TRADE SECRETS' PROTECTION IN CHINA

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OUTLINE

- I. Overview of Trade Secrets' Protection
- II. Definition of Trade Secrets
- III. Misappropriation of Trade Secrets
- IV. Burden of proof
- V. Jurisdiction in foreign related cases

I. OVERVIEW OF TRADE SECRETS' PROTECTION 1)

- Protection laws: similar around the world
- Diverge: in the implementation

- China:
- Civil Procedure Law since 1991

I. OVERVIEW OF TRADE SECRETS' PROTECTION 2)

- **Anti-Unfair Competition Law since 1993**
  - **administrative penalties for misappropriation of trade secrets**
    - **stop the infringing act**
    - **fine Rmb 10,000 and 200,000 (1408 € to 28,169€)**
  - **civil remedies to the trade secret owners**
    - **losses suffered by the secret owner**
    - **profits gained by the infringing party**

I. OVERVIEW OF TRADE SECRETS' PROTECTION 3)

- Criminal Law since 1997
  - misappropriation of trade secrets: crime
  - imprisonment for up to seven years
  - fine
  - serious damages
    - the trade secret owner suffers direct economic damages of over Rmb 500,000 (70,423 €), or
    - which cause the trade secret owner to go bankrupt or
    - suffer other serious consequences

I. OVERVIEW OF TRADE SECRETS' PROTECTION 4)

- Contract Law, Labor Law, Labor Contract Law, and Company Law

  - Article 102 of the Labour Law states that "where an employee breaks an employment contract in violation of the Law or violates a confidentiality agreement provided in the employment contract, causing economic damages to the employer, he or she is responsible for compensating the damages according to the law".

II. DEFINITION OF TRADE SECRETS 1)

- Trade Secrets: secret information for industry and trade
- Definition in Anti-Unfair Competition Law Art. 10:
- "trade secrets" are defined as technical or business operation information that
  - is unknown to the public,
  - can bring economic benefits to the owner,
  - has practical utility, and
  - for which the trade secret owner has adopted measures to maintain its confidentiality.

II. DEFINITION OF TRADE SECRETS 2)

- Interpretation of the Supreme People's Court:
  - unknown to the public: unknown and is difficult to be obtained by the relevant personnel in the field (Art. 9)
  - can bring economic benefits to the owner and has practical utility: "actual or potential commercial value", that it "can bring competitive advantage" to its owner, and that it has "practical applicability". (Art. 10)
  - the trade secret owner has adopted measures to maintain its confidentiality: sufficiency is based on the characteristics of the information, the personal will of the right owner, identification of the measures, the degree of difficulty for others obtaining the information in issue (Art. 11)

II. DEFINITION OF TRADE SECRETS 3)

Case 1.: GE (China) & GE Healthcare (Shanghai) v. Jiuxiang Tech. Co Ltd & Wang

- Wang former GE engineer: GE failed to take sufficient measures to protect the information, and that the information was publicly known (rejected by Court)
- Court: GE's measures to protect the material, including

  (a) a non-disclosure, non-compete clause in Wang's employment contract, and a similar agreement executed by Wang upon his departure;

  (b) GE's marking of the compact disc and the materials thereon as "confidential"

  were sufficient protective measures.

II. DEFINITION OF TRADE SECRETS 4)

Case 2.: Funing Factory v. Nanxin Co Ltd

- Funing sold a patented dust removal plant to Nanxin.
- Because the dust removal plant did not reach the agreed standard written in the contract, Nanxin refused payment.
- When Funing sent workers to dismantle the plant they found out the equipment was already dismantled and destroyed. Funing therefore claimed Nanxin has stolen the trade secret of the dust removal plant by removing the equipment.
- the claim of trade secret infringement was not supported.
- a patented product may include trade secrets, but a trade secret must also be protected through reasonable measures

III. MISAPPROPRIATION OF TRADE SECRETS 1)

- Under the Anti-Unfair Competition Law "misappropriation of trade secrets" includes
  - acquiring the trade secret of another by theft, inducement, duress, or other illegal means;
  - disclosing, using, or allowing others to use the trade secret of another acquired by the above illegal means; or
  - disclosing, using, or allowing others to use a trade secret in breach of an agreement or a confidentiality obligation imposed by a legal owner.

