

Impact of Article 32 of the Anti-Unfair Competition Law 2019 on Trial Rationale for Trade Secret Infringement Cases

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I. Introduction

Since Article 10¹ of the “Anti-Unfair Competition Law of the People’s Republic of China” (hereinafter referred to as the “AUCL”) promulgated in 1993 definitely protected trade secrets as legal interests, trade secret cases have always been regarded as an important type of anti-unfair competition cases heard by the courts. Due to the uniqueness of trade secret cases as compared with other intellectual property cases, efforts have been made in judicial practice for a long time to explore the ways to try trade secret cases, and a relatively fixed trial rationale has been formed. However, it is generally agreed in the fields of intellectual property and competition law that trade secret cases are difficult to handle, and the identification of the trade secrets is especially the case. Further, the protection of trade secrets is an extremely crucial part in the anti-unfair competition regulation that supports the smooth operation of many trading activities in the market economy and innovative development.² Therefore, in order to conform to China’s policy of strict pro-

tection of intellectual property rights, and comply with the trend of strengthening trade secrets protection in major jurisdictions all over the world, the third amendments to the AUCL were made on 23 April 2019, which addressed the issues relating to actors committing trade secret infringement, types of trade secret infringement, the burden of proof, upper limits of statutory damages and punitive damages in trade secret cases. Particularly, the latest provision in Article 32 of the AUCL on the allocation of the burden of proof between trade secret owners and accused infringers is quite noticeable, which may lead to corresponding adjustments to the trial rationale in trade secret cases. The author would like to analyze these issues in furtherance of in-depth discussions in the intellectual property circle.

II. Analysis of conventional trial rationale in trade secret cases

1. Definition and constitutive requirements of a trade

密權利人已提供包括間接證據在內的初步證據，合理指向被告方侵犯商業秘密，則舉證責任或提供證據的責任（在各自法律體系下使用適當的用詞）轉移至被告方。二、中國應規定：（一）當商業秘密權利人提供以下證據，未侵犯商業秘密的舉證責任或提供證據的責任（在各自法律體系下使用適當的用詞）轉移至被告方：1. 被告方曾有渠道或機會獲取商業秘密的證據，且被告方使用的信息在實質上與該商業秘密相同；2. 商業秘密已被或存在遭被告方披露或使用的風險的證據；或3. 商業秘密遭到被告方侵犯的其他證據；以及（二）在

權利人提供初步證據，證明其已對其主張的商業秘密採取保密措施的情形下，舉證責任或提供證據的責任（在各自法律體系下使用適當的用詞）轉移至被告方，以證明權利人確認的商業秘密為通常處理所涉信息範圍內的人所普遍知道或容易獲得，因而不是商業秘密。

”董炳和：“每周評論：從‘特種兵’案說反不正當競爭法與商標法的關係”，“炳叔講知產”微信公眾號。

secret

As for the definition of a trade secret, based on the previous Article 10 of the AUCL which requires “capable of bringing economic benefits to the right owner” and “having practical applicability”, Article 9.3 of the AUCL 2019 reads that “the term ‘trade secret’ in this Article refers to any commercial information unknown to the public, including but not limited to technical information or business information, with economic value and for which reasonable efforts to maintain its confidentiality have been made by the right owner.” According to the revised AUCL, the constitutive requirements of a trade secret have been reduced from four (secrecy, value, practical applicability and confidentiality) to three (secrecy, value and confidentiality).

Irrespective of the four requirements or three requirements of a trade secret, “the identification of secrecy is a crucial step in the trial of trade secret infringement cases”.³ The reason is that different from other intellectual property rights such as copyrights, trademark rights, patent rights and new varieties of plants, trade secrets have no statutory right appearance (Rechtsschein). As trade secrets are often solely owned by right owners themselves, it is often heatedly argued in litigation as to whether there exists a trade secret and how to define the boundaries of the trade secret. Compared with the key requirement of secrecy, if the information in dispute has no value or practical applicability, disputes between the plaintiff and the defendant may not occur. Till now, in trial practice, there is no such a case in which information is denied as trade secrets due to lack of value or practical applicability.⁴ Further, objective evidence can be used to judge whether the confidentiality requirement is satisfied, i.e., whether the right owner has adopted corresponding confidentiality measures for protecting the secret technical information or business information.

