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China Guiding Cases Project
Stanford Law School

中国指导性案例项目
斯坦福法学院

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Editor's Note*

Dr. Mei Gechlik

Dear Readers,

With headlines reporting U.S.–China conflicts over trade and other concerning issues, it may be easy to overlook an extremely important development in China: **the emergence of a new source of Chinese law**. In late October 2019, China's national legislature passed a decision (决定) to authorize the country's National Supervisory Commission to "formulate supervisory regulations in accordance with the Constitution and laws".

The National Supervisory Commission, China's "highest supervisory organ", came into existence after the Chinese Constitution was amended in March 2018. The National Supervisory Commission and its local commissions are in charge of "handling duty-related violations of law and duty-related criminal cases" and these commissions "should cooperate with and have mutual checks with judicial organs, procuratorial organs, and law enforcement organs".

The National Supervisory Commission and its local commissions are expected to "**independently** exercise, in accordance with law, [their] supervisory power" and are "**free from interference** by [any] administrative organ, social organization, or individual". With such authority conferred upon them, these commissions themselves are required to be transparent about their work and "accept democratic supervision, social supervision, and public opinion supervision".

Only time can tell whether the supervisory commissions will evolve to become truly independent entities that can combat corruption and other duty-related crimes, thereby helping build a fair society, conducive to good governance, that will serve both **Chinese citizens and foreign investors**. At present, it is clear that the national legislature's October decision is only intended to be an interim measure and that China's ***Law on Legislation***, a national law that explains the sources of Chinese law, should be amended as soon as possible to include "supervisory regulations" and address, among others, the following issues:

- What is the status of "supervisory regulations" in the hierarchy of sources of Chinese law? For example, if a supervisory regulation is in conflict with an administrative regulation formulated by the State Council, China's "highest organ of state administration", which one shall prevail?

- Given that the supervisory commissions are subject to "social supervision", will citizens have an effective channel through which they can point out inconsistencies between supervisory regulations and the Constitution or a national law? China's national legislature could then consider the matter and, if it indeed finds such an inconsistency, exercise its power to repeal the supervisory regulation.

A related issue is worth considering. Since the *Law on Legislation* was adopted in the year 2000, it has only been amended once (in 2015). When the national legislature turns to the amendment of the law to explain the legal status of "supervisory regulations" and related issues, it should seize the opportunity to include in the law a clear reference to **Guiding Cases**, China's *de facto* binding precedents that are currently regulated by rules released by the Supreme People's Court.

Specifically, for example, Article 104 of the *Law on Legislation* states that "**the interpretations on specific application of laws in adjudication** […] as provided by the Supreme People's Court […] should primarily focus on the specific legal rules and should conform to the objectives, principles, and original intent of the legislation". Do "the interpretations on specific application of laws in adjudication" include the **"Main Points of the Adjudication" of each Guiding Case?** Carefully prepared by the Supreme People's Court to guide the adjudication of similar subsequent cases, the "Main Points of the Adjudication" of each Guiding Case typically clarify how specific legal rules should be interpreted and applied when courts handle similar issues.

The year 2020 marks the 10th anniversary of the establishment of the Guiding Cases System. Legal practice and various empirical data over these years have revealed the **growing importance of Guiding Cases**. Two pieces included in this issue of *China Law Connect* ("*CLC*") are illustrative:

- In the China Cases *Insight*™ piece, **Zhaoyi Song, Assistant Managing Editor of the China Guiding Cases Project (the "CGCP")**, analyzes 26 subsequent cases that explicitly mentioned Guiding Case No. 33 (*Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*). He explains, through his in-depth analysis, how these subsequent cases shed a better light on the "Main Points of the Adjudication" of Guiding Case No. 33, which provide, among other guidance:

  > Where a debtor transfers [its] principal property to an affiliated company at a clearly unreasonably low price and the affiliated company, with knowledge of the debtor's indebtedness, does not actually pay consideration [for the principal property], [a people's court] may determine that the debtor and its affiliated company have **maliciously colluded** to harm the interests of [the debtor's] creditors. [The people's court] should then determine that the related property transfer contract is invalid.

Among these subsequent cases is one decided by the Supreme People's Court, in which the Supreme People's Court clearly stated that the lower court in that case made a mistake because a party referred to Guiding Case No. 33 but the lower court, in defiance of rules issued earlier by the Supreme People's Court, made no comments on the applicability of the Guiding Case, as if this case was never mentioned by the party.

- In an Experts *Connect*™ piece contributed by **Katharine A. Bostick, Assistant General Counsel of Microsoft (China) Co., Ltd., and Melody Wang, Partner of Fangda Partners**, the two co-authors draw on their practical experiences to explain how the principles of shifting the burden of proof from the plaintiff to the defendant stated in Guiding Case No. 49 (*SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Infringement of a Computer Software Copyright*) are now codified as Article 32 of China's ***Anti-Unfair Competition Law*** and how this will lead to better protection of trade secrets.

