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ABSTRACT

Non-compete agreements are commonly used in both the United States and China, and are regarded as an important means for employers to prevent employees or rival companies from using valuable trade secrets for competitive purposes. Despite their popularity, however, the enforceability of non-competes in both countries can be difficult to determine. In the U.S., the level to which non-competes are fully enforced varies by jurisdiction. While some state courts apply a "rule of reason," others, such as California, prohibit non-competes altogether. In contrast, Chinese courts tend to support non-competes. This Article provides a comparative perspective of non-competes in the U.S. and China, highlighting different factors that the two countries consider when deciding enforceability. Specifically, courts in the U.S. focus on the existence of legitimate business interests, while courts in China focus on economic compensation. In order to curb the over-enforcement of non-compete agreements in China and keep the balance between trade secret protection and employee

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mobility, this Article recommends that China define the protectable business interest by statute and narrowly construe the validity of non-compete agreement.

TABLE OF CONTENTS

INTRODUCTION

Trade secrets are one of the most important types of intellectual property. Approximately seventy percent of the market value of U.S. companies exists in the form of trade secrets and other types of intellectual property.[1] Trade secrets range from the formula for Coca-Cola to the client list of a small startup company. Employees create and accumulate trade secrets in the course of their work. Over the course of their employment, employees may learn about technology, designs and specifications, and gain access to customer lists, sales and financial data; such knowledge of trade secrets makes them more valuable to their employer, but also to the employer's competitors. For this reason, departure of employees to competing companies has become one of the primary channels for trade secret misappropriation, and companies must take measures to protect their trade secrets from disclosure by former employees to third parties and competitors.[2]

To this end, the non-compete agreement ("non-compete")[3] has been widely used by companies as the primary weapon with which to protect trade secrets from misappropriation by former employees and to maintain a competitive position in the marketplace. In 2010, more than seventy-eight percent of all chief-executive employment contracts in the U.S. contained a non-compete provision.[4]

Yet, despite the undisputed benefit to employers, scholars highlight a significant negative side effect of non-competes: their impact on knowledge dissemination.[5] To continue to encourage

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[1] *See* William M. Fitzpatrick, Samuel A. DiLullo, & Donald R. Burke, *Trade Secret Piracy and Protection: Corporate Espionage, Corporate Security and the Law*, 12 ADVANCES IN COMPETITIVENESS RES. 57 (2004).

[2] *Id.*

[3] There are several names used for a non-compete, such as a "covenant not to compete," or "noncompetition agreement." This Article uses "non-compete" or "non-competes."

[4] *See* Chris Neumeyer, *Trade Secrets and Employee Mobility in the U.S. and Asia*, IPWATCHDOG (Oct. 9, 2013), http://www.ipwatchdog.com/2013/10/09/trade-secrets-and-employee-mobility-in-the-u-s-and-asia/id=45666/.

[5] *See, e.g.*, Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*,

innovation and create a welcoming environment for technical talent, some states in the U.S. have limited the extent to which they will enforce a non-compete.[6] In China, a similar transition is underway. In light of this trend, the enforceability of the non-compete in China needs to be balanced against technological innovation and trade secret protection.

This Article compares the use of non-competes in the U.S. and China for trade secret protection. Following the introduction in Part I, Part II of this Article describes the need for non-competes in the U.S., including an overview of the history of non-competes and trade secret law, and a discussion of the most important factors that influence enforceability of non-competes—the "protectable business interest." Part III compares differing approaches in both U.S. and Chinese courts to non-competes for trade secret protection. Part IV discusses the differences between the two countries. Lastly, Part V makes recommendations for the non-compete legal system in China.

I. NON-COMPETE AGREEMENTS FOR TRADE SECRET PROTECTION IN THE UNITED STATES

A non-compete term in an employment contract typically states that the employee will not work for a competitor or set up a competitive business for a specified period of time in a designated geographical area.[7] It is a post-employment prohibition that bars the employee from what may be his or her most productive use of skills, knowledge, and work experience.[8] Nowadays, the non-compete is regarded as an important and popular means for employers to prevent employees or competitors from using their valuable trade secrets.

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74 N.Y.U. L. REV. 575 (1999); *see also* Robert W. Gomulkiewicz, *Leaky Covenants-Not-To-Compete As The Legal Infrastructure For Innovation*, 49 U.C. DAVIS L. REV. 251 (2015).

[6] *See* Gomulkiewicz, *supra* note 5.

[7] *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).

[8] *See* Charles Tait Graves & James A. Diboise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323, 330 (2007).

A. History of Non-Compete Agreements in the United States

Non-competes first appeared as traditional common law "restraints of trade" in England more than five hundred years ago.[9] The most important case from this era remains *Mitchel v. Reynolds*,[10] which recognized that partial restraints on trade under certain circumstances might be enforceable.[11] Although *Mitchel* related the concept of a non-compete to the sale of a business, rather than to employment, it deeply influenced nineteenth-century courts' approach to employment-restraints in two ways: (1) it created an open attitude towards the validity of restrictive covenants,[12] and (2) it introduced a standard that "balanc[ed] the social utility of restraints against their possible undesirable effects upon the covenanter and the public."[13]

Mitchel provided the basis for the modern approach to restraints in U.S. employment contracts.[14] Since the beginning of the twentieth century, most American courts have applied the "reasonableness" standard to evaluate the enforceability of non-competes.[15] California, which bans the enforcement of non-competes, is the prominent exception.

The popularity of non-competes grew in large part to the rise of the Industrial Revolution and the necessity of trade secret protection. In the pre-industrial economy, craft knowledge was

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[9] *See* Blake, *supra* note 7, at 626.

[10] *See* Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711). In *Mitchel*, the defendant was a baker who violated a restrictive covenant he had signed when he leased his bakery to the plaintiff. The defendant argued that the covenant was invalid because he was a baker, had served an apprenticeship there, and could not be restrained from practicing his trade. The court supported the covenant in a detailed opinion justifying its decision. *See also* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 454 (2001).

[11] *See* Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 360–70 (2002).

[12] *See* Fisk, *supra* note 10, at 455.

[13] Blake, *supra* note 7, at 630.

[14] *Id.* at 637.

[15] Glick, Bush & Hafen, *supra* note 11.

transmitted through families or from master to apprentice. Secrets were controlled exclusively within a family or a firm.[16] The Industrial Revolution dramatically altered such working relationships in businesses. Firms began to rely on non-competes so that employers could safeguard secret information learned by current or former employees. Courts adapted to the trends by expanding permissible uses of non-competes to prevent wrongful dissemination of knowledge.[17]

B. Overview of Non-Compete Agreements in Different States

In the U.S., non-compete enforcement is governed by state law. States regulate through either statutory or common law. Twenty states[18] have statutes which specifically regulate non-competes.[19] The remaining thirty regulate the use of non-competes via case law. Most states apply a "rule of reason" to non-competes,[20] where enforceability depends on its measure of "reasonableness." The Restatement (Second) of Contracts,[21] for example, states that a restraint is reasonable if it: (1) is no greater than is needed to protect the [employer's] legitimate interest; (2) does not impose undue hardship on an employee; and (3) is not likely to be injurious to the public.[22]

Generally, courts decide enforceability by considering all or most of the following factors: (1) whether an employer's legitimate business interest exists;[23] (2) whether the geographic scope is

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[16] Fisk, *supra* note 10, at 450.

[17] *Id.* at 442.

[18] These states are Alabama, California, Colorado, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin. *See* BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (A.B.A. SEC. OF LAB. & EMP. L., 8th ed. 2012).

[19] For example, the Texas Business & Commerce Code regulates non-competes in § 15.50 (Criteria For Enforceability of Covenants Not To Compete). *See* TEX. BUS. & COM. CODE ANN. § 15.50 (West 2009).

