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# n° 56 WHD Case: TM | Xiaomi's voice-activation command prompt awarded protection in precedent-setting trademark dispute

**Han ZHANG, Jin CHENG, Ye CAI, 19 June 2024, first published by IAM**

In July 2017, Xiaomi launched a smart speaker with a voice activation command prompt (VACP) called '小爱同学' (Xiao Ai Tong Xue), which later became the name of its AI-powered voice-interaction product. In August 2017, a Chinese person named Chen Xiong registered 小爱同学 as a trademark. Between then and June 2020, Chen filed for 66 marks in 21 classes and, after obtaining the registration, sent a cease-and-desist letter demanding Xiaomi to cease use of the mark. Chen then began to use the mark on watches and clocks.

Xiaomi initiated a court action against Chen and the licensee of the copycat trademarks before the Intermediate People's Court of Wenzhou.

The Wenzhou Court issued a first-instance civil judgment on 14 December 2023, affirming that the name of Xiaomi's VACP should be protected under the Anti-Unfair Competition Law. The court found that Chen's extensive trademark squatting and the cease-and-desist letter breached the good-faith doctrine and prejudiced Xiaomi's rights and interests – ultimately constituting unfair competition. The court awarded Xiaomi 1.2 million yuan for commercial losses and reasonable expenses.

The judgment has now taken effect, and the case was listed as one of the Supreme People's Court's top 10 IP cases of 2023.

## Court decision

The development of AI and IoT technologies has fueled the boom of the smart-home industry. Tech giants have launched proprietary AI devices with unique VACPs, such as Apple's Siri and Amazon's Alexa. These names have functioned as source identifiers of goods and services through extensive use and promotion.

The popularity of VACPs means that brands often fall victim to bad actors seeking to profit from trademark squatting. Without explicit provisions offering protection to the legitimate right holders of VACPs in China, this case sets a precedent by affirming that words with certain levels of influence and popularity are protectable under the Anti-Unfair Competition Law.

The judgment also clarified the scope of protection. Xiaomi has applied its Xiao Ai Tong Xue AI-powered engine widely in a slew of products, including mobile phones, TVs and smart speakers. The Xiao Ai Tong Xue VACP enables users to operate smart devices (eg, air conditioners, refrigerators and cleaning robots) using spoken

commands. Thus, the court ruled that this VACP is associated with a wide range of goods that have built-in AI voice interaction engines and so should be protected on these goods.

The court found that the defendant's act of trademark squatting severely infringed Xiaomi's legitimate rights and interests, disrupted the normal trademark registration administration process and harmed fair market competition. When ascertaining the amount of damages to award in this case, the court considered the expenses that the plaintiff had incurred in combatting the defendant's behaviour including costs associated with administrative procedures, such as review of refusal and invalidation, as well as litigation costs.

## Key takeaways

The case is expected to serve as a point of reference for similar future cases because of the precedent it sets.

For VACP rights holders, it is crucial to prove that the names of the prompts have gained a certain level of popularity and influence and that they help to identify the source of goods or services. To do this, rights holders must proactively collect and preserve evidence of popularity during daily use to build a strong case.

Brand owners should also actively exercise their rights by taking action against trademark squatters. Otherwise, the infringer could exploit the right holder's acquiescence and use it against them.

# n° 62 WHD Insights: PT | Patenting AI-driven drug compound screening inventions in China

**Rui WANG, 5 July 2024, first published by MIP**

The integration of AI in drug discovery, particularly in the screening of drug compounds, ushers in seismic change to the pharmaceutical industry. AI technologies, especially machine learning and deep learning, have revolutionised how new drugs are identified and developed. The development of AI-driven algorithms fuels drug discovery from detecting and prioritising disease targets, identifying potential drug candidates within large chemical libraries, predicting molecular behaviour, to simulating clinical trial outcomes, which drastically shortens the process and brings down the costs.

