information not known to the public, have commercial value, and kept confidential by the right-holder are classified as trade secrets and protected.

1.3 Examples of Trade Secrets

According to the relevant judicial interpretation of the Supreme Court:

- structure, raw materials, components, formulas, materials, samples, styles, propagation materials of new plant varieties, processes, methods or steps, algorithms, data, computer programs, and related documents related to technology can constitute the technical information referred to in the fourth paragraph of Article 9 of the Anti-Unfair Competition Law;
- creative, management, sales, finance, plans, samples, bidding materials, customer information, data and other information related to business activities can constitute the business information referred to in paragraph 4 of Article 9 of the Anti-Unfair Competition Law;
- the customer information referred to in the preceding paragraph includes the customer's name, address, contact information, transaction habits, intentions, content and other information.

1.4 Elements of Trade Secret Protection

According to Article 9 of the Anti-Unfair Competition Law, trade secrets must meet three elements:

- they must not be known to the public;
- they must have commercial value; and
- appropriate confidentiality measures must have been taken by the right-holder.

1.5 Reasonable Measures

A trade secret right-holder needs to prove that it has taken reasonable confidentiality measures to protect its trade secrets. Whether the right-holder has taken reasonable confidentiality measures shall be determined according to factors such as the nature of the trade secret and its carrier, the commercial value of the trade secret, the identifiability of the confidentiality measures, the reasonability of the confidentiality measures according to the nature of the trade secret, and the right-holder's will to keep the secret.

According to the relevant judicial interpretations, if one of the following circumstances is sufficient to prevent the leakage of trade secrets under normal situations, it shall be determined that the right-holder has taken reasonable confidentiality measures:

- signing a confidentiality agreement or stipulating confidentiality obligations in the contract;
- putting forward confidentiality requirements for employees, former employees, suppliers, customers, visitors, etc who are accessible to and able to obtain trade secrets, through articles of association, training, rules, regulations, or written notices, etc;
- restricting visitors or conducting separate management for production and business sites such as workshops involving secrets;
- distinguishing and managing trade secrets and their carriers by marking, classifying, isolating, encrypting, sealing up, limiting the scope of persons who can access or obtain them, etc;

- taking measures such as prohibiting or restricting the use, access, storage, reproduction, etc, of computer equipment, electronic equipment, network equipment, storage equipment, software, etc, that can access and obtain trade secrets; and
- requiring resigned employees to register, return, remove and destroy the trade secrets and their carriers that they have accessed or acquired, and continue to undertake the obligation of confidentiality.

1.6 Disclosure to Employees

Employers can sign confidentiality agreements with employees or agree on confidentiality clauses in labour contracts. Even if the employer and employees do not specifically agree on the confidentiality obligation, the employee's obligation to keep the employer's trade secrets confidential is an implied and accompanying obligation.

However, it should be noted that the employee's implied duty of confidentiality with respect to trade secrets cannot be regarded as the employer's taking reasonable confidentiality measures. In a typical case, the Supreme People's Court held that the accompanying obligation to keep secrets derived from the principle of good faith cannot reflect the subjective will of the owner of the trade secret to take confidentiality measures for information and cannot constitute a positive behaviour of confidentiality measures.

1.7 Independent Discovery

According to the relevant judicial interpretations, if the accused infringing information is obtained through self-development or reverse engineering, it should be determined that it does not constitute trade secret infringement as stipulated in Article 9 of the Anti-Unfair Competition Law. Here, "reverse engineering" refers to disassembling, mapping and analysing products obtained

from public channels, through technical means to obtain relevant technical information about the product.

However, if the party concerned has learned of the trade secrets of others by improper means, and then claims that the acquisition is legal on the grounds of reverse engineering, it shall not be supported.

1.8 Computer Software and Technology

In China, the protection of computer software and/or technology is mainly through copyright protection, but software, especially related data, can also be protected through trade secrets. For example, models formed by sorting, processing and analysing data obtained through massive public channels may sometimes not be protected by copyright law because of their low “originality”, but such data and models can be protected through trade secrets.

