

## **Investigation report on the judicial trial of trade secrets after the amendment of Anti Unfair Competition Law**

**Abstract:** Trade secret cases in intellectual property rights trial has its unique judgment ideas and judicial judgment rules. Whether the trade secret itself is established that the focus of the trade secret case and the difficulty of the problem, trade secrets and the right to determine the scope of the standard, the right to determine the scope of the trade secret case. The allocation of the burden of proof of "not being in the public domain" has always been controversial. In the infringement of trade secrets, "employees" and "former employees" can be regarded as "operator" to bear the liability for infringement, the defendant's use of the defendant's trade secrets. There are also differences as to whether the information is the same or constitutes the same substance as the plaintiff's trade secret and whether the information has a legitimate source. Viewpoint. The Anti-Unfair Competition Law of the People's Republic of China, which came into force on April 23, 2019, has no legal effect on the infringement of trade secrets. The subjects, types of acts, allocation of the burden of proof, and damages have been amended to strengthen the legislative level of the Protection of trade secret rights holders. However, at the same time, under the new law, the court's discretionary space is also greater, how to correctly understand and apply the new law, still need in specific cases Further research and analysis.

**Keywords:** trade secret elements, allocation of burden of proof, defenses

The trial work of intellectual property rights is related to the implementation of national innovation driven development strategy, the development of socialist science, technology and culture, and the two overall situations at home and abroad. General secretary Xi Jinping pointed out that "strengthening intellectual property protection is the most important content of perfecting the property rights protection system, and also the biggest incentive to improve China's economic competitiveness". As a part of the intellectual property protection system, trade secrets play an important role in the operation and market competition of enterprises. Some important trade secrets are the embodiment of the core competitiveness of enterprises. How to understand and apply the law accurately and provide strong judicial protection for the business secrets of enterprises is an important issue in the current intellectual property trial work.

On the basis of combing the cases involving infringement of business secrets in courts all over the country from 2013 to 2017, through case study, data statistics, data analysis, thematic discussion and other ways, this research combs and summarizes the basic characteristics, legal difficulties and other issues of the current cases involving infringement of business secrets, aiming to summarize and summarize the existing practices of courts in handling such cases, and for some of the remaining cases Unified opinions are put forward for the courts at all levels of our city to refer to in the trial work.

## ***1. Basic characteristics and situation of cases of infringing trade secrets***

### **(1) In terms of the number of cases, the number and proportion of civil cases of infringing trade secrets are small**

Through searching the judgment documents of civil cases involving infringement of trade secrets in the national court from 2013 to 2017, 338 unfair competition cases involving trade secrets were concluded. Among them, the lowest number of cases was only 38 in 2013, and the highest number was only 88 in 2016 (see Figure 1). It can be seen that the number of trade secret infringement cases is very low compared with the total number of intellectual property disputes in China.



**Figure 1 annual distribution of trade secret cases in China from 2013 to 2017**

In terms of trial level distribution, of the 338 cases mentioned above, 213 cases were concluded in the first instance, 122 cases were appealed to the second instance, and another 3 cases entered the trial supervision procedure.

### **(2) In terms of regional distribution, the number of cases in developed areas is relatively large, while that in inland areas is relatively small**

The search results show that civil cases involving infringement of business secrets are mainly concentrated in economically developed regions, with the top five being 77 in Guangdong, 61 in Beijing, 46 in Shanghai, 29 in Zhejiang and 24 in Jiangsu (see Figure 2). Trade secret disputes often occur between the fast-growing industry and the more competitive business subjects. Therefore, the number of such cases in the economically developed regions is significantly higher than that in other regions.



Figure 2 distribution of business secret cases in 2013-2017

**(3) From the perspective of cause distribution, the number of business secret infringement cases is significantly greater than the number of technical secret infringement cases**

The provisions on the cause of civil cases of the Supreme People's court, under the three-level cause of infringement of trade secrets, is divided into two four-level causes, namely, the dispute of infringement of technology secrets and the dispute of infringement of business secrets. According to the search results, the number of cases involving infringement of business secrets accounts for 63%, which is significantly greater than the number of cases involving infringement of technical secrets (see Figure 3)

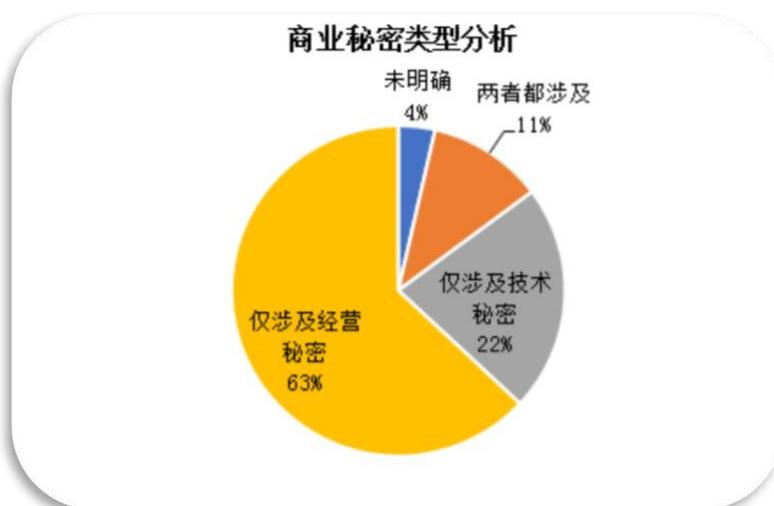


Figure 3 Analysis of trade secret types

**(4) In terms of the proportion of winning and losing cases, the number of cases lost by the plaintiff is obviously larger than the number of winning cases**

According to the search results, in the cases concluded by judgment, the number of cases in which the business secrets claimed by the plaintiff have not obtained judicial protection accounts for 65%, which

is significantly larger than the number of cases in which the plaintiff claims to obtain support (see Figure 4)

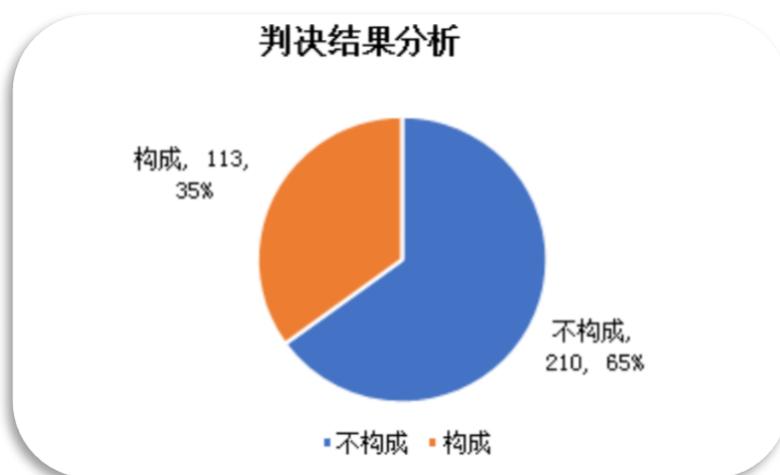


Figure 4 decision result analysis

Because the trade secret case has its unique judgment ideas and judicial judgment rules in the intellectual property trial. Whether the object claimed to be protected by the plaintiff is able to define the secret point, whether confidentiality measures are taken, whether the defendant has access to the plaintiff's secret, and whether the ratio of the secret claimed by the plaintiff to the information used by the defendant is equal all affect whether the plaintiff can win the lawsuit. According to the search results, of the 210 cases lost by the plaintiff, 140 cases were found not to constitute trade secrets by the court (see Figure 5)It can be seen that in judicial practice, the main reason for the plaintiff's failure is that the object that the plaintiff claims to protect does not constitute trade secret.

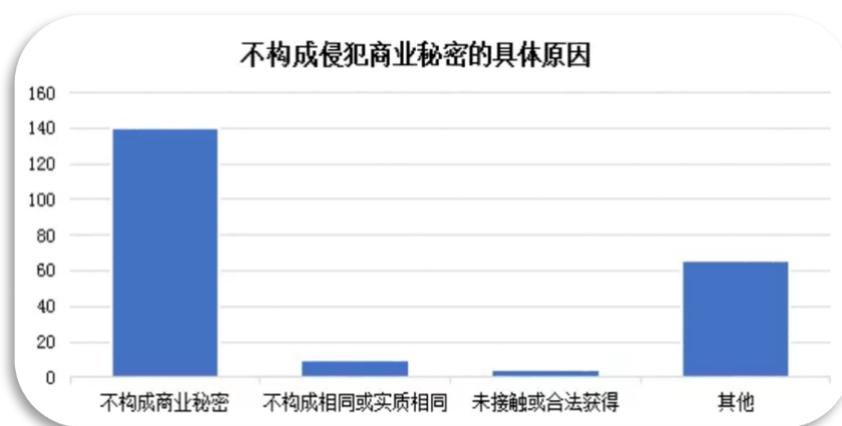


Figure 5 specific reasons for not infringing trade secrets

## 2. Elements of trade secret

2019 Article 9, paragraph 3, of the Anti Unfair Competition Law of the people's Republic of China (hereinafter referred to as the Anti Unfair Competition Law of 2019), which came

into force on April 23, 2019, stipulates that "the trade secrets referred to in this Law refer to the technical information, business information and other trade secrets that are not known by the public and have commercial value and that have been taken corresponding confidentiality measures by the obligee ."As a kind of rights and interests that are essentially information and not generated or obtained through registration, the ownership and scope of trade secrets are not as clear and definite as trademark rights or patent rights. Trade secrets involve two aspects: the interests of operators and the public interests. The low recognition standard of trade secrets may restrict the free competition and hinder the development of technology. The high recognition standard violates the original intention of legislation to protect the legitimate rights and interests of operators. Therefore, whether the trade secret itself is established has always been one of the difficulties in the trial of trade secret cases. In judicial practice, the court usually judges whether the commercial information is a commercial secret or not by three elements of confidentiality, confidentiality and value.