The growing significance of Guiding Cases is not an anomaly in a legal system that has traditionally emphasized legislation. As observed by **Chief Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit** in her article titled *Some Observations About Judicial Precedents*, which is published in this issue of *CLC*:

> Legal traditions around the world have for a long period of time been largely divided into two groups: civil-law and common-law traditions. […] However, there has been a growing convergence between these two different legal traditions. Many common-law jurisdictions now base their legal systems on a comprehensive body of statutes, but then use precedential case law decisions to further flesh out the meaning of these statutes. Conversely, many civil-law jurisdictions are now permitting certain courts to issue decisions that are, to some extent, binding on lower courts. Against this backdrop, the release of Guiding Cases designated by the Supreme People's Court of China as having *de facto* binding effect, is another example of a country seeking to improve its legal system by supplementing legislation with judicial decisions.

Driven by the need to effectively apply Guiding Cases, a growing number of Chinese lawyers are seeking to learn more about the use of cases in practice. In October 2019, **Judge William A. Fletcher**, who sits on **the United States Court of Appeals for the Ninth Circuit**, and I provided training related to this topic to nearly forty lawyers from different parts of China. The lawyers found it very useful. One lawyer shared the following thought:

> The use of Guiding Cases, which are model cases showing equitable application of law, to supplement reasons for adjudication is conducive to the equitable adjudication of cases and persuasion of parties to accept the adjudication results. As lawyers, who are to apply the law and carry out justice, we should keep our faith, never forget our original intentions, apply the law correctly in handling each case, and help build the cornerstone of fairness and justice through individual cases.

After the training, Judge Fletcher adapted his talk to produce an article titled *Deciding Cases in the American Case-Based System*, which is also included in this issue of *CLC*.

Apart from the above training, in October, I also spoke to Stanford Law School students enrolled in the Global Quarter Program, which provides instruction on different legal systems, and participated in a panel titled "International and Global Law: From Education to Practice" during our Alumni Weekend (see the **News and Events** section).

This issue ends with a piece of art titled "**The Delights of Winter**" created by **Mr. CHEN Xuncheng**, a master of ceramic art. The covers of the four issues of *CLC* published in 2019 are uniquely beautiful. We are very grateful to Mr. Chen for letting us use his art to decorate these covers.

Talks in October 2019 | 2019年10月的演讲

We hope you enjoy the insights and information shared in this issue of *CLC*! Happy New Year!

Sincerely,

Dr. Mei Gechlik
Founder and Director, China Guiding Cases Project
Editor-in-Chief, *China Law Connect*

* Dr. Mei Gechlik, *Editor's Note*, 7 China Law Connect v (Dec. 2019), http://cgc.law.stanford.edu/clc-7-201912.

熊美英博士

编辑短笺*

尊敬的读者：

面对众多报道了美国和中国之间在贸易和其他问题上的冲突的头条新闻，人们很容易会忽略了中国一个极其重要的发展：**新的中国法律渊源的出现**。2019年10月下旬，全国人民代表大会常务委员会通过一项决定，授权中国国家监察委员会“根据宪法和法律，制定监察法规”。

国家监察委员会是中国的“最高监察机关”，于2018年3月中国宪法修正后而正式成立。国家监察委员会及其地方的委员会负责“办理职务违法和职务犯罪案件”。它们“应当与审判机关、检察机关、执法部门互相配合，互相制约”。

国家监察委员会及其地方的委员会“依照法律规定**独立**行使监察权，**不受**行政机关、社会团体和个人的**干涉**。”被授予这些权力的同时，这些委员会本身必须对其工作保持透明，并“接受民主监督、社会监督、舆论监督”。

只有时间能证明监察委员会是否会发展成为反腐败和其他职务犯罪的真正独立实体，从而有助于为**中国人民和外国投资者**建立一个有利于善政的公平社会。目前，很明显，全国人民代表大会常务委员会在十月份作出的决定仅是一项临时措施，而解释中国法律渊源的国家法律**《立法法》**应尽快修正，以涵盖“监察法规”并解决相关问题，包括以下两个问题：

- “监察法规”在中国法律渊源层次结构中的地位如何？例如，如果一项监督法规与作为中国“最高国家行政机关”的国务院所制定的行政法规相抵触，那么应以哪个为准？
- 鉴于监察委员会受“社会监督”，公民会否有一条有效的渠道可以通过它而指出监察法规与《宪法》或国家法律不符？然后，中国国家立法机关可以考虑此事，而如果确实发现不一致之处，它可以行使其权力撤销该监察法规。