1.9 Duration of Protection for Trade Secrets

In theory, as long as the relevant information meets the three element requirements for trade secrets, there is no time limit for its protection. According to relevant judicial interpretations, information publicly disclosed in public publications or other media, or disclosed through public reports, exhibitions, etc, can no longer be regarded as trade secrets due to the loss of confidentiality. Instead of disclosing in such a permanent manner that once disclosed, confidentiality is lost as described above, accidental disclosure does not result in loss of confidentiality. Furthermore, controlled disclosure, such as disclosure with a signed NDA, does not result in a loss of confidentiality. After accidental disclosure, steps should be taken as soon as possible to prevent further disclosure, such as signing an NDA with a person with knowledge.

1.10 Licensing

Right-holders of trade secrets have the right to license their trade secrets to others in a non-exclusive, sole or exclusive manner and charge licensing fees. There is usually a confidentiality clause in the license contract. Even if there is no obligation of confidentiality in the license contract, the licensee is also obliged to keep the confidentiality according to the principle of good faith. Therefore, generally speaking, licensing does not affect the protection of trade secrets. In order to ensure that the licensee of trade secrets takes reasonable confidentiality measures, it is recommended that the licensor of trade secrets agrees on confidentiality obligations with the licensee when licensing and verify the licensee’s confidentiality measures.

1.11 What Differentiates Trade Secrets From Other IP Rights

Trade secrets are often associated with the protection of new technologies, often also protected by patents. But the nature of trade secrets and patents is very different.

- Trade secrets include all types of information, not just technically related information. For example, a company’s contact list may be the subject of trade secret protection, but it is not protected by patents.
- For a technology to be patented, it must meet the requirements of novelty, inventiveness and utility. Trade secrets, on the other hand, are not required to be novel or inventive. In general, any non-public information that a party has taken reasonable steps to keep confidential is a trade secret assumed to have utility. For example, any know-how can be protected as a trade secret, even if it is not patentable due to lack of inventive step.
- Patent right and trade mark right subject to administrative review and approval (eg, a Chi-

nese patent must be filed and granted by the State Intellectual Property Office of China), while trade secret protection does not have to. It can be established as long as the three elements of trade secret are fulfilled.

- Protection for trade secrets is indefinite. Patent or trade mark right has a certain term. For example, in China, the term of protection for invention patents is 20 years, the term of protection for utility model patents is ten years, and the term of protection for design patents is 15 years, counting from the date of patent application. The protection of trade secrets has no time limit, as long as the trade secret still remains unknown to the public.
- Protection for trade secrets is relative. A right-holder of a patent right, a trade mark right or copyright can exclude others from implementing his right. However, the right-holder of a trade secret has no right to prohibit others from obtaining the information independently through lawful means (eg, through self-development or reverse engineering).
- Trade secret aims to protect non-public information while the target objects of other IP rights are public. For example, patent and trade mark are published during administrative reviews while the trade secret remains unknown to the public during its whole life span.

1.12 Overlapping IP Rights

Trade secrets are often different from other types of intellectual property in the subject matter to be protected, so theoretically, intellectual property rights can be protected by combining trade secrets and other types of intellectual property at the same time. However, due to the different ways of obtaining trade secrets and patents, where the former requires the relevant technology to be kept secret, while the latter must disclose the technology in exchange for monopoly

protection, the same technical content cannot be protected by both trade secrets and patents. In addition, although software, for example, can be protected by both trade secrets and copyrights, the two lawsuits are *concursum actionum*, and only one of them can be chosen to sue.

1.13 Other Legal Theories

The types and infringement acts of trade secrets are stipulated in Article 9 of the Anti-Unfair Competition Law. According to this provision:

- obtaining right-holder's trade secrets by theft, bribery, intimidation, electronic intrusion or other improper means;
- disclosing, using, or allowing others to use right-holder's trade secrets obtained by the means mentioned in the preceding paragraph;
- disclosing, using or allowing others to use right-holder's trade secrets in violation of confidentiality obligations or the right-holder's requirements on keeping such trade secrets confidential; and
- obtaining, disclosing, using or allowing any other party to use right-holder's trade secrets by instigating, tempting or helping any other party to violate the confidentiality obligations or the right-holder's requirements on keeping such trade secrets confidential.

Article 9 also stipulates that other natural persons, legal persons and unincorporated organisations other than the business operators who commit the illegal acts listed in the preceding paragraph shall be deemed as infringement of trade secrets.