### **(1) Secrecy**

The identification of secrecy is an important step in the trial of cases of infringing trade secrets. The core of trade secret lies in its actual or potential economic value. In the process of exerting its value, specific personnel must contact, know, master and apply the business information and technical information contained in trade secret. This kind of value attribute determines the relativity of the criteria for judging secret subject and the relativity of secret state. The subject of "public" in "not known by the public" is a specific category, which usually refers to the relevant personnel in the field, that is, workers or competitors in the same industry or in the same field; while the "unknown" in the secret state means that the information is not known, understood, obtained or mastered by the public. Article 9 of the interpretation of the Supreme People's Court on Several Issues concerning the application of law in the trial of civil cases of unfair competition (hereinafter referred to as the interpretation of cases of unfair competition) stipulates that the relevant information is not generally known and easily obtained by the relevant personnel in the field to which it belongs, and shall be deemed as "not known by the public" as stipulated in the third paragraph of Article 10 of the Anti Unfair Competition Law. Under any of the following circumstances, it can be deemed that the relevant information does not constitute that it is not known by the public: (1) the information is the general knowledge or industry practice of the people in the technical or economic fields to which it belongs; (2) the information only involves the dimensions, structure, materials, simple combination of parts and other contents of the product, which can be directly obtained by the relevant public through observing the product after entering the market(3) The information has been publicly disclosed in public publications or other media; (4) the information has been publicly disclosed through public reports, exhibitions and other means; (5) the information can be obtained from other public channels; (6) the information is easy to obtain without paying a certain price.

"Not known to the public" as a negative fact, which burden of proof and standard of proof is one of the difficulties in judicial judgment. For a long time in judicial practice, there is a view that if the defendant does not have a secret defense with the information that the plaintiff claims to protect, the defendant should bear the burden of proof that the relevant information has been known to the public. Although the inversion of the burden of proof can solve the problem that the plaintiff is difficult to support because of the difficulty of proof, it is also questioned because of the lack of clear legal basis and the imbalance of the distribution of the burden of proof. The opposite view holds that there is no legal basis for the application of inversion of the burden of proof in trade secret cases, and the party claiming the right shall bear the burden of proof for the basic facts that it enjoys the right." When a right holder claims a right, he must first prove the existence of his right. Before proving the existence of the right, the so-called obligee is only the person who puts forward the claim, but not the established obligee, so there is no inclined protection of its rights. At this time, if we presume that its rights exist and carry out inclined protection, it is obviously aimless and undermines the basic balance of rights protection. " In judicial practice, the court usually adopts the practice of applying the principle of "who claims, who adduces evidence", while flexibly grasping the standard of proof according to the specific situation of the case. That is to say, the plaintiff gives preliminary evidence on the difference between the secret claimed by the plaintiff and the information known by the public. On this basis, the court makes a comprehensive determination based on the defendant's defense, common sense of social knowledge and general knowledge of the industry. Generally speaking, the plaintiff can make clear the specific scope, content and carrier of the trade secret, and the specific content of the information is not the general knowledge of the field, which can not be easily obtained from the open channels (i.e. without paying a certain amount of time, energy, money, etc.), so it can be regarded as having fulfilled the preliminary burden of proof on the "confidentiality". For example, in the case of technical secrets, the plaintiff can prove that the information involved in the case is "not known to the public" by providing evidence such as search report, technical drawings, technological process, technical personnel's description of the R & D process, technical effect of the technology involved in the case, etc. to illustrate the difference and progress between the claimed technical information and the public technology.

2019 Article 32, paragraph 1, was added to the Anti Unfair Competition Law in, which states: "in the civil trial procedure of infringing trade secrets, the obligee of trade secrets shall provide preliminary evidence to prove that he has taken confidential measures against the claimed trade secrets, and reasonably show that the trade secrets have been infringed, and the suspected infringer shall prove that the trade secrets claimed by the obligee do not belong to the trade secrets stipulated in this Law Secret. "This article clarifies the transfer of the burden of proof, reduces the difficulty of proof for the obligee, and increases the burden of proof for the suspected infringer. This significant change highlights the policy tendency of trade secret protection, which is in line with the current background of cracking down on intellectual property infringement and optimizing business environment. However, how to grasp and apply in practice and how to balance the interests of all parties remains to be further explored and studied in the process of trial.

## **(2) Confidentiality**

If confidentiality is the core attribute of trade secret, then confidentiality is the most basic attribute of trade secret. To judge whether the information involved in the case is confidential, we can consider the following aspects: (1) subjectivity, that is, the obligee should be willing to protect the information subjectively, which is embodied in the corresponding measures taken to prevent the information from leaking; (2) objectivity, that is, the measures taken by the obligee are sufficient to prevent the confidential information from leaking under normal circumstances; (3) adaptation, the difference is that the measures taken by the obligee should be "reasonable" and "corresponding", that is, the confidentiality measures should be adapted to the specific circumstances such as the commercial value of the information; (4) the difference is that the means by which the obligee treats and disposes the confidential information should be clearly distinguished from the general information.

According to the eleventh article of the interpretation of unfair competition cases, the reasonable protection measures taken by the obligee to prevent the information leakage should be considered as "confidentiality measures". The court shall determine whether the obligee has taken the confidentiality measures according to the characteristics of the information carrier involved, the obligee's willingness to keep secret, the recognizable degree of the confidentiality measures, and the difficulty degree of others obtaining them by proper means. In case of any of the following circumstances, which are sufficient to prevent the leakage of confidential information under normal circumstances, it shall be recognized that the obligee has taken confidential measures: (1) limit the scope of knowledge of the confidential information, and only inform the relevant personnel who must know the content; (2) take lock and other preventive measures against the carrier of the confidential information; (3) mark the carrier of the confidential information with a confidentiality mark; (4) Password or code shall be used for confidential information; (5) confidentiality agreement shall be signed; (6) visitors shall be restricted or confidentiality requirements shall be put forward for confidential machines, factories, workshops and other places; (7) other reasonable measures shall be taken to ensure the confidentiality of information.

According to the Beijing Higher People's court's answer to several questions about the trial of anti unfair competition cases (for Trial Implementation), the elements of confidentiality measures require that the obligee must take confidentiality measures for the information of his claim both internally and externally; the confidentiality measures adopted clearly and specifically stipulate the scope of information; the measures are appropriate and reasonable, and do not require that there must be no one Loss. In judicial practice, how to judge the rationality and appropriateness of the measures taken by the obligee is controversial. In particular, signing a formatted labor contract or confidentiality agreement, such documents often have broad and general provisions on the scope of confidentiality matters, lack of specific and clear content, so it is controversial in practice whether the obligee can be determined to take reasonable confidentiality measures. In the case of dispute between the plaintiff MEG kunci (Tianjin) Co., Ltd. and the defendant Xia Lingyuan and Suzhou Ruitai

New Metal Co., Ltd. for infringement of technical secrets, The drawings submitted by the plaintiff for claiming technical secrets are stamped with the seal of "confidentiality", and relevant technical materials are kept confidential and archived; confidentiality matters are agreed in the agreement on employee confidentiality and intellectual property rights and the employee handbook; confidentiality is also agreed in the agreement on reconciliation and mutual exemption signed with employees. In this case, the plaintiff took two confidentiality measures at the same time, i.e. "marking the carrier of the confidential information with a confidentiality mark" and "signing a confidentiality agreement". According to this, the court determined that it had taken reasonable confidentiality measures for the technical information involved in the case. In the case of the plaintiff Guangzhou yibeira Decoration Engineering Co., Ltd. and the defendants Guangzhou Magic Square Decoration Engineering Co., Ltd., Hu Xiaoying and Guangzhou elephant soft decoration design Co., Ltd. infringing trade secrets, the trade secrets claimed by the plaintiff were the customer list and design scheme. The court held that the plaintiff only signed the confidentiality agreement and the confidentiality clause in the labor contract to deal with the relevant issues. The restriction of personnel is not enough to confirm that they have taken specific confidentiality measures corresponding to business value. The case is one in which a confidentiality agreement has been signed but it is considered that reasonable confidentiality measures have not been taken.

In this regard, we believe that, first of all, it is not appropriate to put forward too high requirements for confidentiality measures in judicial practice; second, if the obligee has clearly defined the scope of trade secrets in the labor contract or confidentiality agreement and it is consistent with the scope of trade secrets claimed in the lawsuit, it should be recognized that reasonable confidentiality measures have been taken; third, the obligee has not taken the model of trade secrets in the labor contract or confidentiality agreement. For example, only employees should keep the company's business secrets, or the definition is too broad. For example, employees should keep all information related to the company's products, services, operations, knowledge, systems, processes, materials, business opportunities and business matters. In this case, it is not appropriate to determine that reasonable confidentiality measures have been taken only based on the labor contract or confidentiality agreement. It should also be combined with factors such as the carrier, importance of the information involved, the degree related to the industry and main business, whether there are other auxiliary measures (such as whether there is password in the employee system and management system), and the specific situation of the defendant (such as the business scope of the employees involved)Make a judgment.

### **(3) Value**

According to Article 10 of the interpretation of unfair competition cases, if the relevant information has real or potential commercial value and can bring competitive advantage to the obligee, it shall be recognized as "bringing economic benefits to the obligee" under the Anti Unfair Competition Law. Business environment is the background of the existence of trade secret information, whose value is reflected in the fact that it can bring real or

potential economic value through present or future use, and its most essential feature is that all people have competitive advantage because they master the trade secret. In other words, it can be considered as having commercial value if it can bring economic benefits. The value of trade secret has neither quantitative requirements nor time limit. No matter how much economic benefits it can bring, whether it is used continuously or once, it will not affect the judgment of commercial value of the information. In view of this, commercial value is a relatively easy to prove element of commercial secrets. In the case of confidential information involved, it is very rare that the case is deemed not to constitute commercial secrets because it does not have commercial value.