一个相关的问题值得考虑。自2000年通过《立法法》以来，仅对其进行了一次修正（于2015年）。当国家立法机关考虑修正《立法法》以解释“监察法规”的法律地位及相关问题时，它应抓住机会在该法中明确提及**指导性案例**。指导性案例是中国具有事实上约束力的先例，目前由最高人民法院发布的规则所规范。

具体来说，例如，《立法法》第一百零四条规定：“最高人民法院[...]作出的属于**审判[...]工作中具体应用法律的解释**，应当主要针对具体的法律条文，并符合立法的目的、原则和原意。”“审判[...]工作中具体应用法律的解释”是否包括**每个指导性案例的“裁判要点”**？最高人民法院精心准备每个指导性案例的“裁判要点”以指导类似的后续案件的裁判，这些“裁判要点”通常阐明了法院处理类似问题时应如何解释和适用具体的法律规则。

2020年是指导性案例制度建立十周年。这些年来的法律实践和各种经验数据表明，**指导性案例的重要性日益提高**。本期《中国法律连接》（“《中法连》”）所包含的两篇文章说明这点：

- 在一篇中国案例*见解*™的文章中，**指导性案例项目（China Guiding Cases Project；“CGCP”）助理执行编辑宋肇屹**分析了26个明确提及指导案例33号（《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》）的后续裁判。通过深入分析，他解释了这些后续裁判如何阐明了指导案例33号的“裁判要点”。该案的“裁判要点”包含以下的指导：

  > 债务人将主要财产以明显不合理低价转让给其关联公司，关联公司在明知债务人欠债的情况下，未实际支付对价的，可以认定债务人与其关联公司**恶意串通**、损害债权人利益，与此相关的财产转让合同应当认定为无效。

  在这些后续裁判中，有一个是由最高人民法院判决的。当中，最高人民法院明确指出，该案的下级法院犯了一个错误——当事人提出了指导案例33号，但下级法院没有按照最高人民法院之前发布的规则而对该指导性案例的适用性作出评论，就好像当事人从未提及过该案例一样。

- 在一篇专家*连接*™的文章中，**微软（中国）有限公司助理总法律顾问柏凯莉**和**方达律师事务所合伙人王晓萌**借鉴他们的实务经验，说明指导案例49号（《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》）中规定的举证责任由原告转移至被告的原则如何已被编纂为**《反不正当竞争法》**第三十二条，以及这将如何更好地保护商业秘密。

指导性案例在一个传统上强调立法的法律制度中越来越重要，这并非异常现象。**美国联邦第七巡回上诉法院Diane P. Wood首席法官**在其刊登于本期《中法连》、题为《关于司法先例的一些观察》的文章中有如下观察：

> 长期以来，世界各地的法律传统大致分为两类：大陆法和普通法传统。[...]但是，这两种不同的法律传统之间的融合越来越多。现在，许多普通法管辖区的法律制度都以全面的法律条文为基础，但随后用具先例性的裁判进一步充

实这些法律条文的含义。相反，许多大陆法管辖区现在允许某些法院作出在某种程度上对下级法院具有约束力的裁决。在这背景下，中国最高人民法院发布其指定为具有事实约束力的指导性案件，是一个国家尝试通过以司法裁判补充立法来改善其法律制度的另一个例子。

由于有需要知道如何有效适用指导性案例，越来越多的中国律师寻求在实践中更了解案例的使用。2019年10月，**美国联邦第九巡回上诉法院William A. Fletcher法官**和我便为来自中国不同地区的近40名律师提供了培训。他们都认为该培训非常有用。一位律师这样说：

指导性案例，公正适用法律的模范案例，用它来补充裁判说理有利于论证裁判的公正，说服当事人接受裁判。身为律师，法律的应用者，正义的实践者，我们应坚定信念、不忘初心，在处理每个案件中正确适用法律，通过个案筑牢公平正义的基石。

Talks in October 2019 | 2019年10月的演讲

培训结束后，Fletcher法官将其演讲撰写成题为《在美国基于案例的制度中判决案件》的文章。该文章也在本期的《中法连》中刊登。除了上述培训外，在10月份，我还与参加了“全球季度项目”的斯坦福法学院的学生进行了交流。该项目提供关于不同法律制度的指导。同时，在法学院校友周末期间，我参加了“国际和全球法律：从教育到实践”的讨论小组（请参阅“**新闻和活动**”部分）。

本期《中法连》以陶瓷艺术大师**陈训成先生**创作的名为**《冬趣》**的艺术作品作结。2019年出版的四期《中法连》的封面都独特而美丽。我们非常感谢陈先生让我们用他的作品来设计这些封面。

我们希望您喜欢本期《中法连》所分享的见解和信息！新年快乐！

敬祝 顺心

熊美英博士
中国指导性案例项目创办人、总监

《中国法律连接》主编辑

* 熊美英博士，编辑短笺，《中国法律连接》，第7期，第vii页（2019年12月），http://cgc.law.stanford.edu/zh-hans/clc-7-201912。

About the CGCP

Mission

The China Guiding Cases Project (the "CGCP") of Stanford Law School aims to advance the understanding of Chinese law and to help develop a more transparent and accountable judiciary in China by engaging experts and other stakeholders around the world to contribute to a unique knowledge-base, undertaking capacity-building activities for legal actors, and promoting public education and participation.