[20] *See* ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (6th ed. 2012).

[21] RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

[22] *Id.*; *see also* Blake, *supra* note 7, at 649.

[23] States using the rule of reason usually regard it as a prerequisite element

reasonable;[24] (3) whether duration is reasonable;[25] (4) whether adequate consideration exists;[26] and (v) whether the non-compete violates the public policy or imposes undue hardship on the employee.[27]

Although non-competes are enforceable in most states, provided that they meet the reasonableness requirement, several states prohibit non-competes altogether.[28] One such state is California, which has eliminated the common law "rule of reason" and reshaped its public policy in favor of open competition.[29] Civil Code section 16600 states that "[e]xcept as provided in this

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when deciding on enforceability of non-competes.

[24] Geographic scope is another important factor when deciding enforceability of a non-compete. In New York, a non-compete will be enforced by courts "where the restrictions are reasonably limited geographically . . . to protect trade secrets or confidential customer lists." Geritrex Corp. v. Dermarite Indus., 910 F. Supp. 955, 959 (S.D.N.Y. 1996).

[25] In Florida, "covenants that restrict or prohibit competition when they are limited in time . . . are permissible." FLA. STAT. ANN. § 542.331 (2016).

[26] Consideration is the basis of contract formation in the common law. Courts usually find adequate consideration if an employer signs a non-compete agreement or employment contract with the employee. However, some courts will not find adequate consideration if a non-compete agreement is entered into after an employment contract has begun and there is no independent consideration given. In *Pollard Group, Inc. v. Labriola*, 100 P.3d 791 (Wash. 2004), the Washington State Supreme Court held that non-compete agreements entered into after employment has commenced are valid only when there is independent consideration given at the time the agreement is signed.

[27] Many courts also consider undue hardship in conjunction with geographic scope and/or duration. In *King v. Head Start Family Hair Salons, Inc.*, 886 So. 2d 769 (Ala. 2004), the Alabama Supreme Court reversed an injunction issued against a former employee of a hair salon that prohibited her from working within a two-mile radius of any location of her former employer. The Court held that the restriction was unreasonably broad and imposed an undue hardship on the employee because the employer had more than thirty locations in the relevant area, making it impossible for the employee to find work as a hairdresser.

[28] *See* Gomulkiewicz, *supra* note 5. Several states follow a variation of California's strong rule on non-competes, including Hawaii, North Dakota, Montana, and Oklahoma. Montana and Oklahoma permit the enforcement of non-competes in certain circumstances, while Colorado and Oregon limit non-competes to managers and professional workers.

[29] *See* Gomulkiewicz, *supra* note 5; *see also* MERGES, MENELL & LEMLEY, *supra* note 20, at 87.

chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[30] Thus, non-competes are void in California,[31] subject to limited exceptions.[32]

C. Overview of Trade Secrets in the United States

Among the most influential sources of law on the development of trade secrets in the U.S. are sections 757 and 758 of the Restatement of Torts. Published in 1939, the Restatement defines a trade secret as any information "used in one's business [that gives its owner] an opportunity to obtain an advantage over competitors who do not know or use it."[33]

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[30] CAL. BUS. & PROF. CODE § 16600 (2016).

[31] The Ninth Circuit developed the "narrow-restraint" exception to Section 16600 in *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499 (9th Cir. 1987), concluding that Section 16600 "only makes illegal those restraints which preclude one from engaging in a lawful profession, trade, or business." However, in *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 293 (2008), the Supreme Court of California held that "California courts have not embraced the Ninth Circuit's narrow-restraint exception and have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat."

[32] Non-competition agreements are permitted if they are ancillary to the sale of a business and the terms of the agreements are "reasonable." According to CAL. BUS. & PROF. CODE § 16601 (2016):

> Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein.

[33] RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939). *See also* MERGES,

Beginning in 1979, the National Conference of Commissioners on Uniform State Laws developed a model state statute—the Uniform Trade Secret Act ("UTSA")[34]—which forty-eight states have enacted in one form or another.[35] In its 1985 Amendment, the UTSA defined a "trade secret" as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[36]

Notably, this does not follow the Restatement. Instead, the UTSA stipulates that information is not a trade secret if it is "generally known" or "readily ascertainable by proper means."[37] Therefore, once a secret is readily available through public sources, all trade secret protection is lost. In contrast, the Restatement asserts that trade secret protection still exists as long as it is not actually "known" to competitors even if it is "knowable" through public sources.[38]

On May 11, 2016, however, President Obama signed the Defend Trade Secrets Act of 2016 ("DTSA").[39] This represented the first time that U.S. law would provide a federal private right of

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MENELL & LEMLEY, *supra* note 20, at 35.

[34] *Id.* at 36.

[35] *See* Fitzpatrick, *supra* note 1. At that time, Texas, New York, and Massachusetts had not adopted the UTSA, but as of September 1, 2013, Texas had signed the UTSA into law.

[36] *See* UNIF. TRADE SECRETS ACT, 18 U.S.C. § 1905 (1948) (amended 1985).

[37] *See* MERGES, MENELL & LEMLEY, *supra* note 20, at 46.

[38] *Id.*; *see also* Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424 (3d Cir. 1982).

[39] *See* Defend Trade Secrets Act of 2016 (amended 18 U.S.C. §§ 1832, 1833, 1835, 1836, 1838, 1839, and 1961).

action exclusively for trade secret protection since the Economic Espionage Act of 1996.

While its full use remains to be seen, the DTSA remains cautious regarding employer protection. The Act prohibits injunctions that "prevent a person from entering into an employment relationship," and if "any conditions [are] placed on such employment," it must be based on "evidence of threatened misappropriation," not "merely on the information the person knows."[40]

As such, trade secrets have historically had a broad scope in the United States. "A trade secret can relate to technical matters, such as the composition or design of a product, a method of manufacture, or the know-how necessary to perform a particular operation or service.[41] A trade secret can also relate to other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers."[42]

However, there are still some limits. Courts have denied protection to common information or procedures, including recipes, cooking procedures for barbeque chicken[43] and customer lists posted on a company website.[44]

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[40] *Id.*

[41] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. f (1995).

[42] *Id.*

[43] In *Buffets, Inc. v. Klinke*, the Ninth Circuit held that "the detailed procedures of recipes were readily ascertainable" and "many of them were 'basic American dishes that are served in buffets across the United States.'" The court further held that "the recipes were for such American staples as BBQ chicken and macaroni and cheese and the procedures, while detailed, are undeniably obvious." Therefore, they are not entitled to trade secret protection. *See* Buffets, Inc. v. Klinke, 73 F.3d 965, 968 (9th Cir. 1996).

[44] Dawn Rudenko Albert, *Trade Secrets in the United States*, INTELL. ASSET MGMT. (July/Aug. 2010), http://www.iam-media.com/Magazine/Issue/42/Management-report/Trade-secrets-in-the-United-States.

D. The Enforceability of Non-Compete Agreements in U.S. Courts—From the Perspective of Protectable Business Interest

U.S. courts first look for a "protectable business interest" in deciding whether to enforce a non-compete. A non-compete may be enforceable if the employer can identify a legitimate business interest. If the employer cannot demonstrate a legitimate business interest in need of protection by the non-compete, the agreement will not be enforceable in any respect.[45] However, the line between protectable and unprotectable business interests is often indistinct.