2. Stepwise trial rationale for trade secret cases

In the early trial practice, “objectively speaking, trial rationales for trade secret cases were understood inaccurately and differently. In the hearing of some cases, judges neglected the examination on whether the information claimed by the plaintiff constitutes a trade secret, but directly examined whether the defendant acquired and used the plaintiff’s information by unfair means.”⁵ To guarantee the quality of case trials, the Jiangsu High People’s Court summarized the trial rationale for trade secret infringement cases and formulated the Guides for the Trial of Trade Secret Infringement Cases (2010), wherein Article 1.2 reads “disputes

over trade secret infringement shall be tried in a stepwise manner: in the first step, to examine and determine whether the plaintiff is entitled to claim its right on commercial information and whether the commercial information meets the constitutive requirements of a trade secret; in the second step, to examine and determine whether the defendant commits infringement on the premise that the trade secret exists and the plaintiff is entitled to claim the right thereof; and in the third step, to examine and determine whether the defendant shall bear civil liabilities where the infringement is established.”⁶

The above stepwise trial rationale put forwarded by the Jiangsu High People’s Court is typical to some extent and shows that in the determination of trade secret infringement, examination on whether a trade secret exists and accurate delineation of the boundaries of the trade secret shall serve as the premise and foundation for judgment, and therefore the secrecy requirement shall be the first examination step. This article is going to place emphasis on the criteria of the secrecy requirement.

3. Criteria for proving secrecy

Secrecy, also called “unknown to the public” in the AUCL, means the related information is generally unknown or not readily accessible by relevant persons in the art. The Supreme People’s Court formulated in 2006 the Interpretation on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition (hereinafter referred to as “the Judicial Interpretation of the AUCL”, No. Fashi 2/2007), wherein Article 9 reads: “The related information that is generally unknown or not readily accessible by relevant persons in the art shall be determined as the ‘information that is unknown to the public’ as provided for in Article 10.3 of the AUCL. Under any one of the following circumstances, it may be determined that the related information is unknown to the public: (1) it is the common sense or industrial practice as known by people in the related technical or economic field; (2) it only involves the simple combination of dimensions, structures, materials and components of products, and can be directly obtained by observing the products by the public concerned after the products enter into the market; (3) it has been publicly revealed on any publication or any other mass medium; (4) it has been publicized by reports or exhibits; (5) it can be obtained through other public channels; or (6) It can be easily obtained at little cost.” As known from the above provision, Article 9 of the Judicial Interpretation of the AUCL stipulates “unknown

to the public” by way of “generalization and opposite exemplification”, that is to say, the phrase “unknown to the public” is explained first, and then “public information” is excluded through opposite exemplification, so as to provide a criterion for determining “secrecy” (namely, “unknown to the public”). It is noteworthy that the State Administration for Market Regulation also published, on 4 September 2020, the Regulations of Trade Secret Protection (Draft for Comments), which has substantially similar provisions.⁷

However, although the judicial interpretation has provided the criterion for identifying “unknown to the public”, the criterion itself is still general and uncertain like other statutory laws. Thus, different judges may make different decisions because of potential deviations in their understanding of identical facts and law application. Through long-term studies, consensus on the identification of “unknown to the public” has been reached in judicial practice in the following two aspects:

One is to summarize and refine a trial method for clarifying “secret points”. To be specific, after a right owner initiates a lawsuit, the court shall first require the right owner to clarify the scope of its trade secret, i.e., the secret points. Theoretically speaking, only by clarifying the secret points, judges can accurately delineate the boundary of the trade secret claimed by the right owner, which is the premise and foundation for the right owner’s quest for judicial protection. Secret points need to be clarified in both technical secret cases and business secret cases. To be specific, secret points in a technical secret case refer to specific technical solutions or technical information, and those in a business secret case refer to business information, such as special information of customers that is different from relevant publicly-known information.

The other is to clarify that the right owner shall bear the burden of proving that the information at issue is “unknown to the public”. As for such a burden of proof, since “unknown to the public” is a negative fact and quite difficult to prove, it was generally believed at an earlier stage that where the defendant makes a defense by arguing that the information claimed by the plaintiff is not secret, the defendant shall bear the burden of proving that the information has been known to the public, namely, the reverse onus clause shall govern.⁸ The reverse onus clause for trade secrets, however, is not adopted in the Judicial Interpretation of the AUCL. It still follows the principle that “the burden of proof always lies with him who alleges” as stipulated in the

Civil Procedure Law and general provisions on the burden of proof as stipulated in Some Provisions of the Supreme People’s Court on Evidence in Civil Procedures.⁹ Article 14 of the Judicial Interpretation of the AUCL reads: “Any interested party who accuses another party of infringing its trade secret shall bear the burden of proving the facts that its trade secret is in compliance with the statutory requirements, the other party’s information is identical or substantially identical to its trade secret or the other party has adopted unfair means.” It can thus be seen that Article 14 has clarified that the right owner shall bear the burden of proving that the claimed information is “unknown to the public”. It is generally believed that the above Article 14 conforms to the “doctrine of legal requirements” in the theories regarding the burden of proof, that is to say, the burden of proof shall be allocated in the light of the following principles: “the party claiming the right shall bear the burden of proving the existence of the legal requirements for the occurrence of the right; and the party denying the right shall bear the burden of proving the existence of the legal requirements for the hindrance of the right, the elimination of the right or the restriction of the right.”¹⁰ Specifically in trade secret cases, the requirement of “unknown to the public” is the basis for the establishment of a trade secret and shall be proved by the right owner. Where the plaintiff fails to adduce evidence proving the establishment of its trade secret, if the defendant is required to prove the non-existence of the plaintiff’s trade secret for exemption from liability, it is obviously unfair to the defendant and also in conflict with the prevailing burden of proof theories. Of course, the above provision of the Judicial Interpretation of the AUCL is undergoing questioning as some people think the provision subverts the presumptive fault liability system for trade secrets, and obviously increases the difficulty of the infringed party in evidence production, which is very likely to render the infringed party fail to adduce evidence and indulge infringers.¹¹