Brief History

In November 2010, the Supreme People's Court of China (the "SPC") established the Case Guidance System (案例指导制度), a ground-breaking system in which certain Chinese court judgments are selected and re-issued as *de facto* binding Guiding Cases ("GCs"; 指导性案例) to guide the adjudication of similar subsequent cases and ensure the uniform application of law. Immediately thereafter, Dr. Mei Gechlik founded the CGCP to carry out its historic mission.

Subsequent developments show that select important cases issued to date by the SPC under the Case Guidance System also include Belt and Road ("B&R") Typical Cases (一带一路典型案例), which showcase how courts in China adjudicate legal issues related to the country's Belt and Road Initiative (the "BRI"). The growing significance of B&R Typical Cases and the potential impact of the Case Guidance System on the establishment of BRI dispute settlement mechanisms reveal the timeliness and exceptional importance of the CGCP's mission.

The Team

The CGCP team has grown to nearly 200 law students, other graduate students, lawyers, and translation professionals working across the globe and is advised by more than 50 distinguished experts, including justices from the U.S. Supreme Court and the SPC.

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关于中国指导性案例项目（“CGCP”）

使命

斯坦福法学院的中国指导性案例项目（“CGCP”）旨在通过与世界各地的专家和其他利益相关者共同完善我们独特的知识库、为法律工作人员开展能力建设活动、以及促进公共教育和参与，提升对中国法律的理解，并且帮助中国建立一个更加透明、更有问责性的司法制度。

历史简介

2010年11月，中国最高人民法院（“最高法”）建立了具开创性的案例指导制度，把中国各级人民法院的案例经过遴选、提炼成为指导性案例，以指导类似的后续案件的审判工作，确保法律的统一适用。此后，斯坦福法学院的熊美英博士立即创立了 CGCP，展开其具历史性的使命。

随后的发展表明，最高法根据案例指导制度所发布的重要案例还包括一带一路典型案例。这些案例展示了中国法院如何判决涉及一带一路倡议的法律问题。一带一路典型案例的日益重要性，以及案例指导制度对建立一带一路争端解决机制的潜在影响都揭示了CGCP使命的及时性和特殊重要性。

团队

CGCP拥有一支由法学院学生、其他研究生、律师、专业翻译人员组成的约200位成员的国际团队，并有包括在美国联邦最高法院和中国最高人民法院法官在内的50多位杰出的专家顾问。

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Dr. Mei Gechlik

Founder and Director, China Guiding Cases Project, Stanford Law School

Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project ("CGCP"). Formerly a tenured professor in Hong Kong, she began teaching Chinese law and business at Stanford Law School in 2007 and founded the CGCP in 2011. With support from an international team of nearly 200 members and an advisory board of approximately 50 distinguished experts, including justices from the U.S. Supreme Court and the Supreme People's Court of China, the CGCP has quickly become the premier source of high-quality translations and analyses of Guiding Cases—China's *de facto* binding precedents—and related legal developments (https://cgc.law.stanford.edu). In November 2016, the CGCP launched the Belt and Road Series, taking the lead to analyze the legal and political implications of China's ambitious global initiative. In June 2018, the CGCP began publishing its quarterly journal, *China Law Connect*, to help deepen the understanding of legal developments related to China, covering various topics, including the important U.S. Supreme Court's case on vitamin C imports from China.

The CGCP has presented at notable forums, including the World Bank, the Open Government Partnership Global Summit, and U.S.–China Legal Exchange Conferences. In addition, the CGCP and Dr. Gechlik have hosted or participated in multiple events to increase the project's impact. In October 2017, with approvals from China's judiciary, the CGCP organized meetings featuring judges from the Beijing Intellectual Property Court to explain how the court's unique case system has increased judicial consistency and transparency. In March 2018, the CGCP successfully organized a conference titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects", which featured U.S. and Chinese judges as well as other experts from different parts of the world. In July 2018, Dr. Gechlik spoke on legal exchange and collaboration at the Belt and Road Forum organized by China's Ministry of Foreign Affairs and, in September, she met with a delegation from the country's Ministry of Commerce to discuss U.S.–China relations and trade issues.