### **3. Identification of infringement of trade secrets**

In judicial practice, the judgment of whether the defendant's act is a violation of trade secrets generally follows the following ideas: first, whether the information claimed by the obligee belongs to its trade secret; second, whether the defendant belongs to the object regulated in Article 9 of the Anti Unfair Competition Law; third, whether the information used by the defendant is the obligee's trade secrets; fourth, the defendant's bank whether it belongs to the act stipulated in Article 9 of the Anti Unfair Competition Law.

#### **(1) Whether the employees and former employees belong to the adjustment scope of Article 9 of the Anti Unfair Competition Law**

2019 Article 9, paragraph 2, was added to the Anti Unfair Competition Law in, which states that "any natural person, legal person or non legal person other than the operator who commits any of the illegal acts listed in the preceding paragraph shall be deemed to have infringed upon the trade secrets". This article expands the scope of the subject of infringement, and makes a clear statement from the legislative level on whether employees and former employees can be adjusted as the object of Article 9. Before the amendment of the Anti Unfair Competition Law, whether the employees and former employees can be the legal subject of infringing trade secrets has always been controversial. Article 9, paragraph 2, of the Anti Unfair Competition Law of the people's Republic of China (hereinafter referred to as the Anti Unfair Competition Law of 2018), which came into force on January 1, 2018, distinguishes "employees" and "former employees" from "operators" specified in paragraph 1, and at the same time, only "operators" are specified in Article 21 civil compensation liability for infringement of business secrets; in addition, It was stipulated in the deliberation draft of the revised draft that "the employees and former employees of the obligee of trade secrets who carry out the acts specified in paragraph 1 of Article 9 of this Law shall be deemed as the acts of infringing trade secrets", but it was finally deleted. It can be seen that there are still many people who advocate that employees and former employees do not belong to operators and should not be adjusted by the Anti Unfair Competition Law. Although the Anti Unfair Competition Law of 2019 has made clear provisions for this, it is still an important issue to be solved in judicial practice when employees and former employees can enter the lawsuit as the main body of the infringement

of trade secrets and ultimately bear the responsibility. Therefore, we believe that further analysis of this issue is still necessary.

#### **a) The status change of employees and former employees**

In practice, although the defendants in some cases are employees or former employees of the plaintiff, they use the business secrets for their own production and operation activities after illegally obtaining the plaintiff's business secrets or violating the confidentiality agreement. In this case, the identity of the employees and former employees has actually been transformed into the operator, no longer a mere employee or former employee. At this time, they should belong to Article 9 the scope of the adjusted "operator" may be directly applicable to the provisions of this law without invoking the provisions of the new paragraph 2. This view has been generally accepted in judicial practice before the amendment of the law. For example, in the case of the plaintiff Pinot Trading (Shenzhen) Co., Ltd. (hereinafter referred to as Pinot Shenzhen Co., Ltd.) and the defendant Shanghai Pinot International Trade Co., Ltd. (hereinafter referred to as Pinot Shanghai Co., Ltd.), Qiu Gang's infringement of trademark rights and unfair competition dispute, the defendant Qiu Gang is not only the employee of the original Pinot Shenzhen Co., Ltd., but also the actual controller of the defendant Pinot Shanghai Co., Ltd, on behalf of panote Shenzhen company and the outsider Chrysler company to discuss and obtain the trade secrets of panote Shenzhen company, and then submit them to panote Shanghai company for use. In this case, although Qiu Gang is an employee of Pinot Shenzhen company, his use of the obtained trade secrets has changed his identity and become an "operator". Therefore, the court finally investigated Qiu Gang's civil liability in accordance with the provisions of the Anti Unfair Competition Law on operators.

#### **b) The status of employees and former employees has not been changed**

The identity of employees and former employees who have obtained trade secrets illegally or disclosed trade secrets in violation of confidentiality agreement but have not used them in their own production and operation activities has not been changed. Although the aforesaid new clause has confirmed that "if a natural person other than an operator commits the illegal act mentioned in the preceding paragraph, it shall be deemed as an infringement of business secrets", there is still a dispute as to whether the "natural person" here includes employees, former employees or only other natural persons who are unable to apply other laws to adjust their acts. There is a view that from the perspective of systematization, when employees and former employees infringe on business secrets, they can be adjusted by the general principles of civil law, labor law or criminal law respectively in different situations, without giving another claim right to the obligee here. For this point of view, first of all, literal interpretation is the primary interpretation path that should be taken in the interpretation of legal norms, while the literal meaning of the new clause contains "natural person". From this perspective, employees and former employees working as natural persons can obviously be adjusted by Article 9 when meeting specific conditions. Secondly, from the perspective of legislative evolution, legal basis, judicial needs and other aspects,

employees and former employees should also be the object of Article 9 adjustment of the Anti Unfair Competition Law when their identities have not been changed.

Specifically: a) from the perspective of legislative evolution, before this amendment, although the legislative level has never explicitly included employees and former employees into the adjustment scope of the ninth article, there is no opposition from legislators to the current situation that the article is generally applied in judicial practice for many years to adjust employees; infringement of business secrets. b) From the perspective of tort law theory, if an employee or former employee is ordered by a third person as an operator to obtain trade secrets; or if an employee or former employee illegally obtains trade secrets, the trade secrets are handed over to a third person as an operator for production and operation, and the third person knows it, in this case, the employee or former employee actually uses the illegal acquisition together with the third person. As a result, there is no reason why the business secrets of the company can not be regarded as operators. c) From the perspective of the effect of law application, if the relevant behaviors of employees and former employees can be regulated by the Anti Unfair Competition Law, the compensation can reflect better protection effect. On the one hand, under the circumstances that the actual loss or the defendant's illegal income can be calculated, the malicious infringement of business secrets can be added according to the Anti Unfair Competition Law of 2019. On the other hand, if the evidence submitted by the obligee can not prove its actual loss or the illegal income of the defendant, the legal compensation provisions of the Anti Unfair Competition Law can still be applied to determine the amount of compensation as appropriate, and the upper limit of the legal compensation after the amendment has been increased to 5 million. On the contrary, if the general principles of civil law, tort liability law or labor contract law are applied, the compensation calculation method based on compensation can only be applied, or the agreement can be complied with, which undoubtedly increases the burden of proof of the obligee in terms of losses; at the same time, since the obligee and employees often stipulate the confidentiality and non competition in the contract, whether the confidentiality agreement is violated is also subject to the right. Other factors, such as whether or not the benefit person gives the employee corresponding compensation, are obviously less favorable to the obligee in terms of the timeliness and effectiveness of judicial protection than the application of Anti Unfair Competition Law. d) From the perspective of judicial practice demand, the number of defendants or co defendants in unfair competition cases involving employees and former employees; work accounts for the vast majority of all cases involving trade secret infringement. Therefore, in the interpretation of Article 9 of the Anti Unfair Competition Law, the needs of judicial practice cannot be ignored.

In conclusion, we believe that the employees and former employees who have violated trade secrets should be the objects of adjustment of Anti Unfair Competition Law; at the same time, the determination of the identity of employees and former employees should not be completely based on whether there is a labor contract relationship, even if only a labor contract is signed between the two parties, it should also be treated as employees and former employees.

## **(2) Comparison between the information used by the defendant and the plaintiff's trade secret**

### **a) Comparison of technical secrets**

Technical secret, as the trade secret of technical information, can be a complete technical scheme, or one or several relatively independent or common technical points in the complete technical scheme. In cases involving technical secrets, to judge whether the information used by the defendant is the trade secret claimed by the plaintiff, it is generally necessary to first determine the secret point of the trade secret, then compare the information used by the defendant with the secret point, and finally determine whether they are consistent. Due to the strong professionalism and technicality of the technical secret, after the secret point is determined, the court usually entrusts a professional identification agency to identify whether the information used by the defendant is consistent with the secret point based on the opinions of both parties on the comparison results. If the expert conclusion is that the two are inconsistent and the obligee has not provided other evidence, it is generally considered that the information used by the defendant is not the obligee's technical secret.

### **b) Comparison of business secrets**

Business secret, that is, business secret as business information, refers to business strategy, management know-how, customer list, source of goods information, bidding base and other information. With the continuous innovation and development of business model, internal relations and other information may also constitute business secret. When judging whether the business information used by the defendant is the business secret of the plaintiff, it is also necessary to compare the two. Because such information usually does not involve technical issues, the court often does not entrust appraisal, but directly makes a corresponding judgment based on the whole case evidence. When comparing business information, it generally includes the formation process of the core part of information, the similarity degree of information, and the contact possibility between the defendant and information (for example, if the defendant is an employee or former employee of the obligee, whether his / her work position is likely to contact his / her business information; whether the defendant company has ever held discussions and lawsuits with the obligee, so as to access his / her business information, etc.) Consider. If the above aspects are the same, and the defendant is unable to make a reasonable explanation for the source of the information used, the court will generally hold that the information used by the defendant is the business secret claimed by the obligee. It should be noted that when judging whether the defendant has used the obligee's business secrets, it is not required to use all the business secrets, as long as the main or core contents are used. Therefore, even if the defendant proposes that there are slight differences in the information, if there is no impact on the information as a whole, it generally will not affect the final conclusion.

2019The fourth paragraph of the ninth article of the Anti Unfair Competition Law further broadened the scope of trade secrets, that is to say, in addition to the technical information and business information, it added the "equal trade secrets" as a basic expression. We believe that for the types of trade secrets other than technical information and business information, when comparing the trade secrets claimed by the obligee with the information suspected of infringement, we can still use the above-mentioned comparison ideas such as "determining the secret point", "explaining the process of secret formation", "the same or substantially similar information", "the possibility of contact between the suspected infringer and the involved trade secrets".