III. MISAPPROPRIATION OF TRADE SECRETS 2)

- Illegal means: acquiring the trade secrets in an incorrect manner that results in a breach of the confidentiality of the trade secrets

- lawful means: independent discovery, reverse engineering, and inadvertent disclosure

IV. BURDEN OF PROOF 1)

- Plaintiff bears the burden of proving that its trade secret meets the statutory requirements, that what the defendant uses is similar or substantially similar to its trade secret, and that the defendant has used illegal means to acquire the secret

- To prevail in a trade secrets case, the plaintiff needs to prove that
  (1) the technical or business information is unknown to the public,
  (2) the information has economic value and practical utility,
  (3) the trade secret owner has taken steps to maintain the confidentiality of that information and
  (4) the defendant has misappropriated the trade secret.

IV. BURDEN OF PROOF 2)

- Defendant bears the burden of proving

  - the technical or business information is not protected as trade secret
  - obtaining the secret documents legitimately

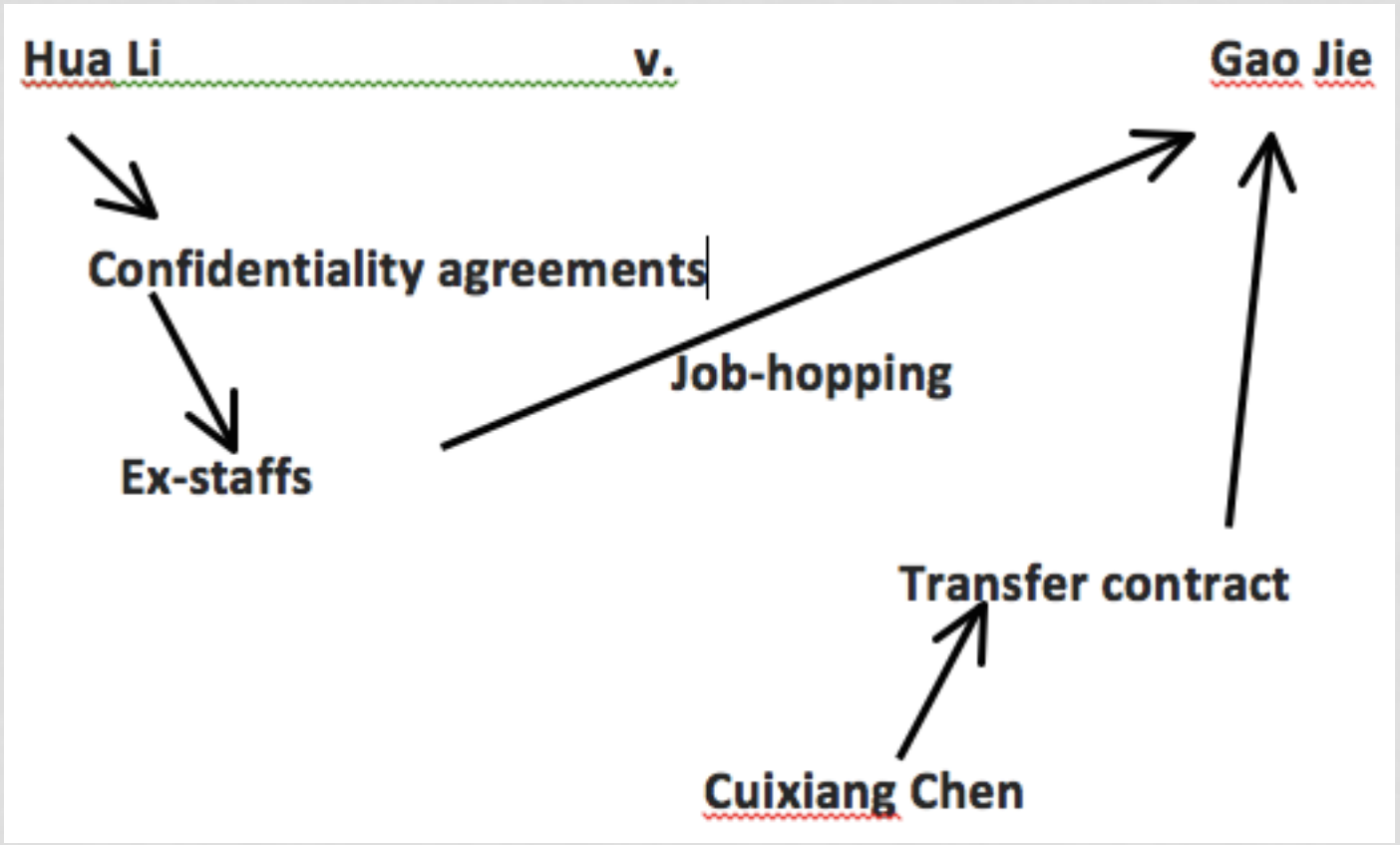
IV. BURDEN OF PROOF 3)