Therefore, an employee who violates the fiduciary duty to steal trade secrets can be subject to a lawsuit either for breach of contract or infringement of trade secrets. Trade secret infringement

claims can also be brought against defendants who induce employees to breach their contractual confidentiality obligations to the right-holder/employer.

1.14 Criminal Liability

According to Article 219 of the Criminal Law, anyone who commits one of the following acts of infringing trade secrets, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, and concurrently or solely with a fine; if the circumstances are especially serious, shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years imprisonment and fine:

- obtaining right-holder's trade secrets by theft, bribery, intimidation, electronic intrusion or other improper means;
- disclosing, using, or allowing others to use right-holder's trade secrets obtained by the means mentioned in the preceding paragraph; and
- disclosing, using or allowing others to use right-holder's trade secrets in violation of confidentiality obligations or the right-holder's requirements on keeping such trade secrets confidential.

At the same time, well knowing the acts listed in the preceding paragraph, still obtaining, disclosing, using or allowing others to use the trade secret shall be regarded as infringement of trade secrets.

According to the relevant judicial interpretations, the implementation of the infringement of trade secrets stipulated in the Criminal Law, (i) causes losses to the right-holder of the trade secrets or the illegal gains from the infringement of trade secrets of more than CNY300,000; or (ii) directly

causes bankruptcy or closing down of the right-holder of the trade secret due to major operational difficulties, it shall be deemed as "causing heavy losses to the right-holder of the trade secret". If the amount of loss caused to the right-holder of the trade secret or the amount of illegal gains due to infringement of the trade secret is more than CNY2.5 million, it shall be determined as "causing especially serious consequences" as stipulated in Article 219 of the Criminal Law.

For the infringement of trade secrets, both civil and criminal proceedings can be brought. Due to the stronger ability of the police to investigate and collect evidence, many plaintiffs will choose to report the case to the police first and obtain relevant evidence from them before proceeding with civil litigation.

1.15 Extraterritoriality

Generally, trade secrets are territorial rights and cannot be prosecuted in China for misappropriation that occurs in other countries. However, if – eg, the trade secrets of a company located in China were stolen by electronic intrusion outside of China, it is possible that Chinese courts have jurisdiction since the result of the infringement occurred in China. In addition, if the infringer steals the trade secret abroad and uses it in China – eg, using the trade secret to produce and operate, the right-holder can sue before a Chinese court for the infringement of the infringer's use of the trade secret. In addition, according to the principle of Lex Personalis of the Chinese criminal law, if the perpetrator of the misappropriation is a Chinese company or individual, even if the misappropriation occurs in another country/region, a criminal lawsuit against the Chinese company or individual can be instituted.

2. Misappropriation of Trade Secrets

2.1 The Definition of Misappropriation

In China, the condition for filing a trade secret infringement lawsuit is to prove that the plaintiff is the holder or interested party of the trade secret, generally the licensee; the alleged trade secret meets the definition of trade secret in Article 9 of the Anti-Unfair Competition Law, namely, it belongs to technical or business information not known to the public, has commercial value and been kept confidential by the right-holder by reasonable confidentiality measures; the defendant has infringed trade secrets as stipulated in Article 9 of the Anti-Unfair Competition Law. For non-employees, it needs to be proven that the defendant committed an improper means.

The right-holder does not need to prove that his trade secret has been used, but just enough to prove that the defendant obtained the trade secret without permission to file a trade secret infringement lawsuit.

2.2 Employee Relationships

If the infringer of a trade secret is an employee, who breaks the duty of confidentiality or disobeys the right-holder's requirement to keep trade secrets, and discloses, uses or allows others to use the trade secrets in his possession, it is also an act of infringement of trade secrets. Therefore, the elements of a trade secret misappropriation claim are different.

For employees, if there is a confidentiality agreement signed with the employer, the confidentiality obligation shall be fulfilled. If there is no confidentiality agreement, the employee has a negative obligation of inaction – ie, to keep the trade secret, not use it beyond the scope or

authority, nor disclose or allow others to use the trade secret.

2.3 Joint Ventures

Based on the principle of good faith, joint venturers have a negative obligation of inaction – ie, the obligation to keep each other's trade secrets known during co-operation.

2.4 Industrial Espionage

At present, there are no special provisions for industrial espionage in Chinese laws. Such acts of stealing trade secrets are still dealt with in accordance with the Anti-Unfair Competition Law and Criminal Law. Similar to other intellectual property rights, remedies for trade secret infringement include damages and injunctions.

