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## The Protection of Business Secrets

Nowadays, many of the companies are starting to be aware that the business information and technical information are vital to their business and development, hence protecting the business secrets is becoming their top priority. However, when we look at the statistics on litigation in relation to companies' claims against their former employees based on infringement of business secrets, we find that nearly 70% of the claims are rejected by the court unfortunately, the case presented below is an example:

### Case Presentation:

Company X was established in January, 2010, whose business scope includes the sales of electrical control cabinets, complete sets of water equipment, water pumps, mechanical equipment, etc. Mr. Zhu joined Company X in 2010, taking the position of workshop director in the production department.

Mr. Zhu concluded a confidentiality agreement with Company X in 2018, agreeing to assume the confidential obligation regarding the client information, the business strategy, the product pricing as well as the market analysis. The confidentiality period covered the employment period plus 5 years after Mr. Zhu's departure from the company. The confidentiality agreement provided for a liquidated damages amounting to RMB100,000 in case Mr. Zhu breached the agreement.

Mr. Zhu left the company and completed the handover formalities in March, 2019.

It was discovered that Mr. Zhu invested in Company Y in March, 2017 when he was still an employee of Company X and therefore bound by the confidentiality agreement, by holding 30% shares of such company. The business scope of Company Y is similar to that of Company X.

As Mr. Zhu had access to a large number of the business secrets of Company X during the employment period, Company X asserted that Mr. Zhu should have taken advantage of such information to get improper benefits, for example, Company Y has contacted some clients of Company X by offering a price 15% lower.

Considering that the behavior of Mr. Zhu and of Company Y has seriously infringed its economic interests, Company X brought the lawsuit against both Company Y and Mr. ZHU before the people's court, requesting the court to: 1. order the two defendants to cease the infringement of business secrets; 2. order the two defendants to compensate Company X for its economic loss arising from their infringement behavior.

Company X mainly presented the following pieces of evidence:

- The labor contract and the confidentiality agreement signed by Mr. Zhu.
- The copy of business license of Company Y, proving that Company Y has the similar business as Company X.
- Some price lists of Company Y and some screenshots of wechat message, proving that Mr. Zhu formulated the price list of Company Y based on Company X's format and sent it to one of the clients of Company X in Beijing.

During the hearing, the two defendants requested the court to dismiss the claims of Company X based mainly on the following arguments:

- The "business information" referred by Company X was only a quotation document, which can be obtained by any person and should not be considered as business secrets.
- Company X never took any confidentiality measures on such information.

### **The Judge's point of view:**

- The fundamental aspect of this case is whether the business secret asserted by Company X can be established.

The court considers that the business secret refers to the technical information or operation information which is not known to the public, it should contain the business value and should be under the corresponding confidential protection measures taken by the owner. Therefore, Company X shall bear the burden of proof in the following three aspects: (1) its business secret has the aforesaid characteristics; (2) the information used by the two defendants are the same as that of Company X in substantial; (3) the two defendants have conducted illegal behaviors in using such business secret.

However, Company X is unable to prove that it has taken the relevant confidentiality measures for the protection of the information pertaining to its products price and to its clients, nor that the products price is unknown to the public. In fact, according to Company X's business practice, Company X could send its price list to all its agents who can in turn provide the price to the clients upon their request, which means the agents can also have access to the information of product price and the clients. Therefore, such price information and the client's information is not considered by the court as being confidential as it could be obtained by and from others. The court thus rejected all the claims of Company X.

## **DS Comments:**

So far, there is no specific law governing the protection of business secrets in China. The relevant provisions are spread in several laws. For example:

- Article 9 of the *PRC Anti-unfair Competition Law*<sup>1</sup> provides that the operator shall not infringe the business secrets of other operators;
- Article 148 of the *PRC Corporate Law*<sup>2</sup> states that the directors and the senior management of the company shall not disclose the company's secrets without authorization;
- Article 22 of the *PRC Labor Law*<sup>3</sup> provides that the employer and the employee can agree on the employee's confidentiality liability regarding the employer's business secrets in the labor contract;
- Then, Article 219 of the *PRC Criminal Law*<sup>4</sup> sets the circumstances of the crime of infringing business secrets.

With regards to the definition of “business secrets”, Article 9 of the *PRC Anti-unfair Competition Law* defines the “business secrets” as the commercial information, such as technical information and operation information, which is unknown to the public and has commercial value, and for which the rights holder has adopted the corresponding confidentiality measures. On September 12, 2020, the Supreme People's Court released the *Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving the Infringement of Business Secrets*. This legal document develops the scope of the “technical information” and “operation information” being qualified as the “business secrets” in specific, and also, provides the guidance for the courts on the trial of the dispute of infringing business secrets.

In legal practice, in order to be qualified as business secrets, an information shall meet three conditions:

- Confidential nature: such information has never been disclosed to the public and cannot be accessed by others;
- Value: it can bring a realistic, anticipated or potential economic interests to the owner, and the owner can keep the competitive advantages by possessing such information;
- Confidentiality measures: the relevant confidentiality measures have been taken by the owner for the protection of such information.

Under the premise of being qualified as “business secrets”, in order to be fully held by the court, the company shall further to prove that the infringing party has access to the business secrets in an illegal way, which caused the losses to the company.

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<sup>1</sup> Promulgated by Standing Committee of the National People's Congress, last amendment effective since April 23, 2019.

<sup>2</sup> Promulgated by Standing Committee of the National People's Congress, last amendment effective since October 26, 2018.

<sup>3</sup> Promulgated by Standing Committee of the National People's Congress, last amendment effective since December 29, 2018.

<sup>4</sup> Promulgated by the National People's Congress, last amendment effective since March 1, 2021.

## **Tips for DS Clients:**

In order to better protect the company's business secrets and to obtain a better position in lawsuits relating to infringement of business secrets from the perspective of obtaining the qualification of "business secrets", DS suggests you to consider the following measures:

1. Take technical measures to protect the business secrets, such as storing the business secrets in a specific file marked "confidential", supervising the download and copy of such secret information, classify the confidential level of the business information and limit the scope of the employees accessing the information.
2. Formulate the management rules to be signed by each relevant employee regarding the business secrets, which shall specify the procedure regarding the access, use and storage of the business secrets, the forbidden behaviors and the corresponding punishments.
3. Carry out a training for all the employees and require them to sign the corresponding acknowledgement of training.
4. Cause each relevant employee to sign a separate confidentiality agreement and a non-compete agreement (if necessary).

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