For instance, a biopharmaceutical company, by leveraging AI platforms designed for drug discovery, managed to nominate ISM001-055, a drug candidate for idiopathic pulmonary fibrosis, with a budget of around $2.6 million within 18 months, in comparison with the usual tens of millions of expenditure incurred over several years.

A study in 2023 indicates that there are more than 70 AI-derived small molecules, antibodies, and vaccines currently in clinical trials. Although applications have been filed to patent these newly found drug compounds, patenting the algorithms associated with the finding of such compounds is not that straightforward. The rationale behind this is that the algorithms or programmes per se are prone to be deemed as “the rules and methods for mental activities” or “abstract ideas”, which is unpatentable subject matter in many jurisdictions, including China. On top of that, algorithms iterate at a fast pace, which could put the inventors in a quandary as to whether it is worthwhile to patent their algorithms at all.

## Practice in China

The filing requirements for patent applications for AI-driven innovations in China remain the same:

- A claimed invention must be a statutory ‘invention’ in the sense that it is an eligible subject matter;
- The claimed subject matter must be novel and involve an inventive step (i.e., it is non-obvious); and
- The specification and claims must satisfy the following: enablement requirement/sufficient disclosure, and the claims are supported by the specification.

As for AI-related methods, in general, a pure algorithm or piece of software per se is deemed to be unpatentable. However, if an algorithm or a piece of software is combined with a specific technical application, the combined technical solution may be deemed patentable. In the screening of drug compounds, if AI algorithms generate significant technical improvement or optimisation, such as increasing the accuracy and/or efficiency of screening, the technical solution may be patentable.



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In prosecuting AI-driven inventions, inventors need to focus on whether the invention solves a specific technical problem and produces a technical effect. With regard to drug compound screening, it is pivotal to demonstrate how the existing drug discovery process is improved by the application of AI.

The 2023 version of the CNIPA's Guidelines for Patent Examination and the 2023 Comparative Study on AI-Related Inventions jointly conducted by the CNIPA and the JPO offer guidance on how to approach AI-related inventions by providing examples and explanations to help applicants to better understand how to construct their applications to meet filing requirements.

The extensive and in-depth application of AI across various fields and the new interdisciplinary techniques pose substantial challenges to the CNIPA. For instance, in the examination of an AI-driven drug discovery invention, the examiners will need expertise in both computer science and biology/pharmacy to understand how the two disciplines work in tandem to achieve the desired technical effect. This could markedly slow down the examination process.

For instance, Wanhuida's search of the CNIPA's official database indicates that a Chinese biopharmaceutical company that filed a dozen patent applications between 2019 and 2022 for AI-related pharmaceutical methods has so far received a first office action for only one application, with the rest still awaiting examination.

Over the past few years, though the CNIPA has granted a number of patents covering the use of AI in drug discovery (e.g., patents related to using AI to optimise the structure of a drug candidate molecule or to predict the effect of a molecule's interaction with a particular biological target), the number of patents granted for AI-related methods is far lower than the number of patents granted for screened compounds and the uses thereof.

### Examples of CNIPA examination practice

The following examples offer a glimpse into the CNIPA's examination practice.

Patent CN114432311B relates to a drug compound for treating idiopathic pulmonary fibrosis and a computer method for predicting and screening the same. In this invention, 20 candidate compounds were selected for Collagen 1A2‑A549 cellular validation testing after the first round of virtual screening and machine learning model prediction. The experimental data from these 20 candidate compounds was then fed back into the machine learning model. Combined with the results of the virtual computation, this process yielded nine candidate compounds in the second round. Following cell and animal experimental validation, two compounds with pharmaceutical activity were identified. Initially, the applicant sought to patent two compounds, formulas I and II, and the computer method for predicting and screening. In responding to the CNIPA's office action, which stated that there was no unity among the three subject matters, the applicant opted to claim the compound of Formula II and abandoned the method.