3. Preventing Trade Secret Misappropriation

3.1 Best Practices for Safeguarding Trade Secrets

Regarding the “best practice” of protecting trade secrets, the relevant judicial interpretations give some “suggestions”:

- signing a confidentiality agreement or stipulating confidentiality obligations in the contract;
- putting forward confidentiality requirements for employees, former employees, suppliers, customers, visitors, etc, who are accessible to and able to obtain trade secrets, through articles of association, training, rules, regulations, or written notices, etc;
- restricting visitors or conducting separate management for production and business sites such as workshops involving secrets;
- distinguishing and managing trade secrets and their carriers by marking, classifying,

isolating, encrypting, sealing up, limiting the scope of persons who can access or obtain them, etc;

- taking measures such as prohibiting or restricting the use, access, storage, reproduction, etc, of computer equipment, electronic equipment, network equipment, storage equipment, software, etc, that can access and obtain trade secrets; and
- requiring resigned employees to register, return, remove and destroy the trade secrets and their carriers that they have accessed or acquired, and continue to undertake the obligation of confidentiality.

Best practices vary by different technical fields. For example, in the field of computer software, the right-holder is usually advised to divide the development of the software into different modules, and each module is developed by different personnel, so as to avoid the developer from mastering all the source code as much as possible. Another example is in the field of chemistry where codification management is usually adopted for raw materials, intermediates, products, etc.

3.2 Exit Interviews

Different companies have different strategies for exit interviews. Typically, an exit interview should include the following:

- review the terms of the NDA with departing personnel and ask him or her to contact the company if they have questions with respect to the NDA;
- remind employee/contractor of duty not to use or divulge company's trade secrets;
- require that the employee sign a termination certificate, if possible, acknowledging the employee's understanding and duty not to

disclose trade secrets or confidential information;

- obtain trade secret materials and documents in the employee's possession or control, including, without limitation, hard copies, soft copies, home computer files, home office files, laptops, cell phones, etc; and
- require that keys and access cards be returned.

4. Safeguarding Against Allegations of Trade Secret Misappropriation

4.1 Pre-existing Skills and Expertise

At present, there is no specific definition of "employee's general knowledge and skills" in China's trade secret practice. In principle, the knowledge and skills acquired by an employee in working for the employer have become part of his personality, and the employee has the right to apply the knowledge and skills acquired in the new job, but the employee should not use trade secrets learnt from the previous employer in the work of a new employer. Usually, if an employer is concerned about the use of trade secrets by a former employee in a particular position, the employer shall enter into a non-compete agreement with the employee, requiring the employee not to engage in an industry that competes with the employer for up to two years, during which the employer must pay a reasonable fee to the employee.

4.2 New Employees

The "new" employer should first strictly manage the employment of such resigned employees and recruit such resigned employees through legal and proper means, check whether the employee to be hired has terminated the labour contract with the former employer, and whether he or she

has the obligation of non-compete and/or confidentiality of trade secrets and ask the employee to be hired to make a written statement or commitment. The “new” employer should investigate the similarities and differences between the original and current position of the employee to be hired and arrange the current position carefully, fully investigate the actual performance of such employees, and require employees to promise not to use the trade secrets of the previous employer in the work; at the same time, most importantly, the “new” employer should archive and preserve relevant evidence, such as keeping all the materials proving that it obtained the trade secrets of others through lawful measures, such as reverse engineering.

5. Trade Secret Litigation

5.1 Prerequisites to Filing a Lawsuit

Since there is no discovery in the civil procedure in China, the plaintiff should collect evidence, including evidence of infringement and compensation, before filing a lawsuit.

To file a lawsuit for infringement of trade secrets, the following work should be done:

- determining the parties of the lawsuit – ie, the plaintiff and the defendant;
- determining the court of jurisdiction: territorial and level jurisdiction, distinguishing between technical and business information;
- carrying out necessary preservation, including evidence and conduct preservation;
- determining the scope of trade secrets;
- determination of the constituent elements of trade secrets – ie, not known to the public, commercial value, and taking corresponding confidentiality measures;

- identifying basic types and scope of infringement acts; and
- determining the litigation claims, the type of civil liability: stop the infringement, compensate for losses, return or destroy the trade secret carrier, remove the trade secret information in possession.

