

# THE 3<sup>RD</sup> SINGAPORE-CHINA LEGAL AND JUDICIAL ROUNDTABLE 2019

## TOPIC 2: APPLICATION OF REFERENCE CASES UNDER THE BRI FRAMEWORK

Wednesday, 28 August 2019

Speech by Judge of Appeal Steven Chong\*

Supreme Court of Singapore

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*Chief Justice Zhou Qiang, President of the Supreme People's Court of the  
People's Republic of China*

*Judges and officials from the Supreme People's Court of the People's Republic  
of China,*

*My fellow Judges, colleagues and distinguished guests,*

### **I. Introduction**

1. When I visited Beijing for the inaugural meeting of the Working Group in May this year, I was delighted to hear from VP Yang that CJ Zhou Qiang treasures the compendium of selected commercial law judgments that CJ Sundaresh Menon had presented at the last Roundtable.<sup>1</sup> We certainly hope that the compendium has provided the SPC with a good feel of Singapore's common law approach.

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\* I wish to acknowledge the valuable assistance of my colleague, Assistant Registrar Justin Yeo, for his research in the preparation of this paper.

<sup>1</sup> This is a reference to *Selected Commercial Law Judgments of the Supreme Court of the Republic of Singapore* 《新加坡共和国最高法院 商法判决精选》, which contains 24 judgments of the Singapore Court of Appeal, Singapore High Court and the Singapore International Commercial Court. It was presented by CJ Sundaresh Menon to CJ Zhou Qiang at the 2<sup>nd</sup> Roundtable on 31 August 2018.

2. At the Working Group meeting, VP Yang mentioned China's Case Guidance System, and also indicated that it would be useful for the Supreme People's Court to learn more about how the common law system works, how conflicting precedents are dealt, and so forth.
3. The "application of reference cases under the BRI framework" thereafter became a formal topic for discussion at this Roundtable.
4. I propose to approach this topic as follows:
  - (a) First, a broad comparison between the Singapore and Chinese legal traditions.
  - (b) Next, a brief summary of how the common law system works.
  - (c) Thereafter, a brief comparison of China's Case Guidance System with Singapore's common law system.
  - (d) Finally, I will suggest a possible way forward in the application of reference cases under the BRI framework.

## II. **Comparative legal traditions**

5. Although Singapore and China share many cultural similarities, our legal systems were developed from different backgrounds.

6. As a former British Colony, Singapore inherited the English “common law” tradition.<sup>2</sup> This system has two key characteristics.
- (a) First, the *content of the law*. In Singapore, we have a sizeable body of “statutory law” – for instance, our company law is generally governed by statute. However, we also have a significant body of “case law” – this refers to law that has been developed through judicial decisions over the years, and includes areas such as contract law, equity and trust law, and tort law.
  - (b) Second, the *doctrine of binding judicial precedent*. The doctrine of binding judicial precedent ensures consistency and uniformity in applying legal principles to cases. I will go into more detail on this later.
7. China, on the other hand, has a “socialist legal system with Chinese characteristics”.<sup>3</sup>
- (a) I understand that the *content* of Chinese law is set out almost exclusively in “codes” or “statutes”.<sup>4</sup>
  - (b) Further, while China does not have a system of binding judicial precedents, China has similarly recognised the importance of consistency and uniformity in applying legal principles to cases.<sup>5</sup>

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<sup>2</sup> “The Singapore Legal System” at para 1.3.1, online: <https://singaporelawwatch.sg/About-Singapore-Law/Overview>.

<sup>3</sup> This was the characterisation adopted by Jiang Zemin in the *Report at the 15<sup>th</sup> National Congress of the Communist Party of China* (12 Sep 1997).

<sup>4</sup> Many of these were enacted in the last quarter of the 20<sup>th</sup> century, and have uniquely Chinese characteristics. These developments came about in view of the vast economic reform spearheaded by Deng Xiaoping. See Mo Zhang, “The Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience” (2010) 24 *Temple International and Comparative Law Journal* 1 at 34–35.

<sup>5</sup> Judge Guo Feng stated that the Case Guidance System is intended to address the problem that “similar cases are adjudicated differently”: see Guo Feng, “The Compilation and Application of China’s Guiding Cases” (27 January 2017).

