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Supreme People's Court Previews Judicial Interpretation of Trade Secret Protection Provisions for Public Comment

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Patent and ITC Litigation

On June 10, 2020, the PRC Supreme People's Court ("**SPC**") issued its proposed *Interpretation on Certain Issues in Applications of Law in Adjudicating Civil Trade Secret Cases (Draft for Public Comments)* (hereinafter the "**Draft**" or "**Draft Judicial Interpretation**")[1]. The Draft includes significant developments in China's trade secret law following the *Economic and Trade Agreement* signed by the United States and China on January 15, 2020 ("**Phase One Trade Agreement"**) and China's 2019 legislative amendment to its trade secret statute, the *Anti-Unfair Competition Law* ("AUCL"). The Draft, once promulgated, is expected to bring more clarity for the lower courts to handle civil trade secret cases as well as more certainty for litigants in the recommended procedures for courts to follow. We recommend multinational companies continue to monitor development in this rule-making to ensure trade secret strategy conforms to current China practice.

The Purpose of the Judicial Interpretation

The Draft's 33 articles address both substantive and procedural aspects of civil trade secret litigation.[2] The SPC in March 2020 added the judicial interpretation on trade secret in its 2020 rule-making agenda, following closely on the heels of the conclusion of the Phase One Trade Agreement. Enhancing the protection of trade secrets was one of the major themes cited by the U.S. in the U.S.-China trade dispute, as evidenced in the mutual understanding reached between the two countries in the Phase One Trade Agreement.[3]

[1]Judicial interpretations by the SPC play an essential role in China, and typically provide detailed guidance to the lower courts throughout the country on how to interpret existing laws. After draft judicial interpretations are issued there is usually a public comment period. The public comment period for this Draft is until July 27, 2020.

[2] In response to the commitments made by China in Article 1.7 and 1.8 of the Phase One Trade Agreement for the criminal enforcement of trade secret theft, the SPC and the Supreme People's Procuratorate jointly issued a draft judicial interpretation for IP-related criminal offenses on June 17, 2020. Its public comment period runs until August 2, 2020.

[3] *See* Section B of Chapter One of the Phase One Trade Agreement.

Additionally, the lower courts have not yet settled on a uniform practice for application of the new provisions of the 2019 AUCL amendment. The SPC provides such uniform guidance in its Judicial Interpretations and this can be expected to help a uniform practice to emerge.

Clarification of the 2019 AUCL Amendment's Burden-of-Proof Shifting Provisions

As previously noted, Article 32 of the 2019 AUCL Amendment concerns burden-of-proof shifting in trade secret litigation. It provides that a trade secret rights-holder can rely on *prima facie* evidence reasonably showing that its trade secret has been misappropriated to shift the burden to the defendant to show it has *not* misappropriated the trade secret. This requires providing evidence supporting that either

1. the defendant had an opportunity to access the trade secret, and the information that the defendant has used is substantially similar to the trade secret; or
2. the trade secret has been disclosed or used by the defendant, or there is a risk of such disclosure.

The Draft Judicial Interpretation seeks to clarify what constitutes an "opportunity to access the trade secret" and a "substantial similarity between the trade secret and the information that defendant has used" as provided in Article 32.

With respect to the "opportunity to access," Article 13 of the Draft Judicial Interpretation lays out several non-exhaustive facts courts may consider when determining whether an employee or ex-employee has the channel or opportunity to gain access to the alleged trade secret, namely, (1) job title, responsibility, and authorization, (2) job content or assignment, (3) specific participation in manufacturing and operating activities related to trade secret, and (4) whether they could have or did ever access, obtain, control, keep in custody, store, or copy trade secret materials.

With respect to "substantial similarity," Article 14 of the Draft Judicial Interpretation sets out the following non-exhaustive factors: (1) similarity between the allegedly infringing information and the alleged trade secret; (2) whether any differences are obvious to relevant persons in the art; and (3) the extent of public domain information related to the alleged trade secret.

Special Rules Applied in Civil Cases with Parallel Criminal Proceedings

The Draft Judicial Interpretations also proposes principles when a parallel criminal proceeding arises out of the same acts of trade secret theft. Article 17 of the Draft states that in such a case if a party requests the civil court to stay the civil proceeding the civil court should, in principle, grant the stay.

Article 18 further requires the civil court to review and verify evidence obtained from parallel criminal proceedings. The parties accordingly may request the civil court retrieve the evidence from the relevant criminal enforcement authorities responsible for investigating, prosecuting and/or adjudicating the criminal cases.

With respect to damages, Article 25 of the Draft provides that on a trade secret right-holder's requests, the civil court shall take into consideration the final findings in a parallel criminal proceeding on losses or illegal gains.

Specific Rules for Preliminary Injunctions in Trade Secret Cases

In China, trade secret right-holders can request the court to issue preliminary injunctions (also known as "behavioral preservation" or "*actes conservatoires*") if the alleged infringer is trying to or has already disclosed, used, or allowed others to use the alleged trade secret and if failure to take conservatory measures would make it difficult to enforce the judgement or result in other losses to the right-holder. The right-holder must also post a bond. Article 20 of the Draft Judicial Interpretation provides that the court should adjudicate the request within 48 hours of its submission if the request is deemed "urgent." Article 21 of the Draft Judicial Interpretation requires the right-holder should include the specific alleged trade secret as well as evidence of measures it has taken to protect confidentiality when requesting this relief. On December 14, 2018, the SPC issued a set of judicial interpretations for preliminary injunctions in IP and competition cases. Notably, Chinese law allows a right-holder to request a preliminary injunction either before or after the filing of a complaint.

Uniform Confidentiality Measures Adopted by the Courts

Article 27 of the Draft Judicial Interpretation requires that the court should adopt measures to protect confidentiality where evidence or materials used in litigation may contain a party's trade secrets. This includes during the stages of the exchange of evidence, examination of evidence, and court hearings.[4] Some lower courts have already adopted confidentiality protective measures. For example, the courts in Jiangsu Province have required that parties and counsel sign Non-Disclosure Agreements (NDAs) and keep confidential business information and trade secrets of opposing parties that they have learned in litigation.[5] The proposed measure in the SPC's Draft Judicial Interpretation promotes this as a uniform practice.

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[4] Such confidentiality protective measures are aimed to protect both parties' confidential information, especially the right-holder's confidential information. Generally speaking, such practice is still less robust and sophisticated than the multiple levels of protection (e.g., the highly confidential information can be only accessed by the outside counsel) afforded by a protective order issued by the court in a civil trade secret litigation in the United States.

[5] Section 7.3 in *Guidance on the Adjudication of Trade Secret Infringement Disputes* issued by Jiangsu Province Higher People's Court in November 2010.