Today, trade secrets provide a necessary competitive advantage to employers. Courts, however, have differed on whether "confidential information" constitutes "protectable business interests" under non-competes. The Restatement (Second) of Contracts offers three examples of basic protectable interests: (1) the customer relationship or good will; (2) trade secrets or other confidential information; or (3) in the context of employment relationships, unique attributes or skills possessed by an employee.[46]

Many states regard "confidential business information" and "customer relationships" as protectable business interest for non-competes, some states also protect goodwill, extraordinary or specialized training, and employees' unique or extraordinary services.[47] Furthermore, lower courts have loosened common law standards by broadening the definition of protectable business interests of non-competes.[48] In *Ingersoll-Rand v. Ciavatti*,[49] the New Jersey Supreme Court held that an employer has a legitimate interest in protecting "highly specialized, current information not generally known in the industry, created and stimulated by the

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[45] *See, e.g.*, E.P.I. of Cleveland, Inc. v. Basler, 230 N.E.2d 552, 557 (Ohio Ct. App. 1967).

[46] *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmts. b, c (1981).

[47] *See* Russell Beck, Employee Noncompetes A State by State Survey, BECK REED RIDDEN, LLP (Aug. 14, 2013), http://www.beckreedriden.com/wp-content/uploads/2012/09/Noncompetes-50-State-Survey-Chart-20130814.pdf.

[48] *Id.*

[49] Ingersoll-Rand v. Ciavatti, 542 A.2d 879, 894 (N.J. 1988).

research environment furnished by the employer, to which the employee has been 'exposed' and 'enriched' solely due to his employment." [50] A similar expansion occurred in employee education and training. In *Borg-Warner Protective Services, Corp. v. Guardsmark, Inc.*, [51] a Kentucky district court recognized investments in generalized employee training as a legitimate business interest, substantially broadening the scope of information protected by non-competes.[52]

While these two cases highlight the expansion of protectable business interests in the 1980s and 1990s, courts have recently started to narrow the scope of a protectable interest under non-competes, [53] curtailing further expansion under a modern approach.[54] In *BDO Seidman v. Hirshberg*,[55] the Court of Appeals of New York scrutinized the legitimacy of any interest claimed by BDO under the common law standard and held that, unless a former employee uses confidential information to obtain clients, the employer's interest is limited to the client relationships that the employer enabled the employee to acquire in the performance of his work.[56]

It is difficult to say whether this trend is reflected throughout the U.S.; after all, Garrison only mentioned one example. In 2011,

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[50] *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107 (2008).

[51] Borg-Warner Protective Servs., Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 502 (E.D. Ky. 1996) (concluding that the employer had a legitimate interest in its investment of training and education in the guards, although neither employer interest in trade secrets or goodwill, nor close relationships from the guards with its customers existed); *see also* Garrison & Wendt, *supra* note 50.

[52] *See* Garrison & Wendt, *supra* note 50.

[53] *Id.*

[54] *Id.*

[55] BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999) (concluding that an employee's status (a manager) in the firm was not based upon the uniqueness or extraordinary nature of the accounting services he generally performed on behalf of the firm, but mostly on his ability to attract a corporate clientele); *see also* Garrison & Wendt, *supra* note 50.

[56] *BDO Seidman*, 712 N.E.2d at 1225*; see also* Garrison & Wendt*, supra* note 50.

in *Reliable Fire Equipment Company v. Arredondo*,[57] the Illinois Supreme Court found that a legitimate business interest is not limited to the two protectable interests identified in over thirty years of precedent: (1) near permanent customer relationships; and (2) trade secrets or confidential information. Instead, the court stated that enforceability is dependent on the totality of the circumstances surrounding the employer's legitimate business interest in a particular case.[58] Factors considered by the court included, but were not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his or her employment, and time and place restrictions.[59]

II. NON-COMPETE AGREEMENTS FOR TRADE SECRET PROTECTION IN CHINA

As an old Chinese proverb says, "when an apprentice learns the skill, his master will starve." This proverb reflects the nature of competition between the apprentice and master in the self-sufficient era before China's Reform and Policies gradually changed this economic form. To avoid competition, masters chose apprentices carefully, considering their relationship (e.g., whether they were relatives), their ability to expand the market, the geographic area where an apprentice would work, and the likelihood of obedience to the master.[60] Furthermore, the master would keep secret his or her most valuable skills and not teach them to the apprentice until the master completely trusted the apprentice.[61] This principle is similar to the early forms of trade

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[57] Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 403 (Ill. 2011).

[58] *Id.*

[59] *Id.*

[60] Until the late 1980s, many areas of China, especially rural areas, heavily relied on the masters and apprentices who produced different kinds of products or tools for daily needs or farming. Houses were built by stonemasons, bricklayer and carpenters together, furniture was made by a carpenter or bamboo craftsman, or clothes were sewn by tailors. Master and apprentices travelled to different villages and to make products in the homes of the villagers. *See* HAILING SHAN, PROTECTION TRADE SECRETS IN CHINA 81 (1st ed. 2008).

[61] *Id.*

secret protection in England, where secrets were controlled exclusively within a family or a firm.

A. Overview of Non-Compete Agreements in China

The concept of non-competes began to come to public attention in China in the early 1990s. When the Anti-Unfair Competition Law was issued in China in 1993, non-competes were not directly mentioned in the statutory language. However, Articles 2 and 10 of the Anti-Unfair Competition Law [62] were often quoted as the basis for non-compete cases regarding trade secret protection, well before the regulation or the act directly regulating non-competes was enacted.

Non-competes were first directly mentioned in *Opinions Regarding Mobility of Employee in Enterprises*,[63] a ministerial-

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[62] Article 2 states that "business operators shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, and also adhere to public commercial moral in their business transactions." Article 10 provides:

> Business operators shall not use the following methods to infringe trade secret: (1) acquiring trade secret of another by theft, inducement, duress, or other illegal means; (2) disclosing, using, or allowing others to use trade secret of another acquired with the above illegal means; or (3) disclosing, using, or allowing others to use trade secret in breach of an agreement or a confidentiality obligation imposed by a legal owner. Any act of a third-party who acquires, uses, or discloses trade secrets that he knew or should have known to have been misappropriated in any of the aforementioned ways, shall be treated as the infringement of trade secret. Trade secret means any technical and business information that is unknown to the public, can bring economic benefits to the rights holder, has practical utility, and for which the trade secret owner has taken measures to maintain its confidentiality.

Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the PRC], NPC (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993), Sept. 2, 1993, *available at* http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4600.htm (China).

[63] Guanyu Qiye Zhigong Liudong Ruogan Wenti De Tongzhi (关于企业职工流动若干问题的通知) [Opinions Regarding Mobility of Employee in

level regulation issued by the Ministry of Labor in 1996. Article 2 of the regulation states that an employer can require that an employee with knowledge of trade secrets not work in an enterprise in competition with the employer within three years after the expiration or termination of an employment contract, provided that the non-compete agreement is signed by, and a certain amount of compensation is given to, the employee.[64]

To meet demands for trade secret protection from emerging high-tech or other technology companies, similar non-compete provisions developed in other ministerial-level or local government level regulations.[65]

Aside from these low-level regulations by ministries or local governments,[66] however, China had no uniform national statute governing non-competes before 2008. Nevertheless, in practice, employers commonly required key employees to enter into non-competes, even before the national statute including non-compete provisions was enacted. Over time, the existence of non-competes began to conflict with other basic laws, such as contract law, which caused courts and the labor arbitration board to question non-compete enforceability. In order to regulate non-competes, the National People's Congress promulgated the Labor Contract Law,[67] effective January 1, 2008, and formally covered non-

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Enterprises], WENKU (promulgated by the Ministry of Labor, 1996), *available at* http://wenku.baidu.com/view/6b8c6f2f647d27284b735109.html (China).