Patent CN114839369B relates to microbial markers for acute high-altitude response and the applications thereof. In the patent, seven microbial species have been

screened to be effective against acute high-altitude response using the XGBoost (eXtreme Gradient Boosting) machine learning method. The granted claims of the patent only include the above microbial markers and their applications, and do not cover the related machine learning methods.

Patent CN110352459B refers to a method for excavating a new drug candidate targeting nonstructure-structure transition site and apparatus for excavating a new drug candidate. Machine learning methods such as neural networks are used in the step of identifying a disorder-to-order transition region and other steps. All four granted claims involve the excavating method, and each step of the method is implemented by a computer device.

Patent CN113039559A proposes a training model that is a variational autoencoder with a learnable prior that is parametrised with a tensor train (VAE-TTLP). The model may be used to generate chemical structures that have desired properties. The VAE-TTLP model can also be used in combination with a reinforcement learning framework to expand the structure of the latent manifold (e.g., the latent space) towards novel chemical structures, such as novel inhibitors of protein or other biological activity. This patent application has not been allowed yet, but its chances are looking good, as the examiner acknowledged the novelty and inventive step of most dependent claims in the first office action.

## Final thoughts

Due to the scarcity of case law and statistics, it would be too early to conduct any meaningful and systematic analysis of the CNIPA's examination practice concerning AI-driven drug compound screening. In principle, inventors are advised to focus on improving the transparency and predictability of AI systems to enhance their patentability.

As AI continues to evolve, intellectual property offices such as the CNIPA need to ramp up the recruiting and training efforts of interdisciplinary examiners and to further refine their guidelines to better address the challenges created by a talent shortage and technical hurdles.

It would also be advisable for stakeholders to keep abreast of the latest legislative and practical updates so as to navigate the constantly evolving landscape.

# n° 63 WHD Insights: PT | China's SPC offers guidance on identifying technical problems actually solved in inventiveness assessments

**Xiaohui WU, 23 May 2024, first published by MIP**

The non-obviousness of a claimed invention to persons skilled in the art hinges on whether the prior art provides motivation for applying the distinguishing features of the invention to the closest prior art so as to solve the actual technical problem to be solved. If the technical problems actually solved by the invention are over-generalised, it will fail to identify the accurate improvement of the invention relative to the prior art, thus leading to an erroneous conclusion of obviousness.

The Intellectual Property Court of the Supreme People's Court (SPC) of China offers valuable insight in this regard in a court decision rendered on November 30 2023.

## Facts

The case relates to the invention patent application No. 201410707259.X for 'VEGF (vascular endothelial growth factor) Antagonist Formulations Suitable for Intravitreal Administration' (the Application). The Application was rejected by the China National Intellectual Property Administration (CNIPA) during a re-examination procedure, on the ground that the Application is devoid of an inventive step. The applicant challenged the decision before the Beijing Intellectual Property Court, but to no avail. An appeal was filed before the SPC, which revoked the CNIPA's and the first-instance court's decision.

## CNIPA decision

The CNIPA based its decision on the below findings.

The differences between Claim 1 of the Application and Reference Document 1 are as follows:

- The components of the ophthalmic formulation of the Application contain a specific amount of excipients such as sodium phosphate, without the presence of histidine or trehalose. In addition, the content of VEGF antagonists and polysorbide 20 is different from that in Reference Document 1, with a pH value ranging between 6.2 and 6.4.

- The Application defines the VEGF antagonist as a dimer composed of two fusion proteins of SEQ ID No. 4, where at least 90% by weight of the VEGF antagonist is not present in an aggregate.

Based on the aforesaid distinguishing features and their effects in this application, the CNIPA ascertained the technical problem actually solved in the Application as "providing a new ophthalmic formulation".

Regarding distinguishing feature (1), the CNIPA found that persons skilled in the art could achieve better stability of the formulation through adjustment and optimisation as taught in Reference Document 1.