Case 3.: Beijing Aozuo Ecology Instrument Co Ltd v Zhai Song

- **Aozuo accused Zhai of misappropriating trade secrets and passing details on to her new employer in the form of Aozuo's confidential information and details on pre-tender estimates for its bid on a Nanjing Forestry University contract.**
- **No evidence show Zhai Song knew of its tender estimate and was involved in preparing his new employer's tender**
- **The court rejected the claim.**

IV. BURDEN OF PROOF 4)

- Case 4.: Hua Li Co. V. Gao Jie Go. & Ex-staffs



IV. BURDEN OF PROOF 5)

- ex-staff did know about the secret technology
- the alleged infringing technology and the protected technology were not same
- transfer contract of the technology in issue between Cuixiang Chen and Gao Jie
- So the claim was not upheld.

V. JURISDICTION IN FOREIGN RELATED CASES 1)

- civil cases: the place where the misappropriation occurred or where the defendant is domiciled

- a Chinese court has jurisdiction if the defendant has domicile in China; or there is an established link with China, such as the signing place of the contract, execution place of the contract or established representative office in China.

- intermediate people's court

V. JURISDICTION IN FOREIGN RELATED CASES 2)

- Criminal cases: Chinese courts have jurisdiction over a crime that occurs within China or over a Chinese citizen committing a crime anywhere

  - Example: an Australian citizen who used improper means in China to gain trade secrets of Chinese companies was held by a Chinese court to be accountable for criminal liability

  - Basic People's Courts

V. JURISDICTION IN FOREIGN RELATED CASES 3)

- **Court Structure**

Supreme People's Courts	
↙	↘
Higher People's Courts (provincial level)	Special and Professional Courts:
↓	Military Courts
Intermediate People's Courts (prefecture level)	Maritime Courts
↓	Forest Courts
Basic People's Courts (county level)	Railway Courts

V. JURISDICTION IN FOREIGN RELATED CASES 4)

- frist instance for criminal cases concerning misappropriation of trade secrets tried by Basic Peoples Courts
- first instance for civil cases concerning misappropriation of trade secrets tried by Intermediate People's Courts
- civil suit collateral to criminal proceedings: heard after the criminal hearing in Basic Peoples Courts

V. JURISDICTION IN FOREIGN RELATED CASES 5)

- Enforcement of awards: bilateral agreement for judicial assistance or it is in accordance with the principle of mutual benefits

- Until March 2015: China has signed 122 bilateral treaties on the mutual judicial assistance, the extradition and the Transfer of Sentenced Persons with other 64 countries, 104 treaties of which have entered into force. (http://www.fmprc.gov.cn)

THANK YOU!

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