Thus, in order to effectively balance the interests between the parties in a trade secret case and overcome the difficulty of proving “unknown to the public”, on the one hand, it is confirmed in judicial practice that the burden of proof shall be borne by the right owner, and on the other hand, judicial policies are adjusted to appropriately lower the standards of proof on the part of the right owner. Analyses show that when the strict application of the “high probability standard” leads to unfairness, considering the evi-

dence provided by the plaintiff and the counter-evidence provided by the defendant, the standards of proof on the part of the right owner can be lowered to the “preponderance of probability” level.

The so-called “preponderance of probability” is a standard of proof relative to “high probability”. The difference therebetween lies in that the former means the facts to be proved are more likely to exist than not, whereas the latter means the facts to be proved are very likely to be true. Article 108 of the Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China (hereinafter referred to as “the Interpretation on the Civil Procedure Law”) reads: “For evidence provided by a party who bears the burden of proof, where a people’s court believes that the existence of the facts to be proved is highly probable upon examination and in combination with relevant facts, it shall affirm the existence of the said fact. For evidence provided by a party for the purpose of refuting the facts claimed by the party who bears the burden of proof, where a people’s court believes whether the facts to be proved are true or false is not clear upon examination and in combination with relevant facts, it shall affirm that the facts do not exist. Where a law provides otherwise for the standards of proof for the facts to be proved, such standards shall prevail.” The standard of proof of “high possibility” in the above Interpretation on the Civil Procedure Law and the standard of proof of “high probability” in the proof theory are different expressions with the same meaning. In this regard, it is believed that although the China’s Civil Procedure Law stipulates the standard of proof of “high probability”, it does not exclude the application of the “preponderance of probability” standard when judges consider it is appropriate on a case-by-case basis. Stipulating reasonable standards of proof for trade secret cases is conducive to encouraging both parties to adduce evidence and to finding facts, meanwhile will not impose excessive burden of proof on the right owner, thereby facilitating the strengthened protection of trade secrets.¹²

III. Issues facing trade secret protection

As stated above, formally speaking, the stepwise trial rationale and the lowered standards of proof for “unknown to the public” adopted in judicial practice are completely a perfectly designed system which balances the interests

(that is, on the one hand, trade secrets need to be protected, and on the other hand, the burden of proof on defendants should not be increased unreasonably) and can effectively solve the problems in the trial of trade secret cases. However, empirical studies show that it has long been difficult to identify trade secrets, to try trade secret cases and to protect trade secrets. To be specific:

(1) Trade secrets are difficult to identify. As stated above, in the trial of a trade secret case, the right owner is generally required to clarify secret points first. Since the determination of secret points is often one of the prerequisites for judicial technical appraisal of whether the information at issue is “not publicly known”, and will ultimately affect the scope of protection of the trade secret, secret points are usually the main disputes between the parties concerned and can only be determined after cross-examinations and arguments at court hearings in most cases. It is believed that the process of determining secret points shall be strengthened since “when initiating a lawsuit, for the purpose of maximizing the scope of protection or due to unfamiliarity with laws or technical background of the disputed technology, the plaintiff often claims a very broad range of a secret, and incorporates some publicly known information into the scope of the trade secret for protection.”¹³

However, the current drawback that cannot be ignored is that in the trial of trade secret cases, regarding the identification of secret points and the determination as to whether the information is “unknown to the public”, the aforesaid trial rationale is too rigidly applied without adaptive adjustments on a case-by-case basis. For instance, in a case where there is conclusive evidence proving that the defendant directly steals, instigates or induces others to steal a trade secret through commercial espionage, a rigid procedure for determining secret points may make the right owner feel that it is hard to get judicial protection for the trade secret. Another unignorable problem is that the criteria for deciding whether information is “unknown to the public” are not accurately understood. As a matter of fact, different from a patented technology which contains a complete technical solution, a trade secret may have various forms, such as a single piece of information, a series of information or even a combination of disclosed information. As for the combination of disclosed information in particular, “unlike patents, trade secrets do not have to possess novelty for the sake of protection. Many trade secrets are actually combinations of known technologies. At the end of last year, the

United States Court of Appeals for the Fourth Circuit (hereinafter referred to as the Fourth Circuit) determined in *Air-Facts Inc. v. Diego de Amezaga* that totally public available information in combination with added value can be protected as a trade secret under the Maryland Uniform Trade Secrets Act (MUTSA). The Fourth Circuit cited the Second Circuit's decision that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret".¹⁴ It can thus be seen that the criteria for secrecy under the U.S. law are not that harsh.