### **(3) Identification of specific acts of infringing trade secrets**

#### **a) Improper access to trade secrets**

According to the Anti Unfair Competition Law of 2019, "improper means" include "theft, bribery, fraud or coercion, electronic intrusion" and other ways. The judgment of "theft, bribery, fraud or coercion" can be determined by combining the judgment results of previous or related cases (usually criminal or civil contract cases)For example, if the theft of the obligee's business secrets through the invasion of the obligee's computer network system has been recognized as a crime of destroying the computer information system by the effective criminal judgment, it can be regarded as obtaining the business secrets by means of theft; if the bribery of the obligee's employees through the provision of property and other means induces the obligee to obtain the business secrets for the defendant, the employee has been recognized as a crime of bribery by the effective criminal judgment. Those charged with crimes such as bribery can be regarded as obtaining trade secrets; those who sign a contract with the obligee in the name of business cooperation and obtain trade secrets, and the obligee requests to cancel the contract on the basis of fraud and obtain the support of effective civil judgment, can be regarded as obtaining trade secrets by fraud; those who intimidate the employees of the obligee to obtain trade secrets by means of manufacturing handle and spreading rumors can be regarded as obtaining trade secrets for them. Trade secrets, which have been recognized as infringement of privacy or reputation infringement by effective civil judgment, can be regarded as obtaining trade secrets by means of coercion. For the newly added "Electronic Intrusion" mode, it is usually used as a specific means to realize other behaviors (such as stealing business secrets by means of hackers, Trojans and other electronic intrusion), so it is generally defined as "theft" from the perspective of behavior nature. After the implementation of the new law, the above-mentioned acts of stealing secrets can be regulated as a single act.

For the behavior of "obtaining business secrets by other improper means", the most common form is to dig corners with high salary, tempt the employees of the obligee to change jobs and obtain business secrets, and intercept the obligee's customers in a short period of time. This kind of behavior usually does not conform to the constitutive requirements of bribery related charges and cannot be regulated by criminal law, but from the perspective of civil tort, it can be regulated as unfair competition behavior. In recent years, there are also some

new forms of expression in practice, for example, the actor maliciously brings a civil action and obtains the obligee's trade secret through the procedure of proof and cross examination in the litigation. Under certain conditions, the behavior can also be included in the adjustment scope of item 1, paragraph 1, Article 9 of the Anti Unfair Competition Law. In practice, when determining whether to obtain trade secrets by "other improper means", we should first make a judgment based on the general provisions of the Anti Unfair Competition Law, from whether the act violates the principle of good faith and generally accepted business ethics. If it can be determined that the information used by the defendant is indeed the trade secrets of the obligee, and the defendant has no reasonable reason to explain that it obtained these secrets through proper means, it can also be generally inferred that the defendant obtained the trade secrets of the obligee through "other improper means". For example, in the case of the plaintiff Beijing wanyantong Software Co., Ltd. (hereinafter referred to as wanyantong company) vs. the defendant Beijing qiaozhe Technology Co., Ltd. (hereinafter referred to as qiaozhe company), Shi Haotian and Chen Hui's infringement of trade secrets, the court combined Chen Hui's and Shi Haotian's position in wanyantong company; the two founded qiaozhe company on the eve of their resignation, and the two companies mainly engaged in business base. This is the same; the two signed a technical service contract with a specific customer within a short period of time after leaving the company, and the technology involved in the contract is exactly the project they were engaged in during their tenure in wanyantong company; the negotiators of the company outside the case overlapped, and it was determined that Chen Hui and Shi Haotian had subjective plans to use the trade secrets involved in the case and achieved competitive advantage in a short period of time by using the trade secrets. The objective behavior of potential obviously violates the principle of good faith and recognized business ethics. This view is reflected in Article 32, paragraph 2, item 1 of the Anti Unfair Competition Law of 2019. According to this article, the obligee of trade secret provides preliminary evidence to show that the trade secret has been infringed reasonably, and there is evidence to show that the suspected infringer has access or opportunity to obtain the trade secret, and the information used is essentially the same as the trade secret, unless the suspected infringer proposes. It can be presumed that the infringement is established if the contrary evidence is submitted to prove that there is no infringement of trade secrets. In this case, it is generally difficult for the obligee to prove the specific behavior of the suspected infringer, so it can be classified as "other improper means".

As for whether the first paragraph of paragraph 1, Article 9 of the Anti Unfair Competition Law of 2019 requires the use of trade secrets after illegal acquisition, it is believed that if the trade secrets are not disclosed or used for production and operation after acquisition, the market competition will not be affected generally and the unfair competition against the obligee of trade secrets will not be constituted. We believe that this view is questionable. First of all, from the perspective of systematization, the illegal acquisition and use of trade secrets have been regulated in the second and second paragraphs of Article 9, paragraph 1. If there is also a requirement for use in the first paragraph, it is a repetition of the regulation. Therefore, the first paragraph of the first paragraph should be understood as "the situation in which trade secrets are acquired improperly but not used". Secondly, if we think that the

adjusted behavior should also include the subsequent use behavior, it will make some improper behaviors that should be regulated by the Anti Unfair Competition Law "legally break away from the regulation". For example, in practice, there has been a black industry chain that uses technical means to invade other people's network to steal business secrets. For thieves, it may not be used immediately, but "for sale". If the behavior is not regulated, it is obviously inconsistent with the original intention of Article 9.

#### **b) Illegal use of trade secrets obtained illegally**

As for the elements of behavior regulated in Item 2, paragraph 1, Article 9 of the Anti Unfair Competition Law of 2019, the first is that the obtained trade secret is obtained illegally, that is, obtained by the first means, if the means of obtaining trade secret is legal, that is, it is not subject to the adjustment of this item; the second is that the illegally obtained trade secret is used illegally, including disclosure and self disclosure Used or allowed to be used by others.

"Disclosure" refers to the disclosure of the obligee's business secrets to destroy the obligee's competitive advantage. In practice, it is typical to disclose the business strategy, management know-how or bidding base of the obligee, which makes the obligee lose the competitive advantage. For the "disclosure" behavior, there may be no agreement between the actor and the subsequent user, but it does not affect the disclosure behavior itself to bear the corresponding legal liability. For example, company a obtains company B's quotation in the negotiation process, and discloses the quotation to company C which has a competitive relationship with company B. company C uses the quotation on its own later, at this time, company a is subject to this adjustment. The typical performance of "self use" is that the resigned employees of the obligee set up a company that competes with the main business of the obligee. The typical performance of "allowing others to use" is that employees transfer their illegally obtained trade secrets from the obligee to the defendant's company after they change jobs.

#### **c) Illegal use of trade secrets legally obtained**

2019The constitutive requirements of the act regulated in Article 9, paragraph 1, item 3 of the Anti Unfair Competition Law of.

First, the premise is that the source of trade secrets is legal. For example, the defendant company obtains the trade secrets by signing a cooperation agreement with the obligee; in the process of litigation between the two parties, the defendant company obtains the trade secrets of the obligee through evidence exchange; the employees and former employees of the obligee know the trade secrets due to their participation in R & D and production, etc. This is also the most critical difference between item 2 and item 3 of paragraph 1 of Article 9 in terms of application requirements. If the acquisition of trade secrets is not legal, it will be adjusted by item 2.

The second is that the defendant violates the confidentiality obligation or the obligee's requirements on keeping business secrets. The specific performance includes: employees sign a confidentiality agreement when they work in the obligee's office, but then disclose the business secrets in violation of the agreement; in business negotiations, they will generally disclose some of their own business secrets, but they will require all parties to the negotiation not to use them outside the negotiation. If such an agreement is broken and other information such as quotations of others are disclosed in other negotiations, it is a violation of the confidentiality agreement. In the process of litigation, the court will generally limit the scope of personnel who can access to the trade secret and the scope of disclosure of trade secret by means of separate cross examination of confidential evidence, prohibition of copying relevant evidence, signing of confidentiality undertaking, etc. for the evidence submitted by the original and the defendant, but one party fails to comply with the requirements of the court to take photos of confidential evidence without permission. Take photos or divulge them to people unrelated to the case. It is worth noting that the Anti Unfair Competition Law of 2019 changes the "breach of agreement" in the original item 2 to "breach of confidentiality obligation", and the confidentiality obligation may be formed on the basis of legal provisions, or the incidental obligation generated in the performance of the contract and not explicitly agreed. Therefore, the Anti Unfair Competition Law of 2019 is expanded to a certain extent. It increases the guarantee responsibility of employees, partners and other personnel who know and master trade secrets, which is more conducive to the protection of the right holders.

Third, the ways of using trade secrets include "disclosure", "self use" and "allowing others to use". Article 9, paragraph 1, item 3, is basically the same as item 2, and will not be repeated.

#### **d) Indirect infringement of trade secrets**

2019 Article 9, paragraph 1, of the Anti Unfair Competition Law of the people's Republic of China added the fourth provision: "instigate, entice and help others to obtain, disclose, use or allow others to use the obligee's trade secrets in violation of the confidentiality obligations or the obligee's requirements for keeping trade secrets." The acts of "abetting", "luring" and "helping" in this article are the performance of joint tort, and they are also called joint tort in the theory of tort law. Combined with this provision, the following elements should be paid attention to when judging whether the alleged infringement constitutes an indirect violation of trade secrets: first, there is another illegal act in Article 9, paragraph 1, item 3, which is the prerequisite for the establishment of this act. Second, the accused infringer has the act of abetting, luring or helping. For example, "high salary poaching", that is, the accused infringer abets and entices the employees of the obligee to change jobs to obtain business secrets with high salary, which is usually not in line with the constitutive requirements of bribery related charges and cannot be regulated by criminal law, but this new clause can be applied to civil regulation. For another example, providing technical or economic conditions for others to commit the act of infringing trade secrets can also constitute joint infringement by providing "help".