[64] *Id.*

[65] Examples include Opinions Regarding Strengthening Trade Secret Management in the Mobility of Technical Persons issued in 1997 by the National Science and Technology Committee and other regulations issued by local governments or local people's congress, such as Trade Secret Protection Regulation for Shenzhen Special Economic Zone in 1996, Trade Secret Protection Regulation for Zhuhai Special Economic Zone in 1997, and Regulation for Zhongguancun Science Park in 2001.

[66] In China, State Council, ministries or agencies, provincial or some special local governments or local people's congress have the authority to issue regulations. However, only National People's Congress or its Standing Committee can enact national laws, such as the Contract Law, Anti-Unfair Competition Law, Labor Contract Law, and Supreme People's Court has the authority to issue interpretations for the national laws. The three main sources of the Chinese legal system are laws, regulations, and interpretations.

[67] Zhonghua Renmin Gongheguo Laodong Hetongfa (中华人民共和国劳

competes in Articles 23 and 24:

> Article 23. An employer and an employee may include in their labor contract confidentiality provisions in respect of the employer's trade secrets and other confidential matters with regard to intellectual property.
>
> If an employee has a confidentiality obligation, the employer may contract with the employee to include non-competition provisions in the labor contract or confidentiality agreement, and agree to pay financial compensation to the employee on a monthly basis during the non-competition period after the termination or revocation of the labor contract. If the employee breaches the non-competition provisions, he shall pay liquidated damages to the employer in accordance with the stipulated terms.
>
> Article 24. The personnel subject to non-competition obligations shall be only applied to the employer's senior management, senior technicians and other individuals with confidentiality obligations. The scope, geographical limitations and term of the non-competition obligations shall be agreed upon by the employer and the employee, and such non-competition agreement shall not violate any laws and regulations.[68]
>
> After the revocation or termination of a labor contract, the non-competition period for any of the persons mentioned in the preceding paragraph in

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动合同法) [Labor Contract Law of the PRC] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) GOV.CN, art. 23, June 29, 2007, *available at* http://www.gov.cn/flfg/2007-06/29/content_669394.htm (China).

[68] *Id.*

> terms of his working for a competing employer that produces or deals with the same type of products or engages in the same type of business, or in terms of his setting up his own business to produce or deal with the same type of products or to engage in the same type of business, shall not exceed two years.[69]

These articles describe the major elements of non-competition: (1) an employment agreement may include non-compete provisions intended to protect trade secrets and other confidential matters of an employer;[70] (2) the non-compete shall only be applied to senior management, senior technicians, and other individuals with confidentiality obligations;[71] (3) restrictions on business scope, geographic area, and duration shall be reasonable and agreed upon by each other, and the duration shall not exceed two years; (4) an employer must pay reasonable compensation to the employee on a monthly basis throughout the duration of the term of the non-compete;[72] and (5) if the employee breaches the non-compete, the employee shall pay the employer the damages agreed upon in the contract.[73]

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[69] *See* Labor Contract Law of the PRC, *supra* note 67.

[70] It is arguable whether the trade secrets and other confidential matters of the employer is the protectable business interest for the non-compete. This topic will be discussed later.

[71] Some courts have included senior sales staffs in this category, while blanket agreements that apply to all employees are invalid.

[72] There is no definition of "reasonable compensation" in Labor Contract Law, but according to the judicial interpretations in 2013 by the Supreme People's Court of China, an employer who can pay thirty percent of an employee's annual salary every year might be considered reasonable compensation.

[73] S*ee* Dan Harris, *Employee Non-Compete Agreements In China. It's Complicated*, CHINA LAW BLOG (Jan. 20, 2010), http://www.chinalawblog.com/2010/01/employee_noncompete_agreements.html.

B. Overview of Trade Secret Law in China

Unlike in the U.S., where the UTSA has been adopted in almost every state, there is no uniform trade secret law in China. China's governance of trade secrets is guided by scattered laws and regulations. Of these statutes, the most significant is the Anti-Unfair Competition Law,[74] supplemented by case law from the Supreme People's Court.[75] Additionally, other laws such as contract law, company law, and criminal law have some provisions that can govern trade secret issues in special circumstances accordingly.

The Anti-Unfair Competition Law, enacted in 1993, defines trade secrets in Article 10 as "technical and business information that is unknown to the public, can bring economic benefits to the rights holder, has practical utility, and for which the trade secret owner has taken measures to maintain its confidentiality."[76] Article 10 further prescribes three forms of trade secret misappropriation: (1) acquiring trade secret of another by theft, inducement, duress, or other illegal means; (2) disclosing, using, or allowing others to use the trade secrets of another acquired with the above illegal means; or (3) disclosing, using, or allowing others to use trade secrets in breach of an agreement or a confidentiality obligation imposed by a legal owner.[77]

In January 2007, the Supreme People's Court issued a Judicial Interpretation on Certain Issues Concerning the Application of Law in Trials of Civil Cases Involving Unfair Competition, which touched upon issues of trade secret protection.[78] The Interpretation

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[74] *See* Anti-Unfair Competition Law of the PRC, *supra* note 62.

[75] Strictly speaking, in a narrow sense, the interpretation ("Judicial Interpretation") by the Supreme People's Court is not the law. Only the statute enacted by National People's Congress or its standing committee can be named as the "law" in China. However, the Judicial Interpretation is very useful and practical for the lower courts when hearing cases because Judicial Interpretation provides courts the detailed interpretations of the laws. Over time, Judicial Interpretation has become regarded by courts as one of the three main binding sources, apart from statutes and regulations.

[76] *See* Anti-Unfair Competition Law of the PRC, *supra* note 62.

[77] *Id.*

[78] Zuigao Renmin Fayuan Guanyu Shenli Buzhengdang Jingzheng Minshi

provided a detailed explanation of the meaning of "unknown to the public," "economic benefits and practical utility," and "confidentiality measures."[79] It also clarified its definition for controversial types of information, including the types of customer lists which could be recognized as trade secrets. The Interpretation made it clear that customer lists could be protected as trade secrets so long as they met the statutory requirements.[80] Customer lists contain names, addresses, contact information, business patterns, and business plans that are distinguishable from public information and constitute specific customer information; they also include the compilations of the names of general customers, and specific customers with a long-term business relationship.[81]

Another important regulation concerning trade secret protection is Provisions Regarding the Prohibition of Trade Secret Infringement, which is the ministerial level of regulation issued by the State Administration of Industry and Commerce ("SAIC").[82] It describes administrative procedures for handling trade secret cases and gives branch offices of SAIC power to investigate trade secret misappropriation acts.[83]

Contract law also provides special trade secret protection in contract negotiations;[84] company law stipulates trade secrets

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Anjian Yingyong Falv Ruogan Wenti De Jieshi (最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释] [Interpretation of Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition], WIPO (Sup. People's Ct., Feb. 1, 2007), *available at* http://www.wipo.int/wipolex/zh/details.jsp?id=6558 (China).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Guojia Gongshang Xingzheng Guanli Ju Guanyu Jinzhi Qinfan Shangye Mimi Xingwei De Ruogan Guiding (国家工商行政管理局关于禁止侵犯商业秘密行为的若干规定) [Several Provisions on Prohibiting Infringements upon Trade Secrets] (promulgated by the State Admin. for Indus. & Com. of the PRC, Nov. 23, 1995, effective Nov. 23, 1995), *available at* http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/7/7-5-08.html (China).