Prior to joining Stanford Law School, Dr. Gechlik worked from 2001 to 2005 for the Carnegie Endowment for International Peace, a Washington D.C.–based think tank, testifying before the U.S. Congress on various topics about China and advising the United Nations and the Chinese government on implementing rule of law programs. Dr. Gechlik is admitted as a barrister in England, Wales, and Hong Kong and is a member of the Bar in New York and the District of Columbia. She received an M.B.A. in Finance from the Wharton School at the University of Pennsylvania and a Doctor of the Science of Law (J.S.D.) from Stanford Law School.

熊美英博士

斯坦福法学院中国指导性案例项目创办人、总监

熊美英博士是中国指导性案例项目（China Guiding Cases Project；"CGCP"）的创办人与总监。曾于香港任终身教授的熊美英博士，于2007年开始在斯坦福法学院教授中国法律和商业，并于2011年创立CGCP。CGCP拥有一支由近200位成员组成的国际团队，以及一个包括美国联邦最高法院法官和中国最高人民法院法官在内、由50多位杰出专家组成的顾问团体。在成员和顾问的支持下，CGCP已迅速成为具有事实约束力的指导性案例和相关法律发展的优质翻译和分析的重要来源（https://cgc.law.stanford.edu）。2016年11月，CGCP开发了"一带一路"系列，领先分析中国这一雄心勃勃的全球倡议的法律和政治影响。2018年6月，CGCP开始出版其季刊《中国法律连接》，帮助深化对中国相关法律发展的理解，其内容覆盖话题广泛，包括美国联邦最高法院有关进口中国维生素C的这一重要案例等。

CGCP亦受邀在世界银行、开放政府伙伴关系全球峰会，以及中美法律交流会议等各个知名论坛上发表演讲。此外，CGCP和熊美英博士也主办和参加了许多活动以提升项目的影响。2017年10月，CGCP在中国司法机关的支持下组织了多场会议，邀请北京知识产权法院法官介绍了法院的独特案例制度是如何提高司法透明度和问责。2018年3月，CGCP成功举办了"中国案例指导制度和'一带一路'倡议：实务见解与前景"大会。会议邀请到了中美法官和来自全球各地的专家。2018年7月，熊美英博士受邀在中国外交部组织的"一带一路"论坛上就法律交流和合作发表演讲。同年9月，她和中国商务部代表团会面，探讨了中美关系和贸易问题。

在加入斯坦福法学院之前，熊美英博士于2001至2005年期间担任华盛顿智囊机构卡内基国际和平基金会的研究员。她曾向美国国会就有关中国的各种课题作证，并对推行法治计划向联合国和中国政府提供建议。熊博士在英格兰、威尔士和香港均有出庭律师执业资格，同时也是纽约和哥伦比亚特区的律师。她获得宾夕法尼亚大学沃顿商学院金融学工商管理硕士（MBA）和斯坦福法学院法律科学博士（JSD）。

China Law Connect ("*CLC*") is a quarterly journal of the China Guiding Cases Project (the "CGCP") of Stanford Law School aimed at advancing the understanding of Chinese law and increasing judicial transparency and accountability in China. *CLC* primarily consists of:

1. **Editor's Note**. Each issue of *CLC* opens with a note from the *CLC* Editor-in-Chief to introduce the content of the issue and discuss related topics.

2. **Letters to the Editor**. *CLC* issues may feature select letters, or excerpts thereof, sent to *CLC* by its readers and responses from *CLC* Editors.

3. **Commentaries**. Each issue of *CLC* contains at least two of the following types of commentaries:

   - **Traditional commentaries**, which are usually longer and provide in-depth and/or extensive contributions to scholarship on China's Case Guidance System, the Belt & Road Initiative, and/or other matters related to China or Chinese law.

   - **China Cases *Insights***™, a series which aims at providing legal and business professionals with concise and practical information, as well as insightful analyses and indispensable takeaways, about cases in or related to China to help these professionals in their practice of law and business.

   - **Experts *Connect***™, a series dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world.

4. **CLC *Spotlight***™. Each issue of *CLC* contains at least two pieces which have a less formal but more focused approach, covering topics related to **China or Chinese law**, as well as **CGCP Interviews** with leading legal practitioners, prominent business professionals, and other luminaries.

5. **News, Events, and Sponsored Content**. Each issue of *CLC* includes the latest news and recent and forthcoming events related to the CGCP as well as its partners and sponsors.