Jiangsu High People's Court also held substantially the same opinion in *Hengchun Co. v. Aibode Co., Gu Zengjun, et al.*, a dispute over trade secret infringement. The main issue is whether technical information totally composed of publicly-known information is unknown to the public. Such kind of issue is not rare in technical secret disputes. The court held that it shall be judged according to whether the selection and combination of public known elements during the formation of the technical information require inventive efforts, that is, the technical information at issue is not formed by simply piling up randomly selected publicly-known information, but instead by selecting, integrating and verifying particular information purposefully selected from enormous publicly-known information based on professional knowledge and finally forming a feasible technical route or solution.¹⁵

It is noteworthy that, regarding whether the combination of public information can be "not publicly known", the judicial practices vary. The requirements/criteria for determining secret points and judging whether the combined information is "not publicly known" usually become over-stringent, that is, the combined information is often ruled out one by one as it is publicly known, while whether the combined information itself is disclosed is rarely analyzed in depth, which eventually lead to the denial of the secrecy of the combined information and the failure of the plaintiff. According to an investigation report made by the Beijing High People's Court based on judgements of civil trade secret infringement cases tried in China from 2013 to 2017, among 338 closed unfair-competition cases involving trade secrets, 210 cases were decided against the plaintiff, wherein the court found that no trade secret was established in 140 cases, accounting for 47.6%.¹⁶ To my knowledge, it is very

rare to see cases in which information does not satisfy the requirements of trade secrets due to lack of confidentiality measures, and "publicly known" serves as the reason for the denial of trade secret in most cases. Compared with the defendants' unfair acquisition of trade secrets, it seems that the proportion of cases in which no trade secret exists, according to the above report, is too high. To be specific, if the information acquired by the defendant is commercial information with no competitive advantage, why does the defendant use unfair means to obtain it? Therefore, it is worthy of in-depth discussion as to whether the criteria for determining trade secrets are appropriate in judicial practice.

(2) Trade secret cases are difficult to judge. This is especially true for technical secret cases where technical issues are complicated, a large amount of evidence is involved, and the identification of secret points is complex, and there are even about a hundred secret points claimed by the plaintiff in a single case. Thus, the parties concerned are often required to make huge efforts to determine the scope of protection of technical secrets, find out infringing acts, and compare the accused technical information with the trade secrets, and meanwhile courts are also under great pressure in the trials. To deal with the difficulties in trade secret protection, the Supreme People's Court provided a clear guidance for lowering the standards of proof in a judicial policy document as early as 2011, stating that "according to the specific situation of the case, [the courts] should properly apply the standards of proof on secrecy and unfair means, and appropriately lessen the trade secret owners' difficulty in safeguarding their rights. If the right owner has proved the secrecy by preponderant evidence or made full and reasonable interpretation or explanation to the differences between the claimed trade secret information and information in the public domain, the information can be considered as compliant with the secrecy requirement. Where the trade secret owner has provided evidence proving that the information of the accused party is the same or substantially the same as its trade secret and the accused party is capable of accessing or illegally acquiring the trade secret, and where it can be concluded that it is highly likely that the accused party has used unfair means based on the specific circumstances and the known facts of the case and experience of daily life, it can be presumed that the accused party acquired the trade secret by unfair means, unless the accused party proves that its information is acquired by legal means."¹⁷ This judicial policy,

however, has not produced a more satisfactory effect in practice. In some cases, the standards of proof were not lowered to a reasonable level. In particular, since the process of case trial is quite complicated, in many cases judicial technical expertise or technical experts are often required to facilitate the determination as to whether the information at issue is “not publicly known” or whether the accused information is identical to the trade secrets. As a result, the trials are usually full of difficulties and the whole procedure often lasts long.

(3) Winning rate for plaintiffs is low. As stated above, the current trial mechanism for trade secret cases is not perfect, the judicial effectiveness for strengthened trade secret protection needs to be further enhanced. According to the aforesaid investigation report of the Beijing High People’s Court, among the 338 concluded cases, 210 cases were concluded against the plaintiffs’ claims for judicial protection of trade secrets, with the losing rate of 65% for plaintiffs, which is obviously higher than the winning rate for plaintiffs.¹⁸ Moreover according to the statistics of the Zhejiang courts, 214 first-instance civil cases involving trade secret infringement were closed from 2008 to 2017, wherein 112 cases, accounting for 52.3%, were withdrawn or closed through mediation, 94 cases, making up 43.9%, were closed with judgments. Among the 74 effective judgments, 38 cases were concluded in favor of plaintiffs, with the winning rate of 51.4% for plaintiffs.¹⁹ Of course, the winning rate alone cannot show the whole picture, because a certain proportion of the cases withdrawn or closed through mediation was settled by defendants’ compensation for plaintiffs’ loss. But generally speaking, the winning rate for plaintiffs in trade secret cases is apparently lower than that in other types of intellectual property cases, such as patent, trademark or copyright cases.