[83] *Id.*

[84] Zhonghua Renmin Gongheguo Hetong Fa (中华人民共和国合同法) [Contract Law of the PRC] (promulgated by the Nat'1 People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 43, *available at* http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm (China).

obligations for senior management;[85] and criminal law provides criminal action for trade secrets cases.[86] [87]

C. The Enforceability of the Non-Compete Agreement in the Court of China—From the Perspective of Protectable Business Interests

An employer must have a legitimate business interest for a non-compete to be valid. In the absence of a legitimate business interest, there are no grounds to justify constraints on an employee's occupational liberty. According to a provision of Article 23 in the Chinese Labor Contract Law, section 1, an employer and an employee may include in their labor contract confidentiality provisions regarding an employer's intellectual property. Section 2 provides that an employer may enter into a non-compete with an employee, but does not specifically mention "protectable business interests."[88] This issue has been a huge source of controversy, as courts are divided over whether the term "protectable business interest" only encompasses a "trade secret" or includes both "trade secrets" and "other confidential matters with regard to intellectual property."[89]

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[85] Zhonghua Renmin Gongheguo Gongsi Fa (中华人民共和国公司法) [Company Law of the PRC] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 149(7), *available at* http://www.gov.cn/flfg/2005-10/28/content_85478.htm (China).

[86] Zhonghua Renmin Gongheguo Xing Fa (中华人民共和国刑法) [Criminal Law of the PRC] (promulgated by the Nat'l People's Cong., Mar., 14, 1997, effective Oct. 1, 1997), art. 219, *available at* http://www.npc.gov.cn/wxzl/gongbao/2000-12/17/content_5004680.htm (China).

[87] *See generally* J. Benjamin Bai & Guoping Da, *Strategies for Trade Secrets Protection in China*, 9 NW. J. TECH. & INTELL. PROP. 357 (2011).

[88] *See* Labor Contract Law of the PRC, *supra* note 67.

[89] Although Labor Contract Law mentioned both "trade secret" and "confidential information," the definition of these two concepts is not determined therein. "Trade secret" is defined in Anti-Unfair Competition Law and subsequent Judicial Interpretation, while "confidential information" has no specific provision. Some kinds of confidential information can be regarded as "trade secret" if they meet certain requirements of trade secret. For example, for customer lists to be trade secrets, they must be customers' names, addresses,

Two judicial viewpoints have emerged. The first is that the scope of a protectable business interest extends to not only trade secrets, but also other confidential matters. The second contends that the validity of a given non-compete should be subject to whether a trade secret is at issue.[90]

While the Supreme People's Court remains silent, lower courts have been split on the issue. According to research by Judge Tao Gu,[91] a majority of courts support the second view that validity of a non-compete depends on the existence of an actual trade secret.[92] Judge Gu lists several examples to support this narrower interpretation, including a decision from the Higher People's Court of Beijing Municipality, which held that "the existence of protectable interest—that is, the trade secret—is the precondition to the validity of a non-compete, and that a non-compete cannot exist if there is no trade secret protection."[93] The Higher People's Court of Zhejiang Province also held that "[a] non-compete must have a reasonable purpose and cannot violate laws, regulations or

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contacts, habits, purpose and content of transactions; and such information must be special and independent from the generally known information by the public. Generally, confidential information can be defined by the parties in the contract and supported by Chinese law. For example, Section 2 of Article 60 of Contract Law states that "the parties shall abide by the principle of good faith, and perform obligations such as notification, assistance, and confidentiality, etc. in light of the nature and purpose of the contract and in accordance with the relevant usage." Labor Contract Law of the PRC, *supra* note 67.

[90] *See* Tao Gu, Lun Qinfan Shangye Mimi Jiufen Zhong Youguan Jingye Xianzhi De Ruogan Falv Wenti (论侵犯商业秘密纠纷中有关竞业限制的若干法律问题) [Study of Non-Compete Issues for Trade Secret Infringement], 5 J.L. APPLICATION (法律适用) 58 (2013) (China).

[91] Mr. Tao Gu is a senior judge and Vice Director working at the IP Division of Higher People's Court of Jiangsu Province. He accumulated rich trial experience in the area of trade secret infringement and published an article named Study of Non-Compete Issues for Trade Secret Infringement.

[92] *See* Gu, *supra* note 90.

[93] *See* Beijing Gaoyuan Minsanting Guanyu Beijingshi Fayuan Shenli Buzhengdang Jingzheng Jiufen Anjian De Jiben Qingkuang Ji Zhuyao Zuofa (北京高院民三庭关于《北京市法院审理不正当竞争纠纷案件的基本情况及主要做法》) [No. 3 Civil Division of People's Court of Beijing Municipality Regarding the Basic Information and Practices for Hearing the Anti-Unfair Competition Cases by the courts of Beijing] (unpublished) (on file with author) (China); *see also* Gu, *supra* note 90.

the public interest; the purpose of a non-compete is to protect the trade secrets of the employer, rather than restricting competition under the guise of a non-compete."[94] Furthermore, the Higher People's Court of Shandong Province also held that "[a] non-compete shall be targeted to the necessary persons and with the necessity of protecting the employer's trade secrets."[95] The Supreme People's Court indirectly expressed judicial policy, however, when it held that "as to the case where neither a trade secret exists, nor is a competitive field in the industry restricted by a non-compete, the lower courts need to balance the relationship between free competition and freedom to choose employers, and the relationship between the non-compete obligation and employee mobility; and courts cannot recklessly make the decision of constituting anti-unfair competition simply on grounds of diminishing certain advantages to the competition."[96] Such a

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[94] *See* Zhejiang Gaoyuan Minsanting Guanyu Shangye Mimi Sifa Baohu Wenti De Diaoyan Baogao (浙江高院民三庭关于《商业秘密司法保护问题的调研报告》) [No. 3 Civil Division of People's Court of Zhejiang Province regarding the Research Report for the Issues of Trade Secret Judicial Protection] (unpublished) (on file with author) (China); *see also* Gu, *supra* note 90.

[95] *See* Shandong Gaoyuan Minsanting Guanyu Shangye Mimi Sifa Baohu Wenti De Diaoyan Qingkuang Baogao (山东高院民三庭关于《商业秘密司法保护问题的调研情况报告》) [No. 3 Civil Division of People's Court of Shandong Province regarding the Research Information Report for the Issues of Trade Secret Judicial Protection] (unpublished) (on file with author) (China); *see also* Gu, *supra* note 90.

[96] *See* Xiaoming Xi, Chongfen Fahui Sifa Baohu Zhishi Chanquan Zhudao Zuoyong Wei Shijian Kexue Fazhanguan He Jianshe Chuangxinxing Guojia Tigong Jianqiang Youlide Sifa Baozhang—Zai Quanguo Fayuan Zhishi Chanquan Shenpan Gongzuo Zuotanhui Ji Zhishi Chanquan Shenpan Gongzuo Xianjin Jiti He Xianjin Geren Biaozhang Dahui Shang De Jianghua (《充分发挥司法保护知识产权主导作用为实践科学发展观和建设创新型国家提供坚强有力的司法保障——在全国法院知识产权审判工作座谈会暨知识产权审判工作先进集体和先进个人表障大会上的讲话》) [Fully Play the Main Role of the Judicial Protection for Intellectual Property so as to Provide the Robust Judicial Safeguard for Practicing the Theory of Scientific Development and Building the Innovation Country – the Speech on the Symposium for the Intellectual Property Case Hearing and the Awards Ceremony for the Individuals and Units of the Intellectual Property Hearing], CHINACOURT (Feb. 5, 2009), *available at* http://gxfy.chinacourt.org/public/detail.php?id=6032; *see also* Gu, *supra* note 90.

narrow interpretation reflects the attitude of the majority of courts which have decided non-competition cases—namely, that a court's core function is to balance employee mobility and the rights of employers in the context of economic development and social stability.

