

JUNHE SPECIAL REPORT



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The Development and Prospect of “Case Law” with Chinese Characteristics

As the two legal families communicate and merge with each other, the common law jurisdictions have been paying growing attention to the compilation of statutes, whilst civil law jurisdictions have been witnessing the rising role played by cases. In China, as trials of the majority of cases are finalized under the provincial level, the issue of “similar cases not being treated alike” has been a long-term focus of the Supreme People’s Court (“SPC”). As a necessary supplement to unifying the standards for the application of law, a case system centered on guiding cases was introduced by the SPC. China is still acknowledging the beneficial elements of the case law system after establishing the China International Commercial Court (“CICC”) to attract parties from various jurisdictions to choose China as a forum for dispute resolution.

I. Guiding Cases

The case law system with Chinese characteristics is centered on guiding cases. On October 26, 2005 the SPC issued the *Second Five-Year Reform Outline for the People’s Courts (2004-2018)*, which propose “to establish and improve the guiding case system and attach importance to the role played by guiding cases in unifying standards for the application of law, guiding trials of courts at lower levels and enriching and developing legal theories”.

On November 26, 2010 the SPC issued the Provisions on Case Guidance, clarifying that **“When trying similar cases, people’s courts at all levels shall refer to and follow the guiding cases issued by the Supreme People’s Court”**, thereby essentially granting binding force to the guiding cases. On May 13, 2015, the SPC issued the *Detailed Rules for the Implementation of the Provisions on Case Guidance*, which provided the detailed requirements, contents, selection methods and promulgation procedures concerning guiding cases, restating that “Where a case being tried by a people’s court at any level is similar to a guiding case issued by the Supreme People’s Court in terms of the basic facts and the application of law, **a judgment shall be rendered by referring to and following the key points of judgment in the relevant guiding case.**”

On June 1, 2018 the SPC issued *Guiding Opinions on Strengthening and Standardizing the Analysis and Reasoning in Adjudicative Instruments*, which pointed out that “Apart from relying on the provisions in laws, regulations, and judicial interpretations, judges may give their reasoning

using the following arguments to enhance the legitimacy and acceptability of adjudicative decisions: **guiding cases issued by the Supreme People's Court**; non-judicial interpretation regulatory documents for trials issued by the Supreme People's Court..." Based on the prior stipulations requiring that people's courts at all levels refer to and follow guiding cases, the Opinions further clarified that courts may use guiding cases as *ratio decidendi* in their reasoning.

On February 27, 2019, the SPC issued the latest version of the *Fifth Five-Year Reform Outline for the People's Courts (2019-2023)*, which also incorporated the task of "improving the uniform standards for the application of law...improving the guiding case system, and optimizing the mechanisms for case reports, selection, publication, assessment and application".

Based on the above documents, China has established a guiding case system with relatively clear promulgation procedures and substantial binding force on courts nationwide. This system is to be further improved in subsequent judicial reforms. As of today, the SPC has published on its official website 139 guiding cases covering various legal departments.

Admittedly, guiding cases are not a formal source of law. *The Detailed Rules for the Implementation of the Provisions on Case Guidance* also prescribes that courts "shall quote the guiding case as the judgment's reasoning, instead of citing it as the basis for the judgment". Hence it remains to be stipulated and observed as to how and where guiding cases are to be positioned in the Chinese

legal landscape.

II. Reference Cases

Apart from the guiding cases, the SPC may also issue other typical cases on various platforms such as the Gazette of the Supreme People's Court, China Law Reports, People's Court Daily, etc. Moreover, according to the SPC's *Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels*, "The higher people's courts shall guide the trial work of the local people's courts at all levels and the special people's courts within their respective jurisdictions by reviewing cases, formulating trial work documents, **releasing reference cases**, holding trial work symposiums, organizing training for judges, etc." As such, local higher people's courts may also release cases with guidance and reference value within their jurisdictions.

The above-mentioned cases with reference effect as released by the SPC and the local higher people's courts, are usually regarded as reference cases in China's judicial practices. Among these, those published on the Gazette of the Supreme People's Court are usually termed as "Gazette cases", which hold higher authority than other reference cases.

Comparatively speaking, Gazette cases, typical cases and other reference cases are larger in number than guiding cases, due to their less stringent selection standards. On the other hand, their legal effects are not as clear as those of the guiding cases.