5.2 Limitations Period

The statute of limitations does not apply to claims for cessation of the infringement of the trade secrets; for claims for damages from infringement, the statute of limitations begins to be counted when the right-holder knows or should have known the scope of infringement, the infringer and the infringing acts. In principle, the limitation period is three years, but shall not exceed 20 years from the date of infringement. At the same time, trade secret cases, like other civil cases, are subject to the relevant provisions on the suspension and interruption of the limitation of action.

5.3 Initiating a Lawsuit

As mentioned above, in China, there is no discovery in the civil procedure. Therefore, after collecting the evidence and finishing other preparations (see **5.1 Prerequisites to Filing a Lawsuit**), the plaintiff should file a lawsuit with the court. Generally, after accepting a case, the court will give both parties a time limit for producing evidence, and then organise evidence exchange and pretrial conference. Furthermore, the court will organise at least one formal trial before reaching a final conclusion. Trade secret litigation cases also often involve forensic appraisal, such as appraisal of whether the secret point is known to the public, and whether the accused information is the same as the secret point information. Forensic appraisal can be unilaterally entrusted by the plaintiff or the defendant, or may be entrusted by the court.

5.4 Jurisdiction of the Courts

In terms of territorial jurisdiction, the court of jurisdiction for cases of infringement of trade secrets includes the court at the place where the infringement is committed (including the place where the infringement is carried out and the result of the infringement occurs) or the court at the place where the defendant is domiciled. In terms of level jurisdiction, the court for technical secret cases is the intermediate people's court designated by the Supreme Court, and the court for trade secret cases other than technical secrets is the basic court. These Supreme Court-designated Intermediate Courts include four Intellectual Property Courts and more than 20 Intellectual Property tribunals across China. In addition, the level of jurisdiction is also affected by the amount of compensation of the lawsuit. For example, for cases with a compensation amount exceeding CNY5 billion, the provincial high court has jurisdiction.

5.5 Initial Pleading Standards

In China, civil cases follow the principle of “who claims, who gives evidence”. Therefore, for trade secret cases, the plaintiff is also required to have conclusive evidence to prove the existence of infringement. However, due to the difficulty of obtaining evidence in trade secret cases, the current trend in legal and judicial practice is to reduce the difficulty of proof for plaintiffs and appropriately reallocate the burden of proof. For example, according to Article 32 of the new Anti-Unfair Competition Law, in the civil trial procedure of infringing trade secrets, the owner of trade secrets shall provide prima facie evidence to prove that it or he has taken confidentiality measures for the claimed trade secrets and reasonably show that the trade secret has been infringed. While the accused infringer shall prove that the trade secret claimed by the right-holder

does not belong to the trade secret stipulated in this law.

Where the right-holder of a trade secret provides prima facie evidence reasonably showing that the trade secret has been infringed, and provides one of the following as evidence, the accused infringer shall prove that it or he has not infringed the trade secret:

- there is evidence that the accused infringer has channels or opportunities to obtain the trade secret, and the information used is substantially the same as the trade secret;
- there is evidence that the trade secret has been or is at risk of being disclosed or used by the accused infringer; and
- there is other evidence that the trade secret has been infringed by the accused infringer.

These provisions reduce the difficulty of the plaintiff's proof and reallocate the burden of proof to the defendant after the plaintiff provides prima facie evidence.

5.6 Seizure Mechanisms

The Civil Procedure Law grants the parties a right to apply to the people's court for preservation of evidence when the evidence may be lost or difficult to obtain in the future. Plaintiffs in trade secret infringement cases often take advantage of this provision of the Civil Procedure Law to file an application for evidence preservation while suing, hoping to obtain direct evidence of the defendant's infringement and relevant compensation evidence through the court. When the court examines the plaintiff's application for evidence preservation, it mainly considers the following factors:

- the plaintiff should clearly claim the specific content of trade secret and fix relevant evidence;
- the plaintiff should provide prima facie evidence of the defendant's infringement;
- the scope of evidence preservation shall be consistent with the claim. Generally, the scope of preservation shall not exceed the trade secrets claimed by the plaintiff nor the claims of the plaintiff. The evidence that the plaintiff can obtain or can be fixed through notarisation will not be preserved by court; and
- the guarantee provided by the plaintiff.