Another example of the cautious attitude of the Supreme People's Court is a general opinion called the Guidance of Case Trial on Employment Dispute under Current Situation. Article 10 of the opinion stipulates that:

> [W]hen hearing the noncompetition cases, the courts shall (1) take into full account the actual level of the economy and technology development in our country; (2) based on the public interests, not only maintain fair competition in the socialist market economy, but also balance the interests of different market players; (3) avoid limiting the employee's freedom of career choice through the inappropriate expansion of the scope of non-competition; and (4) protect employers' trade secrets and other legal rights, so as to fulfill the legislative intent and purpose of the noncompetitive legal system to the full extent.[97]

Although the opinion of the Supreme People's Court provides only the general policy with which courts must comply, it still reflects a cautious attitude towards the expansion of non-competes.

Two cases have provided examples of how courts have determined protectable business interests. In *Rao Haibo v. Beijing New Giant Training School*,[98] Rao Haibo, a former vice-president

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[97] Guanyu Dangqian Xingshixia Zuohao Laodong Zhengyi Jiufen Anjian Shenpan Gongzuode Zhidao Yijian (关于当前形势下做好劳动争议纠纷案件审判工作的指导意见) [Guidance of Case Trial on Employment Dispute Under Current Situation] (promulgated by the Sup. People's Ct., 2009), *available at* http://law.chinalawinfo.com/fulltext_form.aspx?Db=lawexplanation&Gid=1090523960 (China).

[98] *See* Rao Haibo Su Beijingshi Haidianqu Xinjuren Peixun Xuexiao (饶海波诉北京市海淀区新巨人培训学校) [Rao Haibo v. Beijing New Giant

in charge of the textbook research center of New Giant Training School, appealed from a judgment holding that Rao Haibo violated the non-compete and had to pay damages. Rao Haibo raised several affirmative defenses, one of which was that New Giant is a private and non-enterprise school and belongs to the non-profit service organization, and as such could have no trade secrets. The court held that, although the defendant is a private and non-enterprise school, the Labor Contract Law didn't exclude such schools from the application of non-compete provisions; and that Rao Haibo could be regarded as a person governed by a non-compete because he knew and had access to New Giant's training, skills, and related information. The court further held that, in the education-training field, a teacher's training ability and business information constitutes the essential competitiveness for the education-training school, and such skills and information could be protected as trade secrets. Based on this ruling, the appellate court affirmed the district court's decision.[99]

In *Lin Zhenxian v. Shiyu Product Logo (Suzhou) Co.* ("Company"),[100] the appellant, Lin Zhenxian, appealed to the Higher People's Court of Jiangsu Province, from a judgment that he had violated a non-compete because he worked at another competitive company within the period forbidden by his non-compete and used a book containing trade secrets without authorization from his former employer. Lin Zhenxian made several affirmative defenses, including the fact that the book's content could already be found in the public domain and accordingly did not qualify as a trade secret.

In deciding whether the book constituted a protectable interest under the non-compete provision of the Labor Contract Law, the appellate court quoted the definition of trade secrets from Article

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Training School] 2015 NO. 1 FINAL CIVIL TRIAL NO. 02737], PKULAW (Beijing No. 1 Interm. People's Ct. 2015), *available at* http://www.pkulaw.cn/case/pfnl_121768328.html (China).

[99] *Id.*

[100] *See* Lin Zhenxian Su Shiyu Chanpin Biaozhi (Suzhou) Youxian Gongsi (林镇贤诉世誉产品标识(苏州)有限公司) [Lin Zhenxian v. Shiyu Product Logo (Suzhou) Co.], (Jiangsu High People's Ct. 2008); *see also* Gu, *supra* note 90.

10 of the Anti-Unfair Competition Law. The court held that "unknown to the public" means the information—whether as a whole or as the specific construction or combination for each part—is not known to the persons who often access this kind of information in this field and is not easily obtained. However, Lin Zhenxian had spent time, effort, and money analyzing factors contributing to defect products in different manufacturing processes and had filled the book with associated solutions. For this reason, the book contained valuable technical information that could not be obtained through public channels and would have brought the Company a competitive advantage and economic value. As such, the technical information mentioned in the book could be protected by law as a trade secret.[101]

III. COMPARISONS: DIFFERENCES OF NON-COMPETES IN THE U.S. & CHINA

A. U.S. Courts Are Cautious to Non-Competes

In the U.S., enforceability of non-competes varies from state to state. While a few states prohibit non-competes altogether, most states follow the reasonableness test in deciding whether a non-compete is enforceable. Generally, courts have construed non-competes narrowly, presuming that they are invalid and enforceable only upon proof that such contracts are reasonably necessary for the protection of an employer's business interest.[102] A non-compete must reasonably limit the breadth of its subject matter, the duration, and the geographic area in which former employees can compete.[103]

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[101] *See* Lin Zhenxian v. Shiyu Chanpin Biaozhi (Suzhou) Co., *supra* note 100.

[102] *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 118 (5th ed. 2004).

[103] *Id.*

B. Courts in China Have a Tendency to Support Non-Competes

To evaluate the general attitude in Chinese courts towards non-competes, this Article analyzes all final judgments on non-compete cases decided by intermediate or higher courts[104] from March 2014 to February 2015.[105] Thirty-six of these cases were related to the validity of the non-compete; twenty-four of which were regarded by courts as "valid and enforceable." In other words, two out of three non-compete cases were held to be "valid and enforceable" by Chinese courts.[106]

C. Different Focus and Emphasis on the Non-Compete by Courts in the U.S. & China When Deciding Its Enforceability

Traditionally, non-competes arose out of the need to protect trade secrets and other valuable business information. Over time, courts in England and the U.S. gradually began to enforce non-competes. Modern U.S. courts view the protectable business interest as a requisite element needed to enforce non-competes.

In *Modern Environments v. Stinnett*,[107] Stinnett, a salesperson for Modern, signed an employment agreement with Modern containing a one-year non-compete clause. Within one year, Stinnett accepted employment with a company which competed with Modern. Modern notified Stinnett and her new employer by letter that Stinnett's employment with the competitor violated the non-compete clause. [108] Soon afterwards, Stinnett filed a declaratory judgment action to establish that the non-compete in

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[104] In China, common labor cases are filed in the basic people's court and appealed to the intermediate court when necessary. Very few cases are granted certiorari by the provincial higher court. Trade secret infringement cases, on the other hand, are filed in the intermediate court and appealed to the higher court in different provinces.

[105] Since January 1, 2014, all cases decided by all levels of courts in China have been publicized and can be found on the website of Judicial Opinions of China established by Supreme People's Court at http://www.court.gov.cn/zgcpwsw/.

[106] *See infra* Appendix.

[107] Modern Env'ts v. Stinnett, 561 S.E.2d 694 (Va. 2002).

[108] *Id.*

question was overbroad and unenforceable. The Virginia Supreme Court affirmed the trial court's decision that the non-compete was unenforceable because the defendant failed to present evidence of any protectable business interest served by prohibiting Stinnett from being employed in any capacity by a competing company.[109]

Similarly, in *Reliable Fire Equipment Company v. Arredondo*,[110] the Illinois Supreme Court looked at employee non-competes under the three-prong rule of reasonableness where the legitimate business interest of the employer is a long-established component.[111] In this case, the lower courts had held that non-competes were not enforceable where the employer had failed to prove the existence of a legitimate business interest that justified enforcement. Although the Illinois Supreme Court overruled and rejected the appellate court's verdict, which limited the "legitimate protectable interests" to either "near-permanent" customer relationships or confidential information, the Court held that the "legitimate business interest" precedent remains intact, but only as a non-conclusive example of applying the legitimate business interest.[112]

By contrast, the enforceability of non-competes in China generally depends on whether employers compensated departing employees reasonably. In the analysis of the thirty-six non-compete cases,[113] only twelve were held invalid. Nine were held invalid due to the employer's failure to pay reasonable compensation according to the employment contracts or Labor Contract Law. Only three cases were invalid based on a lack of legitimate business information or findings that employers had failed to provide evidence that employees actually accessed the trade secrets in question.[114]

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[109] *Id.* at 695.