Regarding distinguishing feature (2), the CNIPA opined that Reference Document 2 discloses a VEGF capturing agent that could bind and inhibit VEGF activity. Based on the teaching of Reference Document 2, it would be easy to apply the ophthalmic formulation as described in Reference Document 2 to the technical solution of Reference Document 1, thereby obtaining the technical solution of the Application, with foreseeable technical effect. The feature of "at least 90% by weight of the VEGF antagonist is not present in an aggregate" as dictated in the Application is a conventional choice, and there is no evidence in the specification of this application to demonstrate any unexpected technical effects that this choice may bring to the Application.

Therefore, the CNIPA concluded that Claim 1 of this application is obvious to those skilled in the art. The findings were echoed by the Beijing Intellectual Property Court in the first-instance proceeding.

**SPC decision**

The SPC apparently disagreed.

The apex court found that the invention as cited in Reference Document 1 aims to provide a new drug delivery scheme for the treatment of intraocular neovascular diseases, without directly addressing the issue of how to produce stable, safe, and effective formulations from therapeutic compounds. Moreover, the VEGF antagonists in the Application are proteins different from those in Reference Document 1. The technical effects of embodiments 3 and 4 in this application could demonstrate the stability of the VEGF-specific fusion protein antagonist suitable for ophthalmic and intravitreal application as provided in this application.

Based on the technical effects determined by the distinguishing features in this application, the SPC identified the actual technical problem to be solved by the Application as "providing a stable ophthalmic liquid formulation containing high concentrations of different protein antagonists".

As regards technical motivation, the SPC ascertained that the technical problem to be solved in the art lay in making stable, safe, and effective formulations out of the drugs at issue. In view of the technical teaching in Reference Document 1, persons skilled in the art have the motivation to use VEGF antagonists different from those cited in Reference Document 1 to produce formulations featuring similar concentrations.

However, it is also known knowledge in the art that polypeptide and protein drugs are very unstable and prone to spoilage. It is therefore a major technical challenge in the art to produce out of these drugs stable, safe, and effective formulations, not to mention to produce such formulations in high concentration. In particular, Reference Document 1 disclosed numerous VEGF antagonists, without giving any preference to VEGF trapping agents, making it harder to produce stable, safe, and effective high-

concentration formulations. The SPC therefore concluded that Reference Document 1 does not provide any teaching or technical motivation as to how to prepare stable high-concentration protein formulations.

The SPC was of the opinion that Reference Document 1 does not provide any teaching or technical motivation in selecting from numerous excipients and in combining those selected to prepare stable formulations. Persons skilled in the art have long realised that the type and concentration level of buffering agents may affect the stability of proteins. The complex influencing mechanism of various excipients over the stability of proteins makes it hard for persons skilled in the art to determine the excipient combination that would stabilise the protein of this application through conventional or orthogonal experiments.

Similarly, the SPC held that Reference Document 2 does not touch the issue of producing stable high-concentration liquid formulations. Those skilled in the art would be unlikely to conceive that this VEGF antagonist may also be suitable for the same application method. It is also difficult to confirm through conventional experiments that the differences in VEGF antagonists in this application will have no bearing on the expectations of those skilled in the art over their intraocular efficacy or stability.

The SPC thus found that Claim 1, which is not obvious to those skilled in the art, possesses an inventive step.

**Comment**

Basically, a non-obviousness assessment is to assess whether the invention is obvious to those skilled in the art by taking into account the closest prior art reference and the technical problem actually solved by the invention. To cut the mustard, it requires the presence of technical motivation over the prior art in its entirety. That is, the prior art needs to provide a teaching to apply the above distinguishing features to the closest prior art to solve its existing technical problems (i.e., the technical problems actually solved by the invention). Such teaching will motivate persons skilled in the art to improve the closest prior art and obtain the invention at issue when facing the technical problems.