5.7 Obtaining Information and Evidence

As mentioned above, even if an evidence preservation can be applied, the plaintiff should have prima facie evidence of the defendant's infringement. The plaintiff should complete the acquisition of prima facie evidence by himself and cannot rely on other mechanisms. After the prima facie evidence is presented, on the one hand, the plaintiff can obtain further evidence through the court's evidence preservation; on the other hand, if the defendant infringes technical secrets to a serious extent and is suspected of committing a crime, the plaintiff can also report to the police. Because the police have strong investigative capabilities, the plaintiff can also obtain evidence through this channel for civil proceedings.

The evidence that the plaintiff can furnish includes evidence related to infringement and damages.

5.8 Maintaining Secrecy While Litigating

According to the relevant judicial interpretation, when the applicant's trade secret is about to be illegally disclosed, it should be determined whether it is "urgent" as stipulated in Articles

100 and 101 of the Civil Procedure Law; if yes, the applicant can require the court to make a conduct preservation ruling – ie, an injunction to order the defendant not to disclose, use or allow others to use the trade secret stolen from the applicant. Since trade secret cases are not heard in public, if the court conducts evidence preservation, the process will not be made public, and the trade secrets involved and their carriers will not be disclosed to third parties.

5.9 Defending Against Allegations of Misappropriation

Common defences in trade secret cases include the following.

- Defence against trade secrets:
 - (a) the scope of the trade secret is unclear and its carrier is not submitted;
 - (b) the secret point is unclear and incorrect;
 - (c) the trade secret was known to the public before the defendant obtained or used it; and
 - (d) the owner or the licensee of the trade secret involved did not take the corresponding confidentiality measures for the trade secret.
- Self-development or reverse engineering defence:
 - (a) Article 14 of the judicial interpretation of trade secrets;
 - (b) where the accused infringing information is obtained through self-development or reverse engineering, the people's court shall determine that it is not an act of infringing trade secrets as stipulated in Article 9 of the Anti-Unfair Competition Law;
 - (c) the term "reverse engineering", as mentioned in the preceding paragraph, refers to the disassembly, surveying, mapping and analysis of products obtained from

public channels through technical means, in order to obtain relevant technical information of the products.

- Client trust defence:

- (a) Paragraph 2 of Article 13 of the judicial interpretation of unfair competition – if a client conducts market transactions with the employee entity based on his personal trust; after the employee resigns, if he can prove that the client voluntarily chooses to conduct market transactions with himself or his new entity, he shall be deemed not to have adopted improper means unless otherwise agreed between the employee and the original entity;
- (b) Paragraph 2 of Article 2 of the judicial interpretation of trade secrets – if a client conducts market transactions with the employee entity based on his personal trust; after the employee resigns, if he can prove that the client voluntarily chooses to conduct market transactions with himself or his new entity, the people's court shall determine that the employee did not use improper means to obtain the trade secret of the right-holder.

5.10 Dispositive Motions

There are no dispositive motion-related procedures in China's civil litigation. However, in the current trend, before entering the formal trial procedure, the parties can directly conduct a mediation, and the court may also preside over the mediation. If a settlement is reached by both parties, the court can make a mediation statement accordingly, which has legal effect.

5.11 Cost of Litigation

For trade secret litigation, the attorney fees usually range from hundreds of thousands to millions depending on the difficulty of the case. For example, in the "Vanillin" case recently heard by

the Supreme People's Court, the court supported a reasonable fee of 3.5 million for rights protection. The expenses that the plaintiff and the defendant can expect include damages, punitive compensation, and reasonable expenses for rights protection, including attorney fees, notarisation fees, translation fees and appraisal fees.

In China, risk agency is allowed for civil cases. As for litigation financing, or third-party funding, there is currently no clear determination of whether it is legal or not, but litigation financing already exists in practice.

6. Trial

6.1 Bench or Jury Trial

There is no separate jury fact-finding procedure in China. China adopts a unique system of people's assessors. In some cases, people's assessors can participate in the trial of cases. People's assessors have the same rights and obligations as judges.

6.2 Trial Process

In China, there is no difference between the trial of trade secret cases and the trial of general civil cases, except that trade secret cases are usually not heard in public. The trial process generally includes stages such as evidence exchange and cross examination, court investigation and court debate, among which court investigation and court debate are often carried out together. Except for a few cases, the witness who has given testimony shall appear and testify in court, otherwise his testimony cannot be used as the basis for independent determination of facts. Generally, trade secret cases are the same as other civil cases, the second instance is final, and the trial period is six months for the

first instance and three months for the second instance. The above period may be extended.