IV. Analysis of the impact of Article 32 of the AUCL

After the second amendment in November 2017, the AUCL was revised for the third time in April 2019. The third amendment attracted a great deal of attention for the following reasons: one is that the law was revised under the background of the Sino-US economic and trade negotiations, and the other is that although the newly added Article 32 is conducive to lessening the difficulty in trade secret protection, it is controversial as to whether Article 32 leads to re-al-

location of the burden of proof in trade secret cases.

1. Contents of Article 32

Article 32 of the AUCL reads: “In the civil proceeding of infringement upon trade secrets, where the right owner of trade secrets has provided *prima facie* evidence showing that the right owner has taken measures to keep its trade secrets confidential, and has reasonably proved that the trade secrets have been infringed, the suspected infringer shall prove that the trade secrets claimed by the right owner do not belong to the trade secrets prescribed in this Law. Where the right owner of a trade secret has provided *prima facie* evidence showing that the trade secret has been infringed and has also provided any of the following evidence, the suspected infringer shall prove that it does not commit trade secret infringement: 1) evidence showing that the suspected infringer has access to or has chance to obtain the trade secrets and that the information used by the suspected infringer is essentially identical to the trade secrets; 2) evidence showing that the trade secrets have been disclosed or used by the suspected infringer, or face the risk of being disclosed or used by the suspected infringer; and 3) other evidence showing that the trade secrets have been infringed by the suspected infringer.”

Judging from the above provision, Article 32 stipulates two types of “*prima facie* evidence” from the perspectives of constitutive requirements of trade secrets and determination of infringement respectively, and provides the shift of burden of proof where the “*prima facie* evidence” requirements are satisfied. To be specific, the first paragraph of Article 32 is related to the constitutive requirements of a trade secret. It is considered that “before the amendment, the court generally first examines whether the plaintiff provides evidence proving that the information in the dispute is ‘any commercial information unknown to the public, including but not limited to technical information or business information, with economic value and for which reasonable efforts to maintain its confidentiality have been made by the right owner’”. After the amendment, the right owner is only required to provide *prima facie* evidence to prove that reasonable efforts on confidentiality have been made and to show, to a reasonable extent, that the trade secrets at issue have been infringed. The burden of proof will then be reversed to the defendant, who shall bear the burden of proving that the trade secrets claimed by the plaintiff are not trade secrets as stipulated in the AUCL.”²⁰ Second, the second paragraph of Article 32 is related to the determination of in-

fringement. There is a view that “after the right owner has preliminarily fulfilled its initial burden of proof, the further burden of proof is shifted to the accused infringer. Through the shift, the burden of proof on the right owner of the trade secrets in civil proceedings is greatly lessened.”²¹

2. Questioning of Article 32

In fact, since the amendment to the AUCL in 2019, questions have been constantly posed to Article 32. The major questions focus on the following areas: first, Article 32 effectively lessens the difficulty in safeguarding trade secrets but “may also lead to the imbalance between patent protection and trade secret protection”. Patents are disclosed in exchange for protection, whereas trade secrets are kept by right owners themselves with confidentiality measures. For this reason, the contributions made by patents to the prior art are obviously greater than those made by trade secrets. “Apparently, as compared with patentees, trade secret owners under Article 32 of the new AUCL bear less burden of proof. In some sense, the enforcement of trade secret rights is easier than that of patents.”²² Second, Article 32 undermines the jurisprudential basis of the “doctrine of legal requirements” in the conventional theories concerning the allocation of the burden of proof, i.e., “the party claiming the right shall bear the burden of proving the legal requirements for the existence of the right”, or in other words, since a trade secret does not have a statutory right appearance, the owner of the trade secret must first prove the existence of the trade secret. However, in the light of Article 32, the defendant is required to bear the burden of proof when the plaintiff has not yet proved that the constitutive requirements of a trade secret are met. As stated above, it is clearly unconscionable for the defendant and in conflict with the prevailing theories concerning the burden of proof. Third, the background of the promulgation of Article 32 is questionable. “As can be seen from the Phase One Sino-US Economic and Trade Agreement released in January 2020 (hereinafter referred to as the Phase One Agreement), trade secret protection is a crucial issue for both sides, wherein Article 1.5 ‘burden-shifting in a civil proceeding’ of the Agreement, among other things, had been absorbed in advance by Article 32 of the AUCL revised in November 2019.”

In view of these, it is necessary to further analyze the potential impact of Article 32 on the trial of trade secret cases from the aspects of the attributes of trade secrets, legal interests of rights or nature of behavior law.