《中国法律连接》（"《中法连》"）是斯坦福法学院中国指导性案例项目（"CGCP"）的季刊。该刊旨在促进对中国法律的理解，提高中国司法透明度和问责。《中法连》主要包括：

1. **编辑短笺。**每一期《中法连》都以主编的短笺作开端，介绍该期的内容并讨论相关主题。

2. **读者来信。**《中法连》会选登读者来信或其摘录，以及《中法连》编辑的回复。

3. **评论。** 每一期《中法连》包括至少两种以下类型的评论：

   - **传统评论。**这些文章通常篇幅较长、更深入地探讨中国案例指导制度、一带一路倡议和其他与中国或中国法律相关的专题。

   - **中国案例*见解***™。该系列旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践。

   - **专家*连接***™。该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益。

4. **中法连*聚焦***™。每一期《中法连》刊登至少两篇形式较随意但内容更关注一些专题的文章。内容包括与**中国或中国法律相关的**专题和**CGCP专访**法律从业人员、商业专业人士和其他具影响力的专家。

5. **新闻、活动与赞助内容。**每期《中法连》发布**CGCP**及其合作伙伴、赞助方的最新消息和近期活动。

Deciding Cases in the American Case-Based System*

William A. Fletcher
Judge, U.S. Court of Appeals for the Ninth Circuit
Richard W. Jennings Professor of Law at the University of California, Berkeley

Abstract

The American judicial system mirrors the federalism structure in the rest of American government. There is a dual system of federal and state courts. Each system has a clear hierarchy in which lower courts are bound to follow precedent created by the higher courts. Ultimate authority rests in the United States Supreme Court, whose decisions are binding on all issues of federal law, and the state supreme courts, whose decisions are binding on issues of state law. In order to effectuate uniformity across this decentralized structure, the courts publicly disclose their decisions. This is essential to the system of case-based legal education in the United States.

Written decisions are often long, partly due to the fact that some legal rules are stated very generally, which means that application of these rules requires factual elaboration by the courts. A detailed recitation of facts enables courts and lawyers to apply prior decisions to novel legal questions. The result of this system is a highly contextual body of law that is administered both uniformly and predictably.

Opening Remarks

Thank you for inviting me to explain how we decide cases in our American case-based system. As the United States sought to develop a uniform and predictable body of commercial law in the first half of the nineteenth century, one of the most important things we did was to develop systems for public reporting of judicial decisions. The public reporting of decisions allowed lawyers and judges to know what our law was, and it gave judges a way to be uniform and predictable in deciding cases in the future. This led to the case-based system we have today.

To explain our system in more detail, I will first describe the structure of the American judicial system. I will then describe the way we use precedents established in earlier cases to decide subsequent cases.

Structure of the American Judicial System

Federal Courts v. State Courts

In the American judicial system, there are federal courts and state courts. The federal courts are established under Article III of the U.S. Constitution.[1] The state courts are established under the constitutions of the individual states.

There are three levels of federal courts. The first level is the United States District Court. There are 94 United States judicial districts. Depending on a state's population, it may have one or more districts. In states with small populations, such as New Hampshire or Nevada, there is only one district. In a populous state like California, there are four districts (the Northern, Eastern, Central, and Southern Districts). A dissatisfied litigant may appeal to one of thirteen United States Courts of Appeals. The United States Supreme Court is at the top of the federal appellate hierarchy.

Map 1 shows the federal circuit courts.[2] You will notice that the circuits with the lower numbers on the East coast of the United States are much smaller than the circuits with the higher numbers in the West. The circuits with the lowest numbers were created in 1789, at the beginning of our constitutional system, when transportation and communication were difficult. The circuits with the higher numbers were created later as the country expanded. When those circuits were created, transportation and communication had become easier. We had gone from horseback and letters, to railroads and telegrams. We now have airplanes and email.

State courts are organized similarly. For example, in California, there are trial courts (called Superior Courts), appellate courts (called Courts of Appeal), and the California Supreme Court.

In the federal system, the President nominates a federal judge under Article III. If the Senate votes to confirm the nominee, that judge serves for life. The judge cannot be removed from office except by impeachment, which is exceedingly rare (effectively reserved for criminal behavior).[3] Only a small handful of federal judges have been impeached since 1789.[4] The system is designed to protect federal judges from political influence. There are, of course, political considerations that affect who is appointed. But once appointed, a federal judge answers only to his or her conscientious view of what the law requires. There is no mandatory retirement age. In fact, many federal judges serve well into their eighties. My mother was a federal judge on the U.S. Court of Appeals for the Ninth

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Judge William A. Fletcher was sworn in as United States Circuit Judge for the Ninth Circuit on February 1, 1999. He received a B.A. from Harvard College in 1968 in English History and Literature, magna cum laude; a B.A. from Oxford University in 1970 in English Language and Literature, where he studied as a Rhodes Scholar; and a J.D. from Yale Law School in 1975. He was honorably discharged from the United States Navy as a Lieutenant in 1972.