- (i) More than three decades ago, in 1985, the Supreme People’s Court began publishing “typical cases” (*dian xing an li*; 典型案例) in its official *Gazette*. The purpose of doing so was, amongst other things, to promote the “correct application of well-established doctrine”.<sup>6</sup>
- (ii) In the past decade, there has been tremendous development in the Chinese legal system. One of the key achievements is the *Provisions of the Supreme People’s Court Concerning Work on Case Guidance*,<sup>7</sup> which was promulgated by the SPC in 2010. Five years later, the SPC released the accompanying *Detailed Rules for the Implementation of the Provisions*.<sup>8</sup>
- (iii) These developments have marked a ground-breaking establishment of a Case Guidance System in China. The system is observed with great interest both from inside and outside China,<sup>9</sup> and has helped to enhance understanding of Chinese law. This is of benefit not just to Chinese nationals, but also to everyone who does business in China or with Chinese parties. I will come back to the Case Guidance System a little later in my speech.

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<sup>6</sup> Mark Jia, “Chinese Common Law? Guiding Cases and Judicial Reform” (2016) 129(8) *Harvard Law Review* 2213 (“**Jia**”) at 2217.

<sup>7</sup> *Provisions of the Supreme People’s Court Concerning Work on Case Guidance* 《最高人民法院关于案例指导工作的规定》，passed by the Adjudication Committee of the Supreme People’s Court on 15 Nov 2010, issued on and effective as of 26 Nov 2010 (“**Provisions**”).

<sup>8</sup> *Detailed Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance”* 《〈最高人民法院关于案例指导工作的规定〉实施细则》，discussed and passed by the Adjudication Committee of the Supreme People’s Court on 27 April 2015 and Issued on 13 May 2015 (“**Rules**”).

<sup>9</sup> Indeed, the Stanford Law School has even set up a “China Guiding Cases Project” dedicated to this historic initiative: see online: <https://cgq.law.stanford.edu>.

### III. How the common law system works

8. I will now touch briefly on how the common law system works. In a common law system, a Judge's duty is to decide cases in accordance with the law. He must consider all relevant statutes, case law and legal principles in deciding the case before him. If there is no applicable legislation or case law that covers the situation at hand, the Judge may extend the law by analogy, or even create new case law if the justice of the case so requires.<sup>10</sup>
9. A key feature is the doctrine of binding judicial precedent, which is commonly referred to by the Latin term "*stare decisis*".<sup>11</sup> Under this doctrine, a Judge must apply the law in a manner consistent with the decision of a higher court in an earlier case, unless: (a) the earlier decision relates to a different point of law, or (b) the facts of the case at hand can be "distinguished" from the earlier case.
10. While some common law judgments may be quite lengthy, only the key part of the earlier decision is authoritative and binding in future cases. This key part is known as the "*ratio decidendi*". This refers to the legal rule or principle upon which the decision depends, and which is established by the court's decision. It may perhaps be easier to understand the concept of "*ratio decidendi*" if I mention that this appears to be similar to the concept of the "Main Points of the Adjudication" in China's Case Guidance System.
11. The doctrine of binding judicial precedent should, in theory, avoid inconsistency of decisions within a common law system. However, in practice, there might be

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<sup>10</sup> Walter Woon, "The Doctrine of Judicial Precedent", in Kevin Tan ed, *The Singapore Legal System* (Chapter 8) at p 297.

<sup>11</sup> "*Stare decisis*" literally means "let the earlier decision stand".

rare occasions of conflicting decisions from the same level of court. The conflicting decisions may come about for a variety of reasons.

(a) For example, two courts may be hearing a similar case at the same time, and neither court is aware of the other court's decision at the time when it renders its own decision.

(b) Another possibility is that a court may disagree with the approach taken by a previous court at the same level. In such a situation, the court may come to a different conclusion on points of law, thus resulting in conflicting decisions.

12. Where there are conflicting decisions at the same level of court, a future court deciding a case can choose which of the earlier decisions to follow. Typically, the conflict will be resolved by the time it reaches the apex court. In such situations, the apex court will typically render a decision that provides the final word, and authoritative guidance for all future cases touching on that point of law.

#### **IV. Comparing China's Case Guidance System with Singapore's common law system**

13. I now turn to compare China's Case Guidance System with Singapore's common law system.

14. Our systems clearly have differences. Indeed, it is unsurprising that there are such differences: after all, our legal systems are established based on different legal traditions and situated in different socio-political circumstances. To my mind, the three key differences are as follows:

- (a) First, China’s Guiding Cases are not sources of law. Instead, legislation remains the source of law in China, and all Guiding Cases must be based on legislation.<sup>12</sup> In contrast, in Singapore, case law is a source of law in itself, and there are areas of law which are developed entirely by Judges.
  - (b) Second, China’s Guiding Cases serve only as a “reference” to guide Judges in making decisions.<sup>13</sup> They are not binding judicial precedents. In contrast, as explained earlier, Singapore has a system of binding judicial precedent.
  - (c) Third, Chinese Guiding Cases are specially selected and approved through a rigorous centralised process. The selection process involves deriving “Main Points of the Adjudication” and re-constituting the decision to make it easier to digest and more generally applicable.<sup>14</sup> In contrast, Singapore case law decisions are issued directly by the Judge who is deciding the case, and the “*ratio decidendi*” is either made expressly clear by the Judge, or discerned by lawyers and Judges in future cases.
15. However, what is important is that there are some very significant similarities between China’s Case Guidance System and Singapore’s common law system.