3. Attributes of trade secrets and the nature of trade secret law

It is conventionally understood that, unlike other intellectual property rights, the attributes of trade secrets are not statutory rights, but only “legal interests” protected by the anti-unfair competition law. Trade secrets are not exclusive and trade secrets’ holders cannot prevent others from developing identical trade secrets independently or through reverse engineering. Thus, theoretically, the entity holding a trade secret is often called a trade secret holder, instead of a trade secret right owner. For a long time, there have been fierce controversies at home and abroad as to whether trade secrets belong to intellectual property rights. “Even after the United States and the European Union enacted separate laws for trade secrets protection, discussions over whether trade secrets are properties or subject matters eligible for intellectual property protection have never stopped and are still fierce. The Directive (EU) 2016/943 of the European Parliament and of the Council clearly indicated that the issuance of the Directive does not mean trade secrets are considered as intellectual property rights.”²³

In China, trade secrets were first explicitly included into the scope of subjects eligible for intellectual property protection through Article 123 of the General Provisions of the Civil Law of the People’s Republic of China issued in March 2017. Afterwards, Article 123 of the Civil Code of the People’s Republic of China passed on 28 May 2020 restates that, in China’s civil right system, trade secrets are subject matters susceptible to patent protection in the Chinese civil right system and exclusive rights enjoyed by right holders according to law.²⁴ It shows that through more than two decades of gradual development, legislators have eventually raised trade secrets from “legal interests” to “rights”. However, compared with other intellectual property rights such as patents and trademarks, “trade secrets are less exclusive.”²⁵ Therefore, although trade secrets are regarded as a type of intellectual property rights, trade secrets are mainly protected through the AUCL in the current legal system. The AUCL is essentially a behavior law, with the focus on regulating the liabilities for unfair competition conducts. Therefore, based on the inherent characteristics of trade secrets, law on trade secrets obviously possesses the dual attributes of the rights law and the behavior law, and is more like the behavior law, which affects the trial rationale for trade secret cases.

4. Reasonable interpretation of Article 32 and its impact on trial rationale

First of all, Article 32 should be understood as the shifting of the burden of proof rather than the reversal of the burden of proof. Article 1.5²⁶ of the “Phase One” Agreement clearly uses “the shifting of the burden of proof in the civil proceedings” as the subtitle. In theories, the shifting of the burden of proof is obviously different from the reversal of the burden of proof. The latter is in essence the allocation of the burden of proof, i.e., according to the reverse onus clause, it is the defendant who shall bear the burden of proof for the unclear facts, and shall bear the consequences of losing the case when no evidence is adduced. The shifting of the burden of proof, however, does not change the allocation of the burden of proof. When one party bearing the burden of proof has provided preponderant evidence, the other party concerned may submit rebuttal evidence. If no rebuttal evidence is provided or the rebuttal evidence is not sufficient to refute the evidence adduced by the party bearing the burden of proof, it shall be determined that the facts asserted by the party bearing the burden of proof are proved. As far as Article 32 is concerned, the author holds that in consideration of the background of Article 32, interpreting Article 32 as the shifting of the burden of proof does not extend beyond the requirement of Article 1.5 of the “Phase One” Agreement, or undermine the basic principle that the party claiming the right shall bear the burden of proof according to the “doctrine of legal requirements” in the theories of the burden of proof.

Second, “*prima facie* evidence” mentioned twice in Article 32 should be understood as a lowering of the statutory standard of proof. As mentioned above, although the earlier judicial policies have proposed to lower the standard of proof, views are divided as to how to do so. The author believes that the “*prima facie* evidence” in Article 32 actually provides a benchmark for lowering the standard of proof, and is completely in line with the judicial practice in the field of trade secrets. The AUCL is not a rights law, but a behavior law. “Although (the AUCL) has the effect of right protection, it is aimed to prohibit unfair competition conducts.”²⁷ Judging from Article 9 of the AUCL, trade secret infringing conducts are mainly embodied as “disclosing, using or allowing others to use the trade secrets obtained from the right owner”, and the unfair means to obtain other’s trade secrets can be roughly divided into two categories: one is by illegal means, namely “obtaining a right owner’s trade

secrets by stealing, bribing, fraud, coercing, electronic intrusion or any other unfair means”; and the other is by breach of contract, namely, the one who legally possesses other’s trade secrets “violates confidentiality obligations or the requirements of the right owner on keeping its trade secrets confidential”. In fierce market competition, market participants actually have a clear understanding of which information has commercial value and can bring competitive advantage. This also explains the logic that illegal means has to be used to acquire trade secrets. Therefore, it is reasonable that Article 32 lowers the standard of proof to “*prima facie* evidence”.