It is worth noting that the obligee can choose to file a lawsuit with the perpetrator who directly implements Article 9, paragraph 1, item 3, and the perpetrator who instigates, lures and helps as the joint defendant, or only the perpetrator who instigates, lures and helps as the defendant. Of course, the latter may be rare. The reason is that, on the one hand, the high value of trade secrets and the competitiveness of both parties in the dispute of infringing trade secrets determine that the obligee generally pays more attention to the regulation of the direct infringer as its competitor; on the other hand, when the direct infringer does not participate in the lawsuit, it is more difficult for the obligee to prove the existence of direct infringement.

#### **e) The third party obtains, uses or discloses trade secrets maliciously**

2019The constituent elements of the act regulated in Article 9, paragraph 3 of the anti unfair competition act of.

First, the third person should be the operator. It is emphasized that the third person is the operator who is in coordination with the adjustment object of Article 9. In practice, there may be situations in which the business secret is obtained or disclosed by the natural person who has nothing to do with the subject who obtains the obligee's business secret and the subsequent users, and who has not carried out business activities on his own, which should not be included in the adjustment scope of Article 9, paragraph 3, of the Anti Unfair Competition Law.

Second, the premise is that the source is illegal. That is to say, the employees, former employees or other units and individuals of the obligee of trade secrets have committed the illegal acts specified in Items 1 to 4 of paragraph 1 of Article 9, and hand over the obtained trade secrets to a third party for use. It should be emphasized that "to be used by a third party" does not take the existence of consideration as the premise, and even if it is free to be used by a third party, it cannot become a defense of infringement.

Third, the subjective state of the third party is limited to "knowing or should know". "Should know" is the state that should know as long as the necessary and reasonable duty of care is exercised. For well-known technical secrets, such as the formula of Coca Cola and Laoganma chili sauce, it shall be deemed that the third party should know that the information is a trade secret; if the third party and the obligee belong to the same or similar industry operators, they should know that the specific information in the industry should be the trade secret of others, for example, the operators of the Internet industry should know that the e-commerce platform itself collects the information's user consumption data is usually not disclosed to others.

Fourth, the third party has the behavior of "disclosing", "using by itself" or "allowing others to use" the trade secret obtained therefrom.

#### ***4. Defenses in cases of infringing trade secrets***

Through statistical analysis of the plaintiff's losing cases, it is found that the reasons why the defendant does not constitute infringement of trade secrets in the cases are as follows: first, the ownership of information claimed by the plaintiff is unknown; second, the plaintiff does not explain the secret points and carriers of the claimed information; third, the information claimed by the plaintiff does not meet the legal requirements of trade secrets; fourth, the information used by the defendant and the plaintiff's owner Zhang's trade secrets do not constitute the same or substantially the same; 5. There is no evidence to prove that the defendant has contact with the plaintiff, or there is no evidence to prove that the defendant uses improper means to obtain the plaintiff's trade secrets; 6. The defendant uses information from legitimate sources. In other words, the above six cases are the cases where the defendant's defense is tenable.

##### **(1) The ownership of trade secret is unknown**

Business secret is the information that the operator obtains through the investment of human, material and financial resources in the process of production and operation, which has commercial value and competitive advantage for its operation, and it has taken reasonable confidentiality measures to continue to enjoy this competitive advantage. In judicial practice, in addition to ordinary enterprises and self-employed enterprises, operators may also be affiliated enterprises, enterprise groups (including both the head office, parent company, branches, subsidiaries, etc.), or even transnational enterprises and their agents, licensees, wholly-owned subsidiaries in China, etc., because these affiliated enterprises jointly invest in and jointly obtain business activities, jointly maintain their trade secrets, so it is not clear which subject has a separate right to which part of the trade secrets. In this case, who owns the business secrets of the enterprise group and who claims the rights should be discussed.

Due to the fact that the disclosure of trade secrets is often related to the resignation of employees, for the convenience of proof, in practice, most of the plaintiffs are the original units that have signed labor contracts and confidentiality agreements with the resigned employees, which may be either the head office, branches or subsidiaries, or the production enterprises, sales enterprises and after-sales service enterprises in the affiliated enterprises. For example, in the case of the plaintiff Ruijian Technology (Beijing) Co., Ltd. and the defendants PIM Sebastian Smith (PIM) and Diyuan innovation (Beijing) Technology Co., Ltd. (Diyuan), the plaintiff was a wholly-owned subsidiary of Ruijian Software Co., Ltd. (Ruijian Software Co., Ltd.) registered in Hong Kong. Ruijian software company and tjip bv signed the independent contracting service agreement, which stipulates that Ruijian software company provides tjip bv with software quality testing and assurance services, but the actual provider of services in the agreement is the plaintiff PIM was originally the plaintiff's test engineer and project director, responsible for the test service of tjip bv project, and after leaving his job, he worked in Diyuan company. In this case, both the defendant PIM and di yuan believed that the plaintiff itself did not establish a cooperative

relationship with tji BV, which was not suitable as the plaintiff. The court held that the relationship between Ruijian software company and the plaintiff is a parent subsidiary company. Although it is two independent legal entities, its economic interests are also related to each other. Moreover, Ruijian software company authorizes the plaintiff to solve the disputes related to tji BV independently, so the plaintiff has the right to bring the lawsuit in its own name.

If the trade secret involved in the case is generated by the enterprise group, affiliated enterprise, etc. in the joint operation activities, and the ownership of the rights cannot be distinguished, or the trade secret involved is owned by the head office or the parent company, but the plaintiff is one of the subsidiaries or affiliated enterprises, if the court recognizes the subject eligibility of the original in the lawsuit, it means that the trade secret belongs to one of the subsidiaries or affiliated enterprises. This finding may not be consistent with the facts, thus affecting the rights of other subjects; at the same time, there is the possibility that the head office, the parent company or other affiliated enterprises may sue for the same act in addition to the case. However, on the contrary, if the court denies the subject qualification of the subsidiary or affiliated enterprise, it will increase the difficulty of proof for the obligee. In this regard, we believe that relevant subjects should be allowed to issue explanations or authorizations to authorize the use of trade secrets to the subject of prosecution, and grant them the right to safeguard their rights independently. At the same time, it should be clear that they will not claim rights from the alleged infringer in addition to the case. This solution can better balance the interests of both sides, and also reduce the court's decision risk.

## **(2) The object and carrier of the plaintiff's claim for trade secrets are unknown**

Article 14 of the interpretation of unfair competition cases stipulates that if a party alleges that another party has infringed on its trade secret, it shall bear the burden of proof for the fact that the trade secret it owns meets the legal conditions, that the information of the other party is the same or substantially the same as its trade secret, and that the other party adopts improper means. Among them, the evidence that the trade secret meets the legal conditions includes the carrier, specific content, business value and specific confidentiality measures taken for the trade secret. Therefore, in the case of trade secret disputes, the plaintiff's explanation and proof of the specific content and carrier of the trade secret claimed by the plaintiff become the precondition for the plaintiff to own the trade secret. However, in practice, due to the different litigation strategies of the plaintiff, the litigation ability is also uneven. In many cases, what the plaintiff claims to the trade secret is often unclear and the evidence is insufficient. At this time, the defendant usually raises a defense about the plaintiff's Secret point and carrier.

## **(3) The information claimed by the plaintiff does not meet the legal requirements of trade secrets**

As confidentiality, value and confidentiality are the three legal elements of trade secrets, none of which is indispensable. As long as one of them is not satisfied, it will be determined by the court not to constitute trade secrets. In other words, as long as the defendant puts forward one of them as a defense, it can lead to the loss of the plaintiff.

**a) No secrecy**

In the trial practice, if the plaintiff claims that the information constituting the trade secret is the information obtained by investing a lot of manpower and material resources, or the defendant is willing to spend a lot of manpower and material resources to obtain the plaintiff's information, then the information will be identified as confidential. In terms of confidentiality, the defendant's defenses are mainly as follows:

One is common sense in the industry. In the case of unfair competition dispute between the plaintiff Beijing Weituo International Investment Consulting Co., Ltd. and the defendant Zhangyang and Beijing Puxun Business Co., Ltd. , the plaintiff claimed that its business promotion mode and customer list were its business secrets. According to the court, door-to-door visits, telephone calls, internet promotion, and participation in activities held by the Embassy are all common business promotion methods, and the profit model of collecting advertising fees through the production of publications is also a common business model, none of which is "not known to the public". The client list claimed by the plaintiff is the main target client of the foreign investment consulting service company. The plaintiff has not provided evidence to prove that it has mastered the special information about the above client that is "not known to the public" and can bring economic benefits to it through efforts, nor has it proved that it has established a long-term and stable trading relationship with the above client. Therefore, the business promotion mode and customer list claimed by the plaintiff do not conform to the constitutive requirements of trade secrets stipulated by law.

Second, prior patents have been made public. In the case of technology secret, whether the technology claimed by the plaintiff is the existing technology and whether it is disclosed by the prior patent is also a common defense reason. In the case where the plaintiff Beijing Jiuqiang Biotechnology Co., Ltd. sued the defendants Beijing oujin Biotechnology Co., Ltd. and Jiang Yongjun for infringing trade secrets, the plaintiff claimed that the formula and production process of homocysteine products held by the plaintiff were technical secrets, while the two defendants argued that the formula had been disclosed by prior patents. The court held that, first of all, the description in the prior patent claim provided by the defendant is too broad to obtain the same formula as the plaintiff directly; secondly, whether the product formula of the plaintiff falls into the scope of protection of the patent has no inevitable causal relationship with whether it is known by the public. Even if the product composition is optimized in a known large range, it may be obtained a specific product formula that is not known to the public; thirdly, the two defendants did not submit any evidence to prove or explain how to obtain the same homocysteine product formula as the product formula claimed by the plaintiff through the technical scheme disclosed in the

prior patent. Accordingly, the technical information claimed by the plaintiff has not been disclosed by the prior patent, which meets the requirements of trade secret on confidentiality.