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<sup>12</sup> *Jia* at 2232.

<sup>13</sup> Sidney Stein, “The Growing Significance of Cases in China: The Guiding Cases System” (5 May 2017) (“*Sidney*”).

<sup>14</sup> *Jia* at 2232 – the author notes that “Third, guiding cases are heavily edited; top-down selectors abstract holdings out of cases and rewrite the facts and reasoning in a much more centralized process of judicial policymaking.” See also *Sidney*.

- (a) First, both systems share a common aim: to ensure that like cases are treated alike, to enhance consistency in the application of law, to improve the quality of decisions and to safeguard judicial impartiality.<sup>15</sup>
- (b) Second, both systems are also designed to provide guidance where there is ambiguity in statutory law.<sup>16</sup> This is necessary, because it is inevitable that some of our statutory provisions may be ambiguous, or may not provide for the case at hand. In this regard, I note that in some Guiding Cases, the SPC has taken a strict textual interpretation of statutes, while in other Guiding Cases, the purpose of the statute is considered.<sup>17</sup> This is similar to the approach taken by the Singapore courts towards statutory interpretation.
- (c) Third, the processes through which Chinese Judges consider Guiding Cases and Singapore Judges consider judicial precedents are broadly similar. They involve roughly the same three-step process:<sup>18</sup>
  - (i) The first step is to identify similarities between the case at hand and the Guiding Case or judicial precedent.<sup>19</sup>
  - (ii) The second step is to determine the relevant legal principle in the Guiding Case or judicial precedent – this is the “Main Points of the

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<sup>15</sup> The Chinese Case Guidance System is established to “summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality”: see Preamble to the *Provisions*.

<sup>16</sup> *Jia* at 2218.

<sup>17</sup> *Jia* at 2234 – the author mentions that in Guiding Case 9, the SPC adopted a “strict textual reading of statutory articles”, whereas in Guiding Case 6 and 17, the SPC adopted an “international approach” that is “decidedly more purposivist”.

<sup>18</sup> This is based on the three-step process identified by Professor Edward Levi in Edward Levi, “An Introduction to Legal Reasoning” (1948) 15(3) *University of Chicago Law Review* 501; referenced in *Jia* at 2233 and Wang Shucheng, “Guiding Cases and Bureaucratization of Judicial Precedents in China” (2019) 14(2) *University of Pennsylvania Asian Law Review* 96.

<sup>19</sup> In relation to Guiding Cases, see Article 8 of the Rules.



Adjudication” under the Case Guidance System, and the “*ratio decidendi*” under the common law system.

- (iii) The third step is for the court to apply the relevant legal principle to the case at hand.

## V. Taking the matter forward

- 16. The similarities that I have just mentioned mean that there is much scope for cooperation in considering a possible reference case approach under the BRI framework. Importantly, we all recognise the need for consistency in applying the law and in interpreting statutes. We also appear to adopt similar techniques in considering judicial precedents.
- 17. I should add that in relation to BRI disputes, there are probably areas of commercial law in which similar legal principles apply across various legal traditions. Indeed, at an international level, we have already seen how international commercial arbitration has led to the coalescing of a free-standing body of law relating to international commerce.<sup>20</sup> It would be ideal if, at the very least, a basic form of “*lex mercatoria*” or “merchant law” can be introduced across the belt and road. This will provide the international business community with increased legal certainty, guidance and confidence in dispute resolution, which will in turn help to increase investment along the BRI.

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<sup>20</sup> Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence” (26th LAWASIA Conference; 15th Biennial Conference of Chief Justices of Asia and the Pacific) (27-30 October 2013) at para 32.

18. In this regard, it may be useful for our respective academies and agencies to collaborate on examining areas of commercial law affecting BRI disputes, where similar legal principles are likely to apply. These academies and agencies can then work towards producing a joint publication, in both the English and Chinese languages, containing uncontroversial principles of commercial law which are common to both China and Singapore. We may very well be surprised by the commonality we find!
19. Even though such a set of principles will not be legally binding on the parties and our courts, it will nonetheless provide the business community with a valuable guide and reference point in relation to BRI disputes. If we agree with this, the Working Group can iron out details on how the relevant academies or agencies on both sides can work together.
20. Thank you.

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