Judge Fletcher clerked for the Honorable William J. Brennan, Jr., of the United States Supreme Court from 1976 to 1977. He was a law professor at the University of California, Berkeley (Boalt Hall) from 1977 to 1999, specializing in Federal Courts and Jurisdiction and in Civil Procedure. At the time of his appointment to the Ninth Circuit, he was the Richard W. Jennings, Jr., Professor of Law. He is a member of the American Law Institute.

Judge Fletcher is the author of numerous articles, including *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033 (1983); *The General Common Law and Section 34 of the Judiciary Act of 1789*, 97 HARV. L. REV. 1513 (1984); *The Structure of Standing*, 98 YALE L.J. 221 (1988); *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); *International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007); *International Human Rights and the Role of the United States*, 104 NW. U. L. REV. 293 (2010); *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word 'All' in Article III*, 59 DUKE L.J. 929 (2010); *Tribute to Judge Betty Binns Fletcher*, 84 WASH. L. REV. 1 (2010); *Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805 (2014). He is the co-author, with Professors Geoffrey C. Hazard, Jr., Stephen McG. Bundy, and Andrew G. Bradt, of *Pleading and Procedure* (11th ed., Foundation Press, 2015).

Circuit (the same court on which I sit). She heard cases until shortly before she died at age eighty-nine.[5]

In contrast to federal judges, state court judges are not appointed for life. The manner in which they are appointed, and in which they are allowed to continue in office, differs from state to state. But, generally speaking, I can say that a state court judge is chosen by the state Governor. That judge must then stand for election and re-election from time to time. The necessity to stand for election and re-election, I will tell you frankly, is a weakness in our system.[6] Lawyers and judges try very hard to protect judges from being defeated in elections. Indeed, almost all state court judges are elected and re-elected after they are appointed.

But this is not always the case. For example, in 1986, three of the seven Supreme Court Justices on the California Supreme Court lost elections. They had been appointed by Governor Jerry Brown (during his first period serving as Governor) and were quite liberal. A campaign was mounted against them, paid for by business interests, and they were defeated. All three were replaced by then-Governor Deukmejian, a conservative. Justice Otto Kaus, a former Justice on the California Supreme Court, once said that he tried very hard to put elections out of his head when he decided cases, and that he believed that he never decided a case based on political considerations. But he joked that trying to put elections out of his head was like trying to forget an alligator in his bathtub. I know very well many California state judges, and I am pleased to be able to say that they are extremely good judges.

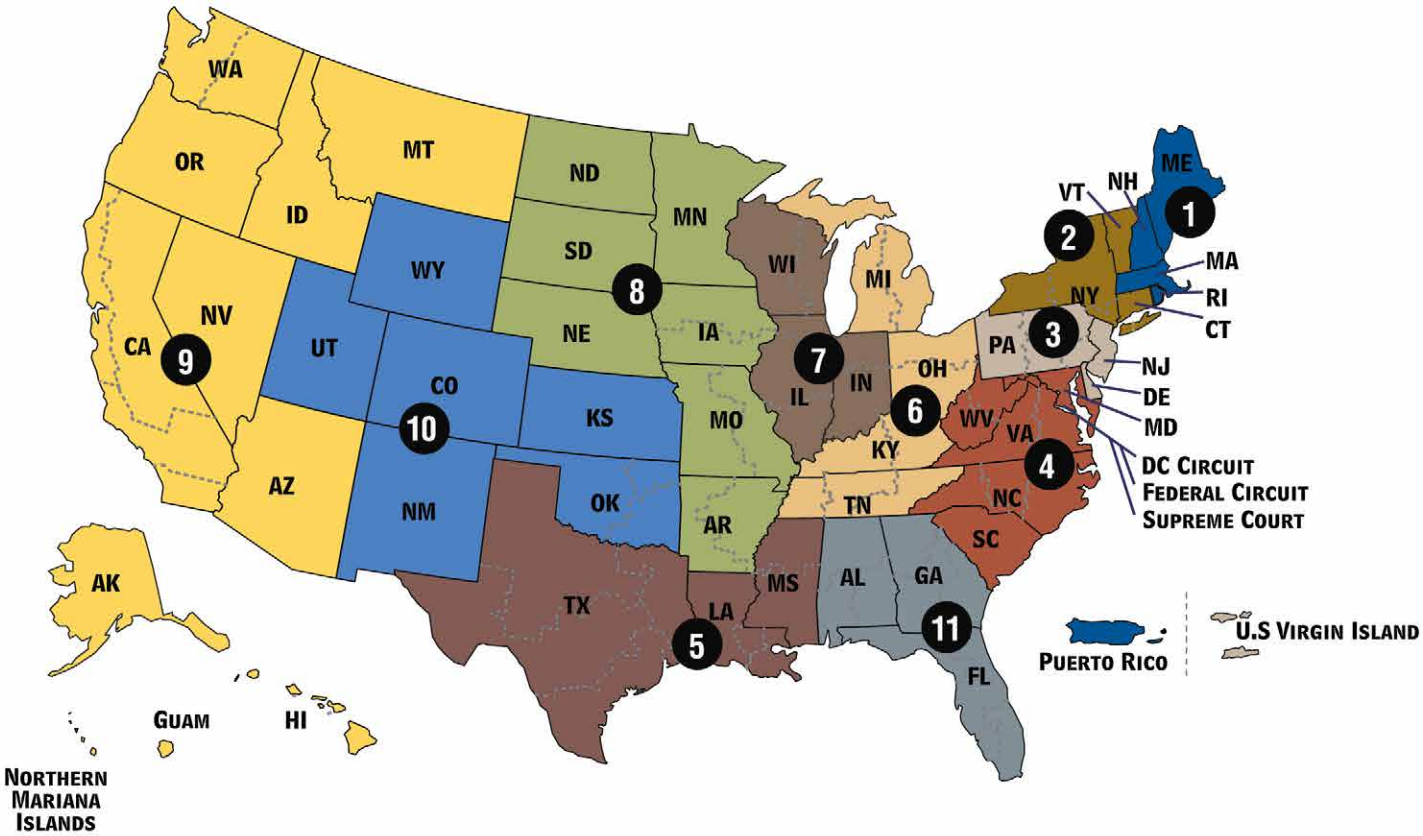
There are many more state court judges than Article III federal judges. There are a total of only 870 Article III federal judgeships in the entire country. By contrast, California alone has over 2,000 judges.