For instance, in various documents, the SPC requires that courts at lower levels "refer to and

follow” guiding cases when issuing a court decision, whereas for Gazette cases, typical cases and other reference cases, there is no such requirement. Theoretically speaking, judges of courts at lower levels may or may not choose to refer to typical cases before issuing their decisions. But it is to be noted that if a court at a lower level issues a decision incompliant with a reference case of which the rule is sustained by the court at a higher level, then the court at the lower level may be deemed to have “misjudged” the case. This may have an adverse impact on its performance assessment.

With the notion that “similar cases shall be treated alike” being established by the SPC as an important reform direction, it may be expected that Gazette cases, typical cases and other reference cases will have a more significant role to play in addressing difficult legal issues in which no explicit statutory provision or guiding cases are available. For instance, the *Opinions of the Supreme People's Court on Implementing the Judicial Accountability System and Improving the Trial Supervision and Management Mechanism (for Trial Implementation)* states that “The people's courts at all levels shall maximize the role of specialized judges' conferences and judicial committees in summarizing trial experiences and unifying adjudicatory standards, and on the basis of improving the reference for similar cases, adjudicatory guidance and other related work mechanisms, establish a compulsory retrieval mechanism for similar cases and associated cases to ensure the unity of adjudicatory standards for similar cases and the unity of the application of laws.”

In the *Fifth Five-Year Reform Outline for the People's Courts (2019-2023)* it is further clarified “to establish a record filing mechanism for trial guidance instruments issued by higher people's courts and reference cases... to improve the compulsory retrieval and report mechanism for similar cases and new cases”.

Predictably, clearer legal status and reference requirements for reference cases beyond the scope of guiding cases are to be ascertained in the future.

III. Practices of the CICC

In 2018, The First International Commercial Court and The Second International Commercial Court of the SPC were respectively opened in Shenzhen and Xi'an to try cross-border commercial disputes that met particular conditions. Notably, the purpose thereof was to attract parties of various jurisdictions to choose China as a forum for dispute resolution against the background of the One Belt One Road Initiative and thereby extend the international influence of the Chinese legal system.

At present, cases tried by the CICC are mostly typical cases selected by the SPC and brought to the CICC's jurisdiction after obtaining the parties' consent. As most of these cases touch upon major legal issues and clarify the guiding approach and standards for treating similar cases, their court decisions are all published online.

Although court decisions issued by the CICC do not have the same legal effect as the guiding cases issued by the SPC, they still have great referential significance for cross-border commercial disputes tried by courts at all levels. This is in light

of the fact that cases accepted by the CICC are all carefully selected and have the potential to shape the relevant Chinese legislation. In this sense, court decisions issued by the CICC may be deemed the Chinese equivalent of “persuasive precedent” in the common law, which endows an international and experimental feature upon them, among other reference cases.

IV. Prospect of “Case Law” with Chinese Characteristics

In conclusion, a characteristic case law system centered on guiding cases incorporating Gazette cases, typical cases, other reference cases and typical cases tried by the CICC has been basically formed in China. Among these, the SPC requires guiding cases to be compulsorily referred to, followed and cited in court decisions by courts at lower levels, whilst reference cases with referential significance exerting a similar effect as “persuasive precedent” through their typicality and influence. Of course, cases are not law in China but are only utilized to better construe and apply the law together with instruments such as the judicial interpretations issued by the SPC. This is the fundamental difference with case law in common law jurisdictions.

It is to be noted that in the practice of common law jurisdictions, attorneys of the disputed parties usually submit to the court precedents related to the present case and present case briefs based on the facts and legal issues of the precedents. The judges may also request that the two sides collect all the relevant precedents concerning a particular legal issue and submit legal opinions thereof if

they have any doubt on an issue.

To unify the standards for the application of law and achieve the goal of “similar cases being treated alike” in China’s future improvement of the case system, it is insufficient if we solely rely on statutes, relevant judicial interpretations and over one hundred guiding cases. Apart from the judge retrieval mechanism for similar cases currently implemented, the formulation of rules requiring attorneys of parties in a dispute to submit cases to be followed after reference or for reference may also be considered. After all, cases can come to life after they have been interpreted, compared and contradicted by attorneys with different understandings and views. Merely relying on the judge’s own collection and retrieval of similar cases is insufficient. The parties’ participation is also needed to clarify the issues since the truth becomes clearer after contention. The unique vitality, features and future development of “case law” with Chinese characteristics also lie in this.

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