6.3 Use of Expert Witnesses

In trade secret cases, the plaintiff and the defendant may hire expert witness to give testimony on the technical issues for which they are responsible. An expert witness can provide answers to professional and technical questions and ask questions of the other party's expert witness. However, in trade secret cases, it is more common to ask a professional judicial appraisal institution to issue an appraisal report, such as whether the secret point is unknown to the public and whether the defendant's information is the same as that of the trade secret. The appraisal expert shall appear in court. Usually, according to different appraisal contents, the appraisal cost is about several hundred thousand yuan.

7. Remedies

7.1 Preliminary Injunctive Relief

According to the relevant judicial interpretation, when the applicant's trade secret is about to be illegally disclosed, it should be determined whether it is "urgent" as stipulated in Articles 100 and 101 of the Civil Procedure Law; if yes, the applicant can require the court to make an conduct preservation ruling – ie, injunction to order the defendant not to disclose, use or allow others to use the trade secret stolen from the applicant. The preconditions for the preservation of the above acts include:

- the trade secret claimed by the applicant meets the constitutive requirements;
- the fact of infringement exists or is about to happen;
- irreparable damage will be caused if such an injunction is not granted;

- guarantee provided by the applicant according to law; and
- the injunction shall not harm the public interest.

If the people's court rules to implement the conduct preservation measures, it shall reasonably determine the duration of the measures according to the request of the applicant or the specific circumstances of the case and other factors.

The effect of ruling to stop the infringement of intellectual property rights is generally maintained until the judgment of the case takes effect.

The amount of guarantee provided by the applicant shall be equivalent to the losses that the respondent may suffer from the implementation of the act preservation measures, including reasonable losses such as the sales income and storage expenses of the products involved to stop the infringement.

In the process of implementing the conduct preservation measures, if the losses that the respondent may suffer as a result exceed the guarantee provided by the applicant, the people's court may order the applicant to add corresponding guarantees.

7.2 Measures of Damages

The amount of compensation for business operators who have suffered damage due to unfair competition shall be determined according to the actual loss suffered due to the infringement. If the actual loss is difficult to calculate, the compensation shall be determined according to the profits obtained by the infringer due to infringement. The amount of compensation shall also include the reasonable expenses spent by the operator to stop the infringement.

In order to obtain the above compensation, the plaintiff shall provide corresponding evidence. In order to determine the amount of compensation, the people's court may order the infringer to provide the account books and materials related to the infringement when the plaintiff has tried his best to furnish evidence and the account books and materials related to the infringement are mainly in the possession of the infringer. If the infringer fails to provide or provides false account books and materials, the people's court may determine the amount of compensation with reference to the claims of the plaintiff and the evidence provided.

If it is difficult to determine the actual losses suffered by the right-holder due to the infringement and the profits obtained by the infringer due to the infringement, the people's court shall make a judgment to compensate the right-holder less than five million yuan according to the circumstances of the infringement.

If an infringer maliciously commits an act of infringing trade secrets and the circumstances are serious, the amount of compensation may be determined at more than one time and less than five times the amount determined in accordance with the above methods.

7.3 Permanent Injunction

Trade secret cases in which plaintiffs win usually result in a cessation of infringement and damages, unless the trade secret has already been disclosed so that the judgment prohibiting the disclosure of the trade secret is meaningless. Generally, unless the case is settled through settlement or mediation, the plaintiff cannot ask the defendant to recall the products. Since employees have the freedom of employment, it is generally impossible to restrict their subsequent employment. Employers can only restrict sub-

sequent employment of a departing employee through a non-compete agreement for a period of no more than two years and for a fee. An injunction to cease infringement generally has no time limit until the invalidation of the trade secret.

7.4 Attorneys' Fees

Generally, the plaintiff can claim for the reasonable expenses to stop the infringement, including reasonable attorney fees, notarisation fees, translation fees, appraisal fees, etc. Claims for reasonable expenses to stop infringement require relevant evidence, usually including contracts, payment vouchers and invoices.