The technical problems actually solved is de facto the technical contribution of the invention over the prior art and the disclosure made by the present invention. The technical effect used to determine the technical problem actually solved should be straightforward and specific relative to the prior art. Over-generalisation of the technical problem actually solved would risk blurring the boundary between the invention and the prior art, improperly including the prior art that solves different problems and leading to an erroneous conclusion that the prior art provides the relevant technical motivation.

In this case, the SPC found the technical problem actually solved by the invention as ascertained by the CNIPA to be over-generalised, which failed to reflect the distinguishing features and rendered the obviousness assessment moot. By correcting the erroneous identification, the SPC boiled down the technical problem actually solved to “providing a stable ophthalmic liquid formation containing high

concentrations of different protein antagonists", which pinpointed the specific effects of the invention that differ from the prior art and provided a proper benchmark for the ensuing assessment of technical motivation.

# n° 64 WHD Insights: IP | China's labour and unfair competition laws: trade secrets, confidentiality, and non-compete issues

**Feng (Janet) Zheng, Xiaoyang Yang, 15 April 2024, first published by MIP**

In today's highly competitive business environment, trade secrets are often pivotal in maintaining the competitive edge of innovative companies. In China, confidential information may be protected by way of trade secrets, but the law has a stringent legal test for what constitutes trade secrets and not all confidential information can pass muster.

Among other things, whether confidential information constitutes a trade secret in China largely depends on whether a proprietor has taken appropriate measures to protect the confidential information of commercial value. Furthermore, to invoke trade secret protection, the portion of the confidential information to be protected as a trade secret must be clearly identified.

This could be problematic in an employment setting: confidential information obtained during employment does not necessarily constitute trade secrets, but unauthorised use or disclosure of such information could still have an impact on the business of the employer. In those cases, non-compete clauses/agreements may kick in as a safeguard, provided that certain legal requirements are met.

By dissecting the legal framework and some recent court decisions on trade secrets and non-compete clauses/agreements, this article aims to provide a glimpse into how these two related, yet distinct, instruments operate to protect confidential information in China.

## Trade secrets

In China, legal provisions regarding trade secrets are scattered across a number of laws, including the Anti-Unfair Competition Law, the Corporate Law, the Civil Code, the Labour Contract Law, and the Criminal Law; among which, the Anti-Unfair Competition Law is the major governing law.

Under Article 9 of the Anti-Unfair Competition Law, trade secrets are defined to be business-related information such as technical or operational information that is not known by the public, of commercial value, and safeguarded by appropriate protective measures by proprietors. Obtaining, disclosing, exploiting, or allowing others to exploit trade secrets without authorisation constitutes infringement of trade secrets.

Where infringement of a trade secret is claimed, the plaintiff bears the burden of

proof to reasonably establish that the trade secret has been infringed upon (Article 32 of the Anti-Unfair Competition Law), despite appropriate protective measures having been adopted concerning the trade secret at issue.

Infringement could be preliminarily established, provided that the plaintiff shows that the defendant had a channel to access the trade secret at issue and the information the defendant illegally obtained or used is essentially identical to the said trade secret.

Once the plaintiff adduces the prima facie evidence, the ball will be in the defendant's court to argue non-infringement. No infringement can be found if the defendant obtained the trade secret at issue by reverse engineering, under Article 14 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringements upon Trade Secrets.

### Thresholds in Chinese trade secret infringement cases

Given that the law sets a high bar for proprietors to satisfy the burden of proof, the chances of success in winning trade secret infringement cases is quite low in China. Statistics released by the Beijing Intellectual Property Court, one of the busiest courts hearing trade secret infringement cases in China, indicate that the court tried 86 trade secret infringement cases from 2021 to October 2023, of which the proprietors prevailed in only 15%.

Proprietors used to fret about the high threshold in satisfying the Chinese courts that sufficient protective measures have been taken to safeguard the trade secret at issue. Fortunately, the situation has significantly improved in recent years. This welcome change is partly attributable to the second amendment to the Anti-Unfair Competition Law, relaxing the stringent test over the 'appropriateness' of protective measures to a more reasonable level, and partly attributable to proprietors' increased awareness of trade secret protection.