#### **b) No commercial value**

Although not having commercial value is also a common defense, but in judicial practice, the court's grasp of the elements of "value" is relatively loose, generally as long as it can bring certain competitive advantages to operators, or even information of potential competitive advantages, it is considered to have commercial value. Therefore, there are few cases where the defendant only takes commercial value as the defense to obtain support.

#### **c) Failure to take reasonable confidentiality measures**

In cases involving trade secrets, the plaintiff's failure to take reasonable confidentiality measures is one of the most common defenses of the defendant. Confidentiality measures are not only related to the "confidentiality" element, but also to the "confidentiality" element. If the confidentiality measures are not in place, leakage will become an inevitable result, and at the same time, the "confidentiality" element will be lost. In the case of dispute between Xiaoxing, the appellant, Zhengzhou COSCO spandex Engineering Technology Co., Ltd. and Zhengzhou COSCO spandex Machinery Equipment Co., Ltd. for infringing trade secrets, the appellant claimed that the secondary reactor and its technical drawings were its trade secrets and took strict confidentiality measures for the trade secrets. The appellee argued that according to the production and processing contract signed between the appellee and the outsider of the case, we can see that the appellee did not take reasonable confidentiality measures against the important technical secrets he called; at the same time, the company provided the confidentiality contract signed with other outsiders, but could not provide the direct infringement with the defendant. Confidentiality contract signed by the relevant actor. In this regard, the Supreme Court held that the appellant did not give a reasonable explanation for the objections raised by the appellee, and it was difficult to prove that the appellant took reasonable confidentiality measures for the drawings requested to be protected as trade secrets, and finally failed to protect the trade secrets claimed by the appellant.

#### **(4) The information used by the defendant is not the same or substantially the same as the trade secret claimed by the plaintiff**

The fact that the information used by the defendant is the same or substantially the same as the trade secret claimed by the plaintiff is the fact that the plaintiff needs to prove in the interpretation of unfair competition cases. Correspondingly, the fact that the information used by the defendant is not the same or substantially the same as the trade secret claimed by the plaintiff is one of the defenses of the defendant. Generally speaking, the plaintiff should bear the same burden of proof in the trial of infringement of trade secrets. To prove that the information used by the defendant is the same as the trade secrets claimed, the

plaintiff must first make clear the specific information of its trade secrets, and at the same time know and prove to the court what kind of information the defendant used, and prove that they are the same or substantially the same by comparison. However, in practice, it is very difficult for the plaintiff to obtain evidence for the defendant's use of information. In many cases, the plaintiff cannot obtain the information by ordinary means of investigation on what kind of information the defendant uses, and on what extent and to what extent. Therefore, in some cases, the obligee will choose to report the case to the public security organ first, and obtain certain evidence through the compulsory means of investigation by the public security organ. Even if the report is not finally solved through criminal cases, it is still possible to obtain certain evidence for use in civil proceedings. If the plaintiff can provide the information used by the defendant, the defendant may defend the result of the comparison between the information used by the plaintiff and the trade secret claimed by the plaintiff.

**(5) No evidence to prove that the defendant used improper means to obtain the plaintiff's business secrets**

In view of the fact that "contact + substantive same legal source" is widely used in judicial practice as a formula to judge whether it constitutes infringement of trade secrets, whether there is "contact" becomes the primary content for the plaintiff to prove whether the defendant uses improper means, and "no contact" becomes one of the reasons for the defendant's defense. However, in the case where the plaintiff sued the former employees and their current company at the same time, due to the intersection between the employees or shareholders of the defendant company and the plaintiff, it is difficult to establish the defense of "no contact" of the defendant company when the information between the plaintiff and the defendant has constituted the same or substantially the same. Therefore, in practice, there are few cases in which the defendant company alone defends with "no contact".

**(6) There are legal sources for the defendant to use the information**

The trade secrets enjoyed by the obligee are relatively speaking, which can not exclude others from obtaining the same information through legal channels. Therefore, the defense of the defendant on "legal source" is also one of the important types of defense. In judicial practice, the reasons for having a legal source of defense mainly include:

**a) Self development**

According to Article 12 of the interpretation of unfair competition cases, trade secrets obtained through self-development or reverse engineering shall not be deemed as violations of trade secrets as stipulated in Article 10, paragraphs 1 and 2 of the Anti Unfair Competition Law. In the dispute of technical information trade secret, if the defendant proposes that the technology it implements is developed by itself, it shall bear the corresponding burden of proof.

#### **b) reverse engineering**

Article 12, paragraph 2, of the interpretation of unfair competition cases stipulates that "reverse engineering" refers to the acquisition of relevant technical information of products obtained from public channels through technical means such as disassembly, mapping and analysis. If the party concerned, after learning the trade secrets of others by improper means, claims that the acquisition is legal on the basis of reverse engineering, he shall not support it. None of the cases searched in this investigation was founded by the defendant's defense of reverse engineering. The main reason is that the defendant failed to provide sufficient evidence for the so-called "reverse engineering".

#### **c) Obtained through commercial negotiation or other open channels**

In the business information trade secret disputes, "obtained through business negotiation or other open channels" is the most common defense, and also the most legitimate and common way to obtain information through business contacts. In such cases, the defendant will usually prove that he has obtained trading opportunities and qualifications through commercial negotiation, bidding, or other legitimate commercial means. In the case of unfair competition and infringement of business secrets between the plaintiff Zhengzhou Sanhui Electric Co., Ltd. and the defendants Zhengzhou waliter Electric Co., Ltd. and Zhang Jianming, the court held that the vast majority of the customers in the list submitted by the plaintiff were state-owned electric enterprises, and their equipment procurement should generally be carried out in accordance with the public bidding process, even if the relevant information is the plaintiff's business secrets, The law does not forbid the defendant to obtain it through legitimate and open channels. Therefore, the existing evidence can not prove that the two defendants violated the business secrets claimed by the plaintiff.

#### **d) Personal trust**

In the business information trade secret disputes, it is very common to take "personal trust" as the defense in the case of leaving employees as defendants. Article 13, paragraph 2, of the interpretation of unfair competition cases stipulates that if the client conducts market transactions with the unit where the employee works based on the trust of the employee, and the employee leaves, it can prove that the client voluntarily chooses to conduct market transactions with himself or his new unit, it shall be determined that no unfair means have been adopted, unless otherwise agreed by the employee and the original unit. The legislative purpose of this article is that, in view of the particularity of professions such as lawyers and doctors, their clients are often based on their trust in the personal ability and morality of lawyers and doctors, and they are also highly mobile. If they leave their original units, their original clients can no longer have business relations with them, which is unfair. Therefore, justice needs to balance the protection of the interests of the obligees of trade secrets with the protection of the right of workers to choose their jobs freely.

In judicial practice, the judgment standard of "personal trust" is the difficulty of examination. It is argued that the application of personal trust defense needs to meet the following three conditions: 1. The employee and the original unit have not made an exclusion agreement on personal trust; 2. The customer trades with the unit of the employee based on the special trust between the employee and the individual. If the employee uses the material conditions and trading platform provided by the unit to obtain the opportunity to trade with the customer, then it is not applicable to personal trust; 3. After the employee leaves the original unit, the customer voluntarily trades with him or his new unit, and the employee shall not actively contact the customer and pry the customer he serves in the original unit into his new unit. There are negative views on whether the second of the three conditions is appropriate. The reason is that employees will inevitably use the material conditions and trading platform provided by the unit in the process of working in the labor unit, but in the process of working, due to the personal service level and service attitude of employees, customers still choose to trade with the employee or the new unit after the employee leaves, which does not violate the unfair competition. The original intention of the interpretation of dispute cases. For example, a client contacted a well-known law firm due to litigation and wanted to entrust the lawyer of the firm to act as an agent. The firm appointed lawyer a to serve the company. Because lawyer a's service level is high and his attitude is good, the client is very satisfied. After leaving the firm, lawyer a set up a new law firm by himself. The client continues to deal with lawyer a. In fact, the first transaction between lawyer a and the client occurred when appointed by the original work unit, but the subsequent client was based on voluntary choice. In this case, it is not appropriate to assume that lawyer a violated the business secrets of the original law firm. Therefore, we believe that the second condition cannot be mechanically applied.

According to the principle of "who claims, who adduces evidence", in practice, the defendant has two main ways of adducing evidence for the defense of "personal trust", one is that the client issues relevant written instructions, the other is that the client gives testimony in court. If the defendant can prove that the client is willing to conduct market transactions with the unit where the employee is based on the trust of the employee, the court should not impose excessive restrictions on the free choice of the employee from the perspective of balancing the free flow of talents, the employment rights of the employee and the protection of the competitive advantage of the enterprise.

### ***5. Civil liability for infringement of trade secrets***

In judicial practice, the civil liability for infringement of trade secrets mainly includes stopping infringement, compensation for losses, destruction of infringing products and tools, elimination of impact, etc.

#### **(1) Stop encroachment**

In the cases searched in this investigation, the cases that the court decided to stop the infringement accounted for 78.76% of the total cases that constituted infringement of trade

secrets. In the case of infringement of trade secrets, should the court support the plaintiff's claim to stop the infringement as long as the infringement is established? On this issue, we believe that the application of the liability for cessation of infringement should be based on the premise that the trade secret claimed by the plaintiff has not yet entered the public domain. If the trade secret involved in the case has entered the public domain and become public information at the time of the court's judgment, it is no longer practical significance to order the cessation of infringement. Article 17 of the interpretation of unfair competition cases stipulates that if the trade secret has been known to the public due to the infringement, the amount of damages shall be determined according to the trade value of the trade secret. The business value of the trade secret is determined according to its research and development cost, the benefit of implementing the trade secret, the available benefit, the time to maintain the competitive advantage and other factors. Therefore, if the plaintiff's trade secret has been publicized due to the defendant's infringement, and it is unnecessary to stop the infringement, the court shall make up the plaintiff's loss by making the defendant compensate for the development cost of the trade secret and the expected benefit loss caused by the application of the trade secret, instead of making the plaintiff stop the infringement.