Lastly, the trial rationale for trade secret cases shall be established on the basis of the behavior law. Objectively speaking, in the past judicial practice, the stepwise trial rationale reflects the notion of the rights law to some extent, but puts little emphasis on the regulation of unfair competition conducts. Thus, in accordance with Article 32, the trial rationale for trade secret cases may be regulated as appropriate from the following three aspects: first, illegal acquisition and acquisition by breach of contract shall be distinguished, and the specific requirement for *prima facie* evidence provided by a right owner shall be determined reasonably and correspondingly. It is not proper to put everything on “the bed of *Procrustes*”. For instance, the requirement for the right holder to provide *prima facie* evidence when someone steals or instigates others to steal a right owner’s trade secrets by commercial espionage should be obviously lower than that when someone acquires the trade secret by breach of contract. If the same standard of proof is adopted in all the cases, it is inevitably detrimental to the protection of trade secrets. Second, Article 32 is related to *prima facie* evidence required for proving the existence of constitutive requirements of a trade secret and for the determination of infringement respectively, but some evidence may serve for both purposes. For instance, if the right owner has provided *prima facie* evidence proving the existence of illegal conducts, such as stealing or instigating others to steal a trade secret as mentioned above, the requirement that the right holder “has reasonably proved that the trade secrets have been infringed” shall be considered satisfied. Together with the *prima facie* evidence on confidentiality and confidential efforts required in Article 32, as well as *prima facie* evidence showing “the suspected infringer has access to or has chance to obtain the trade secrets and that the information used by the suspected infringer is essential-

ly identical to the trade secrets”, the burden of proving “unknown to the public” and “the suspected infringer does not commit trade secret infringement” should be shifted onto the defendant. It shall be noted that in a single case, the timeliness and strength of the judicial protection of trade secrets decide whether the burden of proof can be shifted timely on the basis of the *prima facie* evidence adduced by the plaintiff. Third, in view of the above two points, the right owner shall bear the burden of adducing *prima facie* evidence for secrecy. Although Article 32 does not clearly stipulate that the right owner shall bear the burden of proving that “its trade secret complies with statutory requirements”, or shall provide *prima facie* evidence for it, it is still necessary to require the right owners to provide *prima facie* evidence to clarify the scope of trade secrets, since trade secrets have no statutory right appearance and its boundary often needs to be clarified during the litigation. *Prima facie* evidence for secrecy should focus on the developing process of the trade secrets, differences between trade secret information and public-domain information, and the like. Whether the standard of proof for “unknown to the public” is satisfied shall be further decided through the confrontation between both parties. If the right owner is required to fulfill the burden of proving that information is “unknown to the public” before infringement comparison, it actually returns to the “high probability” standard, which does not comply with the legislative purpose of Article 32 for lessening the difficulty in trade secret protection. Of course, it may still be possible in judicial practice that the requirement for adducing *prima facie* evidence on the part of right owners may be raised according to the details of each case. Generally speaking, in the light of Article 32 of the AUCL and judicial policies for strict protection of trade secrets, the trial rationale for trade secret cases should conform to the characteristics and realities of trade secrets, which will be a foreseeable change in judicial practice. ■

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* The views and opinions expressed in this article are those of the author.

¹ Article 10.3 of the AUCL promulgated in 1993 reads: “Trade secret in this Article means technical information and operational information which is not known to the public, which is capable of bring eco-

nomic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep its confidentiality.”

² Sun Yuanzhao (2016). Research on the protection of trade secrets in Anti-Unfair Competition Law. *Competition Policy Research*, 5. Research on the protection of trade secrets in Anti-Unfair Competition Law (I). WeChat Account: Electronic Intellectual Property Center, MIIT, posted on 10 November 2016. Retrieved from <https://mp.weixin.qq.com/s/j6PQGzWKjcTPoIlgHFjjIA>.

Research on the protection of trade secrets in Anti-Unfair Competition Law (II). WeChat Account: Electronic Intellectual Property Center, MIIT, posted on 11 November 2016. Retrieved from <https://mp.weixin.qq.com/s/JEmeiq3y9ey30MdT97vHQw>.

³ The project team of the IP Tribunal of the Beijing High People’s Court (2019). A research report on judicial adjudication of trade secrets cases after the amendment to Anti-Unfair Competition Law. *Electronic Intellectual Property*, 11; WeChat Account: Electronic Intellectual Property Center, MIIT, posted on 9 January 2020. Retrieved from <https://mp.weixin.qq.com/s/XxU3ab5YgjFern5NmJjFwg>.

⁴ Gu Tao (2015). Discussion about trial methods of technical secret infringement dispute case. *Electronics Intellectual Property*, 12; WeChat Account: Electronic Intellectual Property Center, MIIT, posted on 22 January 2016. Retrieved from <https://mp.weixin.qq.com/s/W5zN-SyYLea4qwS8rVVyjrjg>.

⁵ Song Jian and Gu Tao (2010). Summary of trial experiences on intellectual property cases involving trade secrets. *Journal of Law Application*, 2 and 3.

⁶ Jiangsu High People’s Court. Guidelines for the Trial of Trade Secret Infringement Cases (2010). Retrieved from https://mp.weixin.qq.com/s/wUIBA5Xs_R5TzAGJt-5PYg.