Under current practice, the Chinese judiciary is prone to find that regular and reasonable internal measures employed by proprietors cut the mustard, such as setting forth confidentiality obligations in employment contracts, creating company policies specifying proper procedures regarding the handling of confidential information, and providing confidentiality training to employees.

However, the collection of evidence pertaining to unauthorised obtaining, exploitation, or disclosure of trade secrets by the accused and that relates to damages remains an onerous task for proprietors. Proprietors therefore rely heavily on parallel criminal prosecution proceedings to furnish evidence in trade secret infringement cases.

Yet in a recent court decision, Ingersoll Rand v Sun ((2020) Zui Gao Fa Zhi Min Zhong No. 1276), China's Supreme People's Court (SPC) sets a good example that a proprietor can still establish its case as long as effective and responsive measures are adopted within the company to protect the trade secret at issue.

### Ingersoll Rand v Sun

In the case, the defendant, Sun, an ex-employee of Ingersoll Rand Shanghai, downloaded nearly 700,000 design figures from the company's database and saved them to external storage devices. Sun's anomalous downloading activities were immediately detected and investigated by his former employer.

Ingersoll Rand Shanghai requested Sun to turn in his computer for further investigation and during the ensuing interview, Sun admitted his misconduct and signed a confirmation statement. Ingersoll Rand Shanghai produced a notarial certificate for Sun's download history within the company's internal database, commissioned a judicial appraisal of Sun's computer and external storage devices, and applied for in-court inspection of Sun's download history.

In view of the evidence, the Shanghai Intellectual Property Court found that Sun infringed the trade secrets of Ingersoll Rand Shanghai in 2020. The decision was affirmed by the SPC the following year.

### Other notable Chinese trade secret cases

It is also gratifying to see that the SPC has been aggressively raising the amount of damages since 2020. For instance, among the Ten Most Influential Cases released at the fifth anniversary of the SPC's Intellectual Property Court, there are four high-calibre trade secret infringement cases.

In the carbomer case of 2020 (Guangzhou Tinci Materials Technology Co., Ltd. et al. v Anhui Newman Fine Chemicals Co., Ltd. et al., (2019) Zui Gao Fa Zhi Min Zhong No. 562), the SPC awarded RMB 30 million for damages. In the vanillin case of 2021 (Jiaxing Zhonghua Chemical et al. v Wanglong Group Co., Ltd. et al., (2020) Zui Gao Fa Zhi Min Zhong No. 1667), the SPC awarded approximately RMB 159 million to the plaintiffs. In the melamine case of 2022 ((2022) Zui Gao Fa Zhi Min Zhong No. 541), the SPC awarded RMB 98 million. In the rubber antioxidant case of 2023 ((2022) Zui Gao Fa Zhi Min Zhong No. 816), the SPC affirmed damages of approximately RMB 202 million.

The vanillin case is an example of how proprietors may address the damages issue in trade secret infringement cases. In the case, the defendants defied the court order and refused to provide evidence on the sales of the infringing products.

The plaintiff presented three calculation models. The first model was based on the estimated operating profit of the defendants, calculated by the amount of infringing products manufactured and sold by the defendants × the plaintiff's selling price × the plaintiff's operating profit margin for the same period, giving a total of approximately RMB 179 million. The second calculation model was based on the estimated sales profit of the defendants, giving a total of approximately RMB 156 million. The third model was based on encroachment on the plaintiff's selling price, as calculated by an analysis report submitted by the plaintiffs, giving a total of approximately RMB 791 million.

The SPC chose the calculation method based on the defendant's sales profit, taking

into consideration factors such as wilful infringement by the defendants, the scale of the infringement, the defendants' obstruction of evidence production, and bad faith, as well as two of the defendant companies being founded solely for implementing infringement. As a result, the SPC awarded approximately RMB 155 million for damages.