As for the application of cessation of infringement, another controversial issue is whether the period of cessation of infringement should be specified in the judgment. In the case of this research and retrieval, the vast majority of judgments do not limit the duration of the liability to stop the infringement, or only use a general way of expression to stop the time. For example, "the defendant stops using the plaintiff's trade secret" and "the defendant stops using the plaintiff's trade secret until it has been known by the public". According to Article 16 of the interpretation of unfair competition cases, when the people's court decides to stop the civil liability for infringement of trade secret, the time of stopping the infringement generally lasts until the trade secret is known to the public. If it is obviously unreasonable to stop the infringement according to the provisions of the preceding paragraph, the infringer can be judged to stop using the trade secret within a certain period or range under the condition of protecting the competitive advantage of the trade secret of the obligee according to law. The confidentiality of trade secret is not constant. In theory, trade secret is always in a state of secret as long as it is not disclosed, but when the trade secret will be known by the public is unpredictable. Therefore, most decisions define the period of stopping infringement as "until the trade secret has been known by the public". In this investigation, we found that there are also a small number of judgments that have made clear the time limit for stopping infringement. There are two main situations: first, there is an agreement on the time limit for confidentiality between the parties, and the court decides that the agreed time limit for confidentiality is the time limit for the liability for stopping infringement; second, there is no agreement on the time limit for confidentiality between the parties, and the court takes the competitive advantage of the trade secret itself or labor payment, the defendant shall be judged to bear the responsibility to stop the infringement within a definite period. In the second case, we take a cautious attitude, because it is difficult to quantify the competitive advantage or labor cost, which is difficult for the court to make an accurate measurement. If the court takes the initiative to determine the confidentiality period, it is inevitable that there will be excessive judicial interference

in private rights, thus damaging the legitimate rights of the parties. As for the scope of stopping infringement, we believe that it should be clearly limited to the obligee's business secrets and not extended to the public domain; at the same time, the scope of stopping infringement should not be limited by the relevant regions.

**(2) Compensation for loss**

The determination of compensation for infringement damages is the key and difficult problem in the trial of infringement of trade secrets. In practice, due to the fact that the obligee is not active in adducing evidence and the difficulty in adducing evidence and other factors, the actual loss of the obligee and the infringement profit of the infringer are often difficult to identify. Therefore, in the case of this research and retrieval, there are fewer cases to determine the amount of compensation based on the actual loss and the infringement profit, and in many cases, the court has applied the statutory compensation.

First, the amount of legal compensation. From the perspective of historical evolution, the amount of legal compensation has been greatly increased, and the protection of trade secrets has been greatly strengthened. According to Article 17 of the interpretation of unfair competition cases, the amount of legal compensation for trade secret infringement disputes refers to the relevant provisions of the patent law, that is, more than 10000 yuan but less than 1 million yuan. Article 17, paragraph 4, of the Anti Unfair Competition Law of 2018 clearly stipulates that the amount of damages for infringement of trade secrets shall be subject to legal compensation, that is, if the actual losses suffered by the obligee due to the infringement and the interests obtained by the infringer due to the infringement are difficult to be determined, the court shall, based on the circumstances of the infringement, make a judgment of less than 3 million yuan. One year later, the Anti Unfair Competition Law of 2019 raised the legal compensation limit from 3 million yuan to 5 million yuan. From Figure 6, it can be seen that in recent years, the support rate (the ratio between the amount of compensation and the original application) of the amount of damages for trade secret infringement shows an overall upward trend.

| 年度    | 最大值        | 最小值   | 判赔支持率  |
|-------|------------|-------|--------|
| 2013年 | 4000000    | 10000 | 29.37% |
| 2014年 | 11568285.3 | 4500  | 37.09% |
| 2015年 | 22660000   | 20000 | 28.84% |
| 2016年 | 12207340   | 1000  | 47.97% |
| 2017年 | 1000000    | 5000  | 38.69% |

**Figure 6 judgment compensation**

Secondly, the use standard of legal compensation. In the cases searched in this survey, the cases that the court applied legal compensation accounted for 80.53% of the total cases that

constituted infringement of trade secrets. In the specific analysis of the cases where legal compensation is applied, most of the cases are only generally stated in the judgment as the amount of legal compensation determined by the court according to the actual situation of the case, while only a few of the cases are clearly defined in the judgment as the factors for the court to consider at its discretion. In this regard, we believe that it is still necessary to refine the specific reference factors of legal compensation, specifically including: the types of trade secrets and the level of innovation; the nature, duration, scope and consequences of infringement; the possible losses suffered by the plaintiff and the possible benefits obtained by the defendant; the reasonable transfer fee, licensing fee and other income and remuneration; the fault degree of the defendant; and whether there is a history of infringement; whether the plaintiff's goodwill is damaged due to the infringement; whether the plaintiff decides to destroy the infringing products involved in the case, etc. When there is evidence to prove that the loss suffered by the plaintiff has obviously exceeded the upper limit of legal compensation, discretionary compensation can be applied to determine the amount of compensation beyond the upper limit of legal compensation.

In addition, the revised law adds the punitive compensation provisions, that is, if the operator maliciously violates the trade secret, and the circumstances are serious, the compensation amount can be determined at more than one time and less than five times of the actual loss or infringement profit. As for the specific applicable standards and scales of punitive damages, we will carry out research in the next step, which will not be discussed in this paper.

### **(3) Destroy infringing products or tools**

Should claims for the destruction of infringing products or tools be supported. Generally speaking, if the court holds that the infringement is established in the trial of intellectual property infringement cases, it may, at the request of the obligee, order the infringer to return the drawings, software and other relevant materials containing trade secrets to the obligee, and order to destroy the infringing products or tools. However, in judicial practice, the court generally shows a prudent attitude towards the claim of the obligee to destroy the infringing goods. If the defendant is ordered to stop the infringement enough to prevent the infringement from continuing, the court will no longer order the destruction of infringing products or tools in order to avoid the waste of social resources. In this regard, we believe that when determining whether to support the claim of the obligee to destroy the infringing goods, the court should not only consider from the perspective of avoiding the further spread of the infringing goods to cause secondary damage to the obligee, but also consider whether the disposal of the infringing goods will cause unnecessary loss to the infringer, or damage the public interest of the society, causing unnecessary waste of social resources. In addition, in judicial practice, when the court supports the claim of the obligee for destroying the infringing goods, it will comprehensively consider whether the infringing tools belong to the special mold for producing the infringing products, the actual enforceability of destroying the infringing goods, whether the infringing goods can be transferred to the obligee for treatment, and whether there are other alternative measures.

For example, in the case that the plaintiff Shenyang Scientific Instrument Research Center Co., Ltd. of Chinese Academy of Sciences sued the defendant Shenyang Boyuan Scientific Instrument Co., Ltd., Su Dongling, Chen Zhongzheng, etc. for infringing trade secrets, the plaintiff claimed to destroy the products and semi-finished products produced by the defendant including the plaintiff's technical secrets. In the judgment, the court held that the products manufactured by the defendant involved in the case included the plaintiff's technical secrets. The rest of the products should be legal products with certain value and should not be destroyed. The purpose of protecting the plaintiff's technical secrets can be achieved by dismantling the part of the products involved in the case involving technical secrets. Therefore, the plaintiff's claim for destruction is not supported.

#### **(4) Eliminate impact**

The premise of eliminating the liability for influence is that the defendant's tort has caused negative impact on the plaintiff's goodwill. In this case, the defendant can be ordered to eliminate the adverse impact of the tort on the plaintiff in a certain way within a certain period of time, usually by publishing statements in relevant newspapers and websites.

### ***6. Procedural problems in cases of infringement of trade secrets***

#### **(1) Evidence preservation**

In the civil case of infringing trade secret, because of the particularity of secret carrier, the plaintiff often has some difficulty in submitting the direct evidence about the defendant's use of technical information or business information, as well as the defendant's profit and other relevant evidence. In this case, the plaintiff usually applies for evidence preservation in the lawsuit. When reviewing and implementing evidence preservation, the court will generally focus on the following issues.

##### **a) The necessity of evidence preservation**

The examination of the necessity of evidence preservation in trade secret cases is usually divided into two steps: for the evidence materials that can be collected and obtained by the right subject or fixed by means of notarization and electronic evidence preservation, the court generally does not allow the application for evidence preservation; for the evidence materials that are difficult to obtain by the right subject due to objective conditions, the court will proceed in combination with the plaintiff's litigation request one step examination is to examine whether the object of preservation is directly related to the specific content of the trade secret, the alleged infringement, and the illegal income of the defendant. It should be noted that the scope of evidence preservation cannot exceed the scope of the plaintiff's claims.

##### **b) Particularity of evidence preservation**

Trade secrets are neither explicit nor exclusive. It is difficult for the plaintiff to prove that it has trade secrets and clear the scope of protection of trade secrets. It is more difficult to prove that others have infringed on its trade secrets. Therefore, if the plaintiff initially proves that it has the basis of rights and the infringed acts may exist, the court does not take evidence preservation measures in time. Implementation may lead to the difficulty of obtaining or even losing relevant evidence materials in the future, so the evidence preservation of such cases is more necessary and urgent than other types of cases. But at the same time, it is precisely based on the above characteristics that the court will be more difficult to judge the possibility of the plaintiff winning the case. Therefore, when deciding whether to take preservation measures, we should also fully consider the possible impact or even loss caused by the mistake of evidence preservation on the respondent.