[110] Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393 (Ill. 2011).

[111] *Id.* at 400.

[112] *Id.*; *see also* KIRKLAND & ELLIS LLP, *Kirkland Alert: New Illinois Supreme Court Decision Requires Detailed Analysis of Restrictive Covenants*, KIRKLAND.COM (Dec. 2011), http://www.kirkland.com/siteFiles/Publications/Alert_121611.pdf.

[113] *See infra* Appendix.

[114] These three cases are (1) Jiangsu Niupai Fangzhi Jixie Youxian Gongsi Su Zou Daoyong (江苏牛牌纺织机械有限公司诉邹道勇) [Jiangsu Niupai

The following court structure in China may provide an explanation as to the reason that the judges have focused more on economic compensation rather than on protectable business interests in non-compete cases. Courts in China, especially in the intermediate or high courts, have different divisions to hear different types of cases. These divisions include the civil, criminal, administrative, and intellectual property divisions, among others. Usually, the civil division of the court decides non-compete cases because such cases belong to the category of labor law cases, which falls in the domain of the civil division, while the intellectual property division of the court decides trade secret infringement cases. As a result, when trade secret cases fall to the intellectual property division, a judge specializing in intellectual property decides whether the information constitutes a trade secret. By comparison, civil division judges are generally not well-versed enough in intellectual property law to decide trade secret issues.[115]

Another practical reason may be that the protectable business interest is not the key issue for the parties. Unlike the U.S. where the employer usually files non-compete claims, in China, both the employer and the employee may file for non-compete claims—usually disputing compensation. As such, courts often consider compensation first, and only make a limited examination as to

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Textile Mach. Co. v. Zhou Daoyong], PKULAW (Yangzhou Interm. People's Ct. 2014), *available at* http://fjlx.pkulaw.cn/Case/pfnl_121476260.html?match=Exact; (2) Chongqing Suotong Chuguo Qihua Youxian Gongsi Su Liu Ying (重庆索通出国企划有限公司诉刘影) [Chongqing Suotong Chuguo Planning Co. v. Liu Ying], OPENLAW (Chongqing No. 5 Interm. People's Ct. 2014), *available at* http://openlaw.cn/judgement/98ce438f53de436bad87dda8c8bd436e; and (3) Guangdong Jixian Dianlan Fujian Youxian Gongsi Su Zhang Jinmei (广东吉熙安电缆附件有限公司诉张金梅) [Guangdong Jixian Cable Accessory Co. v. Zhang Jinmei], PKULAW (Fushan Interm. People's Ct. 2014), *available at* http://www.pkulaw.cn/case/pfnl_120588231.html?match=Exact (China).

[115] *See* Feng Yan & Liquan Huang, Shilun Jingye Xianzhi Xieyi Yu Shangye Mimi Zai Shenpan Shiwuzhong De Guanxi (试论竞业限制协议与商业秘密在审判实务中的关系) [Study of the Relationship of the Non-Compete Agreement and Trade Secret in the Practice of Hearing], JINAN LICHENG DISTRICT COURT (May 6, 2014), *available at* http://jnanlcqfy.sdcourt.gov.cn/jnanlcqfy/379762/379695/569552/index.html.

whether a legitimate business interest exists.[116]

IV. RECOMMENDATIONS

A comparison of the non-compete systems used in the U.S. and China show that non-competes have been as explored in China as in the United States. Non-competes are, however, more easily supported by Chinese courts, despite the fact that the non-compete provision has been statutory law in China for less than ten years. In the thirty-six cases discussed, Chinese courts paid less attention to the analysis of "protectable business interest[s]" in non-compete cases. In so doing, they diverge from the real purpose of a non-compete, which is to protect trade secrets. The current over-enforcement of non-competes in China jeopardizes the balance between trade secret protection and employee mobility.

A. Create a Statutory Definition of "Protectable Business Interest"

A statutory definition of the "protectable business interest" should be added to the Labor Contract Law or any future laws specific to governing trade secrets. While Article 23 and 24 of Labor Contract Law currently govern non-competes, these provisions do not specifically mention what constitutes a protectable business interest.

In order to solve this problem and provide guidelines for the judges, two solutions are possible. The first is to have the Labor Contract Law amended by the National Congress, or to have a judicial interpretation regarding this matter issued by the Supreme People's Court. Either would provide clear guidance for the courts in China; however, issuing the judicial interpretation is more practical and much simpler when compared to the time-consuming legislative process. For example, the pertinent part of Article 23 could be amended or interpreted (as the case may be) as follows: "an employer and an employee may include in their labor contract the non-compete provision which protects an employer's

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[116] *Id.*

reasonable legitimate business interests." If possible, the protectable business interest should be explicitly defined with language such as: the protectable business interest shall be defined to include trade secrets, customer lists, specific customer relationships, and other confidential matters with regard to intellectual property. As a "catch all" clause, this would be narrowly construed and only adopted in exceptional circumstances.

The second solution would be to enact a national trade secret law, creating separate provisions for non-competes. Until now, most trade secret-related cases have relied on Article 10 of Anti-Unfair Competition Law and the related Judicial Interpretations.[117] If the trade secret law were to be enacted, it may be advisable to have a separate section to delineate the non-compete in order to ensure that the precondition for a non-compete is the existence of a "protectable business interest," and to define the "protectable business interest."

B. Narrow the Validity of Non-Compete Agreements

The high rate of enforceability in China may jeopardize the balance between trade secret protection and employee mobility, which may in turn affect the spread of technology inside the country. From the thirty-six cases previously analyzed, courts in China paid the most attention to economic compensation rather than restrictions such as specific employees, duration, geographic scope, and the competitiveness of the industry. As a result, two-thirds of non-compete cases have recently been found valid by Chinese courts.

In the U.S., there is a tendency to limit the enforceability of the non-compete in order to encourage innovation and create a welcoming environment for technical talents.[118] By learning from the successful experiences of Silicon Valley in California and avoiding the lesson of Route 128 in Massachusetts, some states began to consider creating an employee-friendly non-compete

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[117] *See* Interpretation of Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, *supra* note 78.

[118] *See* Gomulkiewicz, *supra* note 5.

legal system, and several states even began to consider banning non-competes altogether.[119]

China is currently transitioning from a traditional economy to a technology-motivated economy. Therefore, in order to balance employee mobility and trade secret protection, China should facilitate knowledge dissemination to better meet the demands of economic development. In a word, Chinese courts should narrow the validity of the non-compete.

CONCLUSION

This Article provides a comparison of the ways in which legal systems in both the U.S. and China have historically considered non-competes and trade secret protection. Compared to the cautious attitude to non-competes exhibited in the U.S., Chinese courts have a far stronger tendency to support non-competes. In addition, this Article provides an explanation for such strong enforceability of non-competes by analyzing non-compete cases: courts in China focus more on economic compensation and less on protectable business interests. However, in the context of economic transformation in China, the technology-driven economy plays an increasingly important role in China. Therefore, it is the right time for legislators and the courts in China to reexamine the non-compete legal regime to assure that it does not hold back employee mobility and technology dissemination.

PRACTICE POINTERS

- In the U.S., courts are often cautious in non-compete cases, and decide an agreement's enforceability based on the "reasonableness" standard, where a protectable business interest is merely one of many important factors to consider.
- In China, courts focus more on economic compensation, which is easily satisfied by employers, and less on the factor of protectable business interests, which no exact statutory provisions govern. As such, they have a tendency to support non-competes.