⁷ Article 6 of the Provisions on Trade Secret Protection issued by the State Administration for Market Regulation reads: The term “unknown to the public” as used herein means that the information is not generally known to the relevant person in the art or cannot be easily obtained from public sources. Under any one of the following circumstances, it can be determined that the information does not constitute information “unknown to the public”: (1) it has been publicly disclosed in public publications or other media at home and abroad or has been disclosed through public reports, exhibitions, etc.; (2) it has been publicly used at home and abroad; (3) it is common knowledge or common practice of the industry that is well known to relevant person in the art; (4) it is easily accessible at little cost or can be obtained from other public sources; (5) it only relates to information such as the size, structure, components of a product and the simple combination thereof that can be easily obtained by the relevant public through observation, survey-

ing, and disassembly after entering the public domain.

⁸ The Intellectual Property Tribunal of the Beijing First Intermediate People's Court. Overview of Classified Intellectual Property Cases (1st edition, p. 180). Intellectual Property Press.

⁹ Jiang Zhipei, Kong Xiangjun and Wang Yongchang (2007). Understanding and Application of the Interpretation on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition. *The Journal of Law Application*, 3.

¹⁰ Leo Rosenberg (GE). Die Beweislast (2002 edition, pp. 111-114), translated by Zhuang Jinghua. China Legal Publishing House.

¹¹ Xia Jianjun. On determination and burden of proof for trade secret infringement. Symposiums of the 2009 All-China Lawyers Association Intellectual Property Professional Committee Annual Meeting and Chinese Lawyers Intellectual Property High-Level Forum (I).

¹² See supra note 5.

¹³ See supra note 5.

¹⁴ Zheng Youde. The combination of disclosed information can constitute trade secret. WeChat Account: Zhichanli, posted on 22 June 2019.

¹⁵ See the Civil Judgement No. Suzhiminzhongzi 0179/2010.

¹⁶ See supra note 3.

¹⁷ Article 25 of the Opinions of the Supreme People's Court on Issues Concerning Maximizing the Role of Intellectual Property Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Economic Development (No. Fa fa 18/2011).

¹⁸ See supra note 3.

¹⁹ See Zhejiang Province Trade Secret Protection Joint Research Working Group. Search Report on Zhejiang Province Trade Secret Protection Status (June 2019).

²⁰ Li Zhanke and Zhang Yanbing. "Trade secret" that we should know—Interpretation of the revised AUCL 2019. WeChat Account: LexisNexisChina, posted on 16 May 2019. Retrieved from https://mp.weixin.qq.com/s/fjE5xUKcP450y5FIj_UYFQ.

²¹ Dong Binghe. Weekly review: Take a calm look at Article 32 of the new AUCL. WeChat Account: Uncle Bing's View on Intellectual Property, posted on 4 January 2020. Retrieved from <https://mp.weixin.qq.com/s/a08DoFjB2QZ4QYGHVTSTiQ>.

²² See *ibid*.

²³ Lin Xiuqin (2020). Theoretical foundation of intellectual propertyization of trade secrets. *Gansu Social Sciences*, 2. WeChat Account: Intellectual Property Institute of Xiamen University, posted on 26 May 2019. Retrieved from <https://mp.weixin.qq.com/s/hZqB4u8YaOtC61y3CRgD1g>.

²⁴ Article 123 of the Civil Code of the People's Republic of China reads: "The parties of the civil law enjoy intellectual property rights ac-

cording to law. Intellectual property rights are the exclusive rights enjoyed by right owners according to law in respect of the following objects: (1) works; (2) inventions, utility models, and designs; (3) trademarks; (4) geographic indications; (5) trade secrets; (6) layout designs of integrated circuits; (7) new varieties of plants; and (8) other objects specified by laws."

²⁵ See supra note 23.

²⁶ Article 1.5 of the "Phase One" Agreement stipulates: Burden-Shift in a Civil Proceeding. 1. The Parties shall provide that the burden of production of evidence or burden of proof, as appropriate, shifts to the accused party in a civil judicial proceeding for trade secret misappropriation where the holder of a trade secret has produced *prima facie* evidence, including circumstantial evidence, of a reasonable indication of trade secret misappropriation by the accused party. 2. China shall provide that: (a) the burden of proof or burden of production of evidence, as appropriate, shifts to the accused party to show that it did not misappropriate a trade secret once a holder of a trade secret produces: (i) evidence that the accused party had access or opportunity to obtain a trade secret and the information used by the accused party is materially the same as that trade secret; (ii) evidence that a trade secret has been or risks being disclosed or used by the accused party; or (iii) other evidence that its trade secret(s) were misappropriated by the accused party; and (b) under the circumstances that the right holder provides *prima facie* evidence that measures were taken to keep the claimed trade secret confidential, the burden of proof or burden of production of evidence, as appropriate, shifts to the accused party to show that a trade secret identified by a holder is generally known among persons within the circles that normally deal with the kind of information in question or is readily accessible, and therefore is not a trade secret.

²⁷ Dong Binghe. Weekly review: On the relationship between AUCL and Trademark Law from the "special forces" case. WeChat Account: Uncle Bing's View on Intellectual Property. Retrieved from https://mp.weixin.qq.com/s/JJ5rgMV-FD4Ylpb_ILitGA.