### **c) Enforceability of evidence preservation**

In trade secret cases, the objects of evidence preservation mostly involve the defendant's instruments and equipment, technological process, technical drawings, product information, customer information, office computers, computer software, e-mail, financial statements, etc. If the scope of the materials the plaintiff applies for evidence preservation is too wide and the direction is not clear, it may affect the enforceability of evidence preservation. In addition, if the plaintiff applies for preservation of the machinery and equipment or means of production that the defendant is using or operating, taking into account the possibility of winning the lawsuit and the possible loss caused by the preservation error of the plaintiff, it is generally not necessary to detain or seal them up. The relevant content can be fixed by photographing or videotaping the disputed part, or the dispute can be fixed without affecting the overall operation of the equipment as much as possible. Some of them were partially sealed up. If the trade secret involved in the case is highly professional and technical, an expert assistant or technical expert can be hired as required to participate in the preservation, conduct on-site inspection and make records.

### **d) Preservation fee and guarantee**

In judicial practice, the preservation fee of property preservation is charged according to the amount of preservation, but whether and how to charge the preservation fee of evidence preservation and whether the parties need to provide a certain amount or form of property security need to be judged by individual cases. The particularity of trade secret cases makes evidence preservation more necessary, but the low winning rate of plaintiffs in such cases also makes evidence preservation behavior more likely to be questioned by the defendants, and even puts forward the claim that their legitimate interests are damaged by the preservation behavior. In this case, the court shall require the plaintiff to provide a certain guarantee according to the specific circumstances of the case.

## **(2) Act preservation**

What is more difficult to implement than evidence preservation is action preservation measures. Article 6 of the provisions of the Supreme People's Court on Several Issues concerning the application of law to the examination of cases concerning the preservation of acts in intellectual property disputes (implemented on January 1, 2019) stipulates that "in case of any of the following circumstances, if it is sufficient to damage the interests of the applicant not to immediately take measures for the preservation of acts, it shall be deemed as an emergency; under Articles 100 and 101 of the Civil Procedure Law: (1)The business secrets of the applicant will be illegally disclosed... "Although the interpretation of unfair competition cases stipulates in Article 6, paragraph 1 that trade secrets will be illegally disclosed, which shows its urgency, the court still has many difficulties in handling such preservation applications. On the one hand, if the behavior prohibition is not adopted, once the plaintiff's trade secret is illegally used and disclosed by others, it may cause irreparable losses to the obligee. On the other hand, it is precisely based on the characteristics of trade secrets, such as the existence of confidentiality, that the court has difficulties in determining the basis of rights and infringement in advance without substantive trial. The trial difficulty will be far greater than the judgment of other intellectual property rights, such as patent, trademark, copyright, etc. In addition, the adoption of the act ban should fully consider the possible impact or even loss of the respondent caused by the act preservation error. Before the scope of trade secret information has not been accurately identified, the use of pre litigation or in litigation prohibition may also prohibit the use of information originally belonging to the public domain, thus damaging the public interest. Therefore, based on the characteristics of civil cases of infringement of trade secrets, we should take a cautious attitude when judging whether such cases have the conditions to adopt prohibition.

### **(3) Identification issues**

Trade secret cases, especially those involving technical secrets, involve technical issues such as judging whether the technical information claimed by the plaintiff is "not known to the public", whether the technical information of both parties is the same or substantially the same. It is not only easy for the parties to apply for judicial identification, but also the court sometimes starts judicial identification procedures according to its authority. According to the judicial practice experience, we think the court should pay attention to the following aspects when starting the judicial identification procedure.

First, we need to take into account the specific situation of the case, the cost of appraisal and the cost of time. If we can find out the technical facts through expert consultation, expert hearing and expert assistant appearing in court, we do not need to start the appraisal process.

Second, if the above-mentioned methods really fail to find out the facts, before officially starting the judicial appraisal process, the parties shall be allowed to clarify the technical secret points to be identified within a limited time, so as to prevent the parties from

repeatedly changing the secret points, resulting in the failure of identification or the failure of the appraisal report to cover all the technical secret points claimed by the plaintiff.

Third, the expression of the appraisal items should be clear and operable. It should be noted that the legal issues that should be judged by the court, such as whether the technical information involved in the case belongs to the technical secret, whether the defendant has implemented the unfair competition behavior claimed by the plaintiff, should not be included in the items to be appraised. Before the identification matters are finally determined, the communication with the identification organization can be carried out first to prevent the identification matters from being unable to be identified because they are not operable.

Fourth, the identification materials must be cross examined and determined by both parties before being sent for identification. In order to dispel the concerns of the parties about the disclosure of technical secrets, necessary measures should be taken to prevent one party from learning other's technical secrets through litigation, cross examination, identification and other links. Specifically, the parties and their agents are required to sign a confidentiality agreement to clarify the legal liability for the disclosure of secrets; for the core evidence involving technical secrets, the other party can be required to check in the court, and the materials shall not be copied or taken away. In addition, there are also views that we can prevent the leakage of secrets by paying security deposit, or make up for the actual losses caused by the leakage to the obligee. But for this point of view, we don't think it is necessary in practice. Even if there is a leak, the other party can still file a separate lawsuit for relief, without the need to settle the case by way of security deposit.

#### **(4) The problem of civil and criminal cross**

Article 219 of the criminal law of the people's Republic of China stipulates the crime of infringing trade secrets. In judicial practice, it is not uncommon for the obligee to report the case to the public security organ and finally enter into the criminal procedure at the same time of bringing civil dispute of infringing trade secret against the specific subject of infringing trade secret. How to deal with the relationship between the two proceedings and the order of handling is a difficult problem. The two procedures have their own advantages for the obligee. Because of the intervention of public power, the criminal procedure has more advantages in finding out the facts than the obligee's own evidence; the threshold of civil procedure is lower, and the preservation measures such as evidence preservation, property preservation and behavior prohibition are stipulated. However, there is also a problem between the two kinds of procedures, as long as the criminal procedure is started (Criminal filing), it is necessary to follow the principle of "punishment before the people" to suspend the trial of civil cases. Although "punishment before the people" is reasonable and feasible, there are also the following problems in practice: first, it is possible that the behavior of the perpetrator has been identified as a crime of infringing trade secrets in criminal proceedings, but in civil proceedings, through the full evidence and cross examination of both parties, the court holds that the information requested by the plaintiff

for protection does not constitute trade secrets; second, two kinds of procedures are in the process of protection. The object of protection, the burden of proof, the form of evidence and the standard of proof are different, which may lead to inconsistencies in evidence acceptance and fact identification. Thirdly, criminal litigation pays more attention to the repair of the damaged social relations and the sanction of criminal acts, while civil litigation pays more attention to the compensation of the damaged interests of the business secret obligee. Therefore, the legal rights and interests of the obligee can not be maintained in a timely and effective manner under the "punishment before the people" litigation procedure.

Based on the above problems, there are two different views on the application of the criminal procedure: one is to approve the principle of "punishment before the people", but to protect the "private rights" without impeding the exercise of the "public rights", the "private rights" can take priority; the other is to follow the principle of "punishment after the people", and to deal with the damaged private rights in trade secret cases. Relief in the case of the dispute between the plaintiff MEG kunci (Tianjin) Co., Ltd. and the defendant Xia Lingyuan and Suzhou Ruitai New Metal Co., Ltd., the second instance judgment discussed the relationship between this case (civil case) and another case (criminal case): first, this case does not conform to the provisions of the civil procedure law that "this case must be based on the trial results of another case, and the case of "suspension of litigation" in which another case has not yet been concluded. According to the generally applicable principle of "contact plus similar exclusion of legal sources" in civil cases of infringement of trade secrets, the existing evidence is sufficient to determine that Xia Lingyuan and Ruitai have infringed on the trade secrets of MEG company, and it is not necessary to take the trial results of criminal cases as the basis for determining civil infringement, so it is not necessary to suspend the trial of this case. Secondly, the principle of distribution of burden of proof and the standard of proof of fact are different from that of civil cases. In criminal cases, it is strictly forbidden for the defendant to "prove his crime by himself", and the facts and evidence should meet the strict standards of "clear criminal facts, sufficient evidence" and "excluding all reasonable doubts", while in civil cases, the standard of proof with high probability is adopted, that is to say, in the case that the proof of evidence can not meet the actual sufficiency, If the evidence provided by one party has proved that the fact has a high probability, the people's court can determine the fact. Therefore, in this case, the court adopts the rule of "contact plus similar exclusion of legal source" in civil proceedings to determine that xialingyuan and Ruitai company constitute infringement of trade secrets, which belongs to the presumption of fact, but the presumption does not necessarily meet the strict standard of proof for excluding all reasonable doubts in criminal proceedings, Therefore, the appellant can not only be identified as a crime of infringing trade secrets. That is to say, the judicial determination of civil infringement based on the standards of civil proof in this case can not be the basis for determining the crime and sentencing in criminal cases.

In this regard, we believe that in the civil litigation of infringement of trade secrets, from the perspective of trial efficiency and protection of the rights of the parties, it is not necessary to follow the principle of "punishment before the people". If the obligee submits

the earlier effective criminal judgment in the civil action of infringing trade secret to prove the infringement of trade secret by the defendant, it can be regarded as the preliminary evidence for the establishment of the obligee's claim, unless the other party submits the opposite evidence, which is enough to overturn the criminal judgment. If a party submits an effective civil judgment to prove that there is an error in the determination of the effective criminal judgment, the trial supervision procedure of the criminal case shall be initiated. In addition, for the statements and confessions made by the parties in criminal cases, the court shall, in the trial of civil cases, combine the evidence on the case to determine the authenticity of the statements and confessions.

## **7. Conclusion**

2019The Anti Unfair Competition Law in amended the types of acts of infringing trade secrets, the distribution of the burden of proof and the compensation for damages, and strengthened the protection of the obligee of trade secrets from the legislative level. The problems of the difficulty of proof and protection of the obligee in the past will be improved. But at the same time, the court's discretion space under the new law is also larger. How to correctly understand and apply the new law, balance the interests of all parties, and maintain a fair and free competition order remains to be further explored and studied in the future judicial practice.