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[119] *Id.*

APPENDIX

No.	Case Name	Validity
1	[杨高翔诉现代金融控股(成都)有限公司上海分公司]] [Yang Gaoxiang v. Shanghai Branch of Xiandai Financial Holdings (Chengdu) Co.] (Shanghai No. 1 Interm. People's Court, 2014)	Invalid (no compensation)
2	广州天玑房地产咨询服务有限公司诉何体秀 [Guanzhou Tianji Real Estate Consulting Service Co. v. He Tixiu] (Guangzhou Interm. People's Court, 2014)	Invalid (no compensation)
3	许绍婷诉合肥锦雯言语康复中心[Xu Shaoting v. Hefei Jinwen Language Rehabilitation Centre] (Hefei Interm. People's Court, 2014)	Invalid (no compensation)
4	浙江海纳电气有限公司诉周峰[Zhejiang Haina Electric Co. v. Zhou feng] (Wenzhou Interm. People's Court, 2014)	Invalid (no compensation)
5	南京东方明珠化工有限公司诉戴维维[Nanjing Oriental Pearl Chemical Engineering Co. v. Dai Weiwei] (Nanjing Interm. People's Court, 2014)	Invalid (no compensation)
6	广州希创旺思电子科技有限公司诉郑浩荣[Guangzhou Xichuang Wangsi Electronic Technology Co. v. Zheng Haorong] (Guangzhou Interm. People's Court, 2014)	Invalid (no compensation)
7	广州启圆钢材加工有限公司诉温建营[Guangzhou Qiyuan Steel Processing Co. v. Wen Jianying] (Guangzhou Interm. People's Court, 2014)	Invalid (no compensation)
8	广州番禺上海三菱电梯特约销售服务有限公司诉夏国红[Guangzhou Fanyu Shanghai Mitsubishi Elevators Sales & Service Co. v. Xia Guohong] (Guangzhou Interm. People's Court, 2014)	Invalid (no compensation)
9	湖北省赵李桥茶厂有限责任公司诉任志刚[Hubei Zhaoliqiao Tea Factory Co. v. Ren Zhigang] (Xianning Interm. People's Court, 2014)	Invalid (no compensation)
10	江苏牛牌纺织机械有限公司诉邹道勇[Jiangsu Niupai Textile Machinery Co. v. Zhou Daoyong] (Yangzhou Interm. People's Court, 2014)	Invalid (no access to trade secret)
11	重庆索通出国企划有限公司诉刘影[Chongqing Suotong Chuguo Planning Co. v. Liu Ying] (Chongqing No. 5 Interm. People's Court, 2014)	Invalid (no access to trade secret)
12	广东吉熙安电缆附件有限公司诉张金梅[Guangdong Jixian Cable Accessory Co. v. Zhang Jinmei] (Fushan Interm. People's Court, 2014)	Invalid (no trade secret infringement)
13	饶海波与北京市海淀区新巨人培训学校[Rao Haibo v.	Valid

	Beijing New Giant Training School] (Beijing No. 1 Interm. People's Court, 2015).	
14	陈文飞诉上海宇昂水性新材料科技股份有限公司 [Chen Wenfei v. Shanghai Yuyang Shuixing New Material Technology Corp.] (Shanghai No. 1 Interm. People's Court, 2015)	Valid
15	黄迅雷诉杭州网泰信息技术有限公司[Huang Xunlei v. Hangzhou Wangtai Information Technology Co.] (Hangzhou Interm. People's Court, 2014)	Valid
16	胡银华诉上海比迪工业铝型材配件有限公司[Hu Yinhua v. B&D Shanghai Aluminum Industrial Profiles & Accessories Co.] (Shanghai No. 1 Interm. People's Court, 2014)	Valid
17	纪向东诉北京东方惠尔图像技术有限公司 [Ji Xiangdong v. Beijing Dongfang Huier Image Technology Co.] (Beijing No. 1 Interm. People's Court, 2014)	Valid
18	陈福泰诉上海回天新材料有限公司[Chen Futai v. Shanghai Huitian New Material Co.] (Shanghai No. 1 Interm. People's Court, 2014)	Valid
19	陈科萍诉浙江信互贷电子商务有限公司[Chen Keping v. Zhejiang Xinhudai Electric Commerce Co.] (Hangzhou Interm. People's Court, 2014)	Valid
20	软岛科技(重庆)有限公司诉陈文[Ruandao Tecknology(Chongqing) Co. v. Chen Wen] (Chongqing No. 5 Interm. People's Court, 2014)	Valid
21	威士伯(上海)企业管理有限公司诉范熠侃[Valspar (Shanghai) Management Co. v. Fan Yikan] (Shanghai No. 1 Interm. People's Court)	Valid
22	盖洪涛诉山东南山科学技术研究院[Gai Hongtao v. Shandong Nanshan Scientific Technology Research Institute] (Yantai Interm. People's Court, 2014)	Valid
23	孔玲丽诉上海易佩司国际物流有限公司[Kong Lingli v. Shanghai Yipeisi International Logistics Co.] (Shanghai No. 1 Interm. People's Court)	Valid
24	李义栋诉连云港市金荷纸业包装有限公司[Li Yidong v. Lianyungang Jinhe Paper Packing Co.] (Lianyungang Interm. People's Court, 2014)	Valid
25	陆洲诉湖北爱康大通汽车销售服务有限公司[Luzhou v. Hubei Aikang Datong Auto Sales & Service Co.] (Xiaogan Interm. People's Court, 2014)	Valid
26	马忠仁诉济南鲁发环保科技有限公司[Ma Zhongren v. Jinan Lufa Environmental Protection Technology Co.] (Jinan Interm. People's Court, 2014)	Valid

27	秦洪格诉北京神州在线科技有限公司[Qin Hongge v. Beijing Shenzhou Online Technology Co.] (Beijing No. 1 Interm. People's Court)	Valid
28	深圳力方群英数字科技有限公司诉丘秋[Shenzhen Lifang Qunying Digital Technology Co. v. Qiuqiu] (Shenzhen Interm. People's Court, 2014)	Valid
29	林肯电气(锦州)焊接材料有限公司诉王雷(Jinzhou Interm. People's Court, 2014)	Valid
30	杭州恒生网络技术服务有限公司诉王云敏[Hangzhou Hengsheng Network Technology Service Co.] (Hangzhou Interm. People's Court, 2014)	Valid
31	南京倍立达新材料系统工程股份有限公司诉王羿[Nanjing Beilida New Material System Engineering Corp. v. Wangyi] (Nanjing Interm. People's Court, 2014)	Valid
32	邢玉锋诉上海德卡服装科技有限公司[Xing Yufeng v. Shanghai Deka Clothing Technology Co.] (Shanghai No. 1 Interm. People's Court, 2014)	Valid
33	重庆山外山科技有限公司诉尹明兰[Chongqing Shanwaishan Technology Co. v. Yinminglan] (Chongqing No. 1 Interm. People's Court, 2014)	Valid
34	佛山市博晖机电有限公司诉翟良松[Foshan Bohui Electromechanical Co. v. Zhai Liangsong] (Foshan Interm. People's Court, 2014)	Valid
35	赵建川诉北京神州在线科技有限公司[Zhao Jianchuan v. Beijing Shenzhou Online Technology Co.] (Beijing Haidian People's Court, 2014)	Valid
36	沈阳和谐文化传播有限公司诉赵岩[Shenyang Hexie Culture Communication Co. v. Zhaoyan] (Shenyang Interm. People's Court, 2014)	Valid