It is very welcome that the SPC pierced the corporate veil, holding the controller of a defendant company jointly and severally liable for the damages, along with other corporate defendants. It should also be noted that punitive damages were not meted out in this case, since the plaintiffs claimed damages for the period until the end of 2017, when the law did not provide for punitive damages at that time. However, the SPC indicated that the plaintiffs may seek punitive damages for the persistent infringement of the defendants after 2018.

### Non-compete clauses/agreements

The purpose of non-compete clauses/agreements is to limit a party's ability to engage in unfair competitive activities. In China, non-compete clauses/agreements are mainly governed by the Labour Contract Law.

Article 23 of the law provides that an employer may introduce a non-compete clause in the employment contract or confidentiality agreement with its employees. Once the employment contract is terminated, the employer makes a monthly payment of financial compensation to its employees bound by the non-compete obligation, and the employees are liable for damages if they fail to meet the non-compete obligation.

Under Article 24, the non-compete obligation only applies to senior executives of the employer, senior technical staff, and other employees carrying the confidentiality obligation. The non-compete obligation prohibits employees from working in a competing business or starting up their own competing business for a maximum of two years.

A non-compete clause/agreement may be rescinded if the employer fails to comply with its contractual obligation to pay financial compensation for three months.

### Wang v Wande Information Technology

Though non-compete obligations are widely recognised by the Chinese judiciary, there has been controversy over how a 'competing business' should be defined. In that regard, a guiding case published by the SPC, Wang v Wande Information Technology ((2021) Hu 01 Min Zhong No. 12282), sets a good precedent.

In that case, the accused, Wang, signed a non-compete agreement with his employer, an information technology company, where he worked as a data analyst. In July 2020, Wang resigned and joined another information technology company within two weeks of his departure, without reporting the new employment to his ex-employer as mandated by the non-compete agreement.

In November 2020, Wang's former employer filed a complaint with the Labour Dispute Arbitration Board, requesting compliance with the non-compete agreement,

return of the received non-compete compensation, and liquidated damages of RMB 2 million for breach of his non-compete agreement.

In February 2021, the board returned a decision to fully support the claims of Wang's ex-employer. Wang filed a civil proceeding before a first-instance court, which partially sustained the arbitral award but reduced damages to RMB 240,000. Wang appealed. In 2022, a second-instance court ruled in Wang's favour, concluding that he did not breach the non-compete agreement.

The second-instance court reasoned that whether an employee breaches a non-compete agreement hinges on whether the employee's ex-employer and new employer are in competition. The court cautioned that such a finding shall be based on a comprehensive review of all the relevant facts, as a non-compete obligation limits the employee's rights to be employed. In that regard, the court noted that the scope of business as indicated in the business licence of a market entity is not necessarily consistent with its actual business activities. It is the latter that matters.

In that case, the court noted that while there was some overlap in the scope of business of Wang's former and new employers, the two employers differed markedly in their business modes, target customers, and target markets. Wang's former employer focused on providing financial information with individual and institutional investors as targeted customers, whereas his new employer operated a platform where users could upload videos and interact for entertainment purposes.

Accordingly, the court concluded that Wang's former and new employers were not in competition and Wang did not breach his non-compete agreement. The court repealed all the monetary damages awarded to Wang's ex-employer but further held that Wang would still be bound by his non-compete agreement and is obligated to notify his ex-employer about his employment condition until the expiry of the non-compete agreement.

## Non-compete clauses as an alternative protection tool

Under the Chinese legal framework, non-compete clauses/agreements could be used as a complementary and alternative route to protect the employer's confidentiality. Unlike trade secrets, which are protected without a prescribed time limit until they become publicly known, a non-compete clause/agreement is valid for two years at most, provided that the employer complies with the clause/agreement and is mindful not to miss the payment of financial compensation for a prescribed period.

As such, it would be advisable for businesses to plan ahead and make the best of these legal instruments for confidentiality protection.