7.5 Costs

As mentioned above, successful plaintiffs can obtain damages for infringement, punitive compensation and reasonable expenses spent to stop infringement, including reasonable attorney fees, notarisation fees, translation fees, appraisal fees, etc. The plaintiff shall list the above claims in the indictment, and the judge will hear the case according to the claims. Successful defendants generally cannot obtain compensation unless the plaintiff abuses intellectual property rights.

8. Appeal

8.1 Appellate Procedure

Either or both the plaintiff and the defendant who are dissatisfied with the first instance judgment, may appeal to the higher court. For technical secret cases, the Intellectual Property Tribunal of the Supreme People's Court has jurisdiction, and for trade secrets other than technical secrets, the higher court (mostly intermediate people's courts) has jurisdiction. For the judgment, the appeal period is 15 days from the date of receipt of the judgment, for the ruling, the appeal period is ten days from the date of receipt of the ruling,

and for a party who has no domicile in China, the appeal period is 30 days from the date of receiving the judgment or ruling. The trial period of the second instance is three months, which can be extended. The appeal procedure will not vary between courts.

8.2 Factual or Legal Review

The court of second instance focuses more on legal issues, but usually also ascertains factual issues. If the second-instance court finds out that the basic facts determined by the first-instance judgment are unclear, it will usually send it back to the first-instance court for retrial; if other facts are unclear, the second-instance court can also revise the judgment after finding out the facts. Usually, the second instance is not de novo and will be tried according to the appellant's grounds of appeal. For issues that need to be reserved, the appellant should clearly record it in the grounds of appeal. For most trade secret cases, the court of second instance does not merely conduct a written hearing, instead, it usually gives both parties an opportunity to present and debate.

9. Criminal Offences

9.1 Prosecution Process, Penalties and Defences

To file a criminal lawsuit against a trade secret case, it is necessary to report the case to the police first and provide preliminary evidence of the trade secret held and the infringement of the trade secret.

According to Article 219 of the Criminal Law, if the circumstances of infringing trade secrets are serious, the infringer shall be sentenced to fixed-term imprisonment of not more than three years, and concurrently or solely with a fine; if the cir-

cumstances are particularly serious, the infringer shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall also be fined.

The defences in criminal cases are basically the same as those in civil cases. However, it should be noted that the proof level of evidence in criminal cases is to eliminate reasonable doubt, while civil cases adopt the high probability standard. Therefore, being recognised as infringement in civil cases is not necessarily recognised as infringement in criminal cases. Holders of trade secrets can actively provide clues, but once the police file a case, the investigation will be completed by them.

10. Alternative Dispute Resolution (ADR)

10.1 Dispute Resolution Mechanisms

Regarding the ADR for trade secret disputes, the more mature mechanism in China is mediation, which includes not only court mediation, but also people's mediation and administrative mediation. The main pros of mediation include:

- mediation is simple, fast and flexible; the general cost of mediation is low; and
- mediation can resolve disputes in a relatively mild way, and can also reflect fairness and justice.

However, mediation also has cons, including:

- the limitations of mediation cases— ie, it is only suitable for cases with clear legal relationship and minor disputes; and
- mediation cases may make the parties lose the best time to litigate; and
- poor execution of non-court mediation.

Due to the difficulty in proving evidence and the low success rate in trade secret cases, the plaintiff may consider mediation to achieve the purpose of protecting trade secrets to a certain extent for cases with pessimistic prospects for litigation. Usually, the mediation process can guarantee the confidentiality to avoid further disclosure of trade secrets.

In addition, as another ADR mechanism, if a “contract” has been signed between the right-holder and the infringer and both parties voluntarily reach an arbitration agreement, they can apply for arbitration to the local arbitration institution or the arbitration institution agreed in the arbitration agreement in accordance with the Arbitration Law of the PRC.

Alternative dispute resolution mechanisms can be used as a pre-procedure to litigation and are not inconsistent with litigation procedures, so interim measures can be obtained from the courts.

In addition, the mediation statement issued by the court according to the mediation agreement of the parties has the force of enforcement, and the parties can apply to the court of first instance or the court at the same level where the property being enforced is located for enforcement. The arbitration award issued by the arbitration institution is also enforceable, and the parties may apply for enforcement to the intermediate people’s court in the place where the person subjected to enforcement has his domicile or where the property subjected to enforcement is located.

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