Jurisdiction

I turn now to jurisdiction, or the power of a court to hear a case and to enter a judgment. The jurisdictions of the federal and state courts overlap. The overlapping jurisdictional system is complicated and was formed as a result of political compromises when we drafted our Constitution in 1788. The system is sufficiently complicated that it warrants a separate course in law school. I have taught that course for over forty years. What takes me a full semester to teach to my students, I will try to teach you in a very few minutes.

Federal law governs many, but not all, subjects. For example, federal law governs intellectual property (patent and copyright), anti-trust, securities (purchase and sale of stocks), many aspects of transportation, and bankruptcy. State law governs many other subjects, including contracts, torts, real property, and domestic relations (marriage, divorce, and child custody). When there is overlap between federal and state laws, and when those laws are inconsistent, federal law governs.

Disputes do not come in tidy packages, entirely governed by either federal law or state law. Federal judges decide questions of federal law and of state law. And the same is true of state judges, who decide questions of state law and federal law.



Map 1.A: Geographic Boundaries of United States Courts of Appeals

As you may see from **Chart 1**, there are two hierarchical lines of judicial authority. A case that starts out in a U.S. District Court can be appealed to a U.S. Court of Appeals and may possibly be heard by the U.S. Supreme Court. A case that starts out in a California Superior Court can be appealed to a California Court of Appeal and may possibly be heard by the California Supreme Court. A decision by the California Supreme Court may possibly be heard by the U.S. Supreme Court, but only on a question of federal law. As to any issue of state law decided by the California Supreme Court, the decision of that court is final and may not be reviewed by the U.S. Supreme Court.

The U.S. Supreme Court hears very few cases. In any given year, the U.S. Supreme Court will hear only about seventy or eighty cases from the entire country. The appellate jurisdiction of the U.S. Supreme Court is almost entirely discretionary. That is, the U.S. Supreme Court chooses the cases it wants to decide. It generally chooses cases in order to decide unsettled questions of law (for example, under a new statute), to decide questions of law on which the U.S. Courts of Appeals have different interpretations, and, more rarely, to change an interpretation of our U.S. Constitution. State Supreme Courts in large states such as California behave the same way, deciding relatively few cases. This means, as a practical matter, that the decisions of the U.S. Courts of Appeals and of the California Courts of Appeal are almost always the final decisions.

Use of Precedent

American courts try to decide cases consistently. They try to follow precedent—that is, to understand earlier judicial decisions, and to decide later cases in a way that is consistent with those earlier decisions.

Binding Authority v. Persuasive Authority

In a precedent-based system, an important distinction is between decisions that have *binding* authority and decisions that have only *persuasive* authority. A decision with binding authority must be followed by a later court, even if the later court disagrees with the decision. A decision with persuasive authority will be followed by a later court only if the later court is persuaded by the reasoning in that decision.

A decision by a higher court in one court system is binding authority for a lower court in that system. For example, a decision by the U.S. Supreme Court is binding on the U.S. Courts of Appeals and U.S. District Courts. Similarly, a decision by the California Supreme Court is binding on the California Courts of Appeal and California Superior Courts. A decision by the U.S. Supreme Court on a question of federal law is binding on both the federal courts and the state courts.

However, a decision by a court in one system is only persuasive authority for a court in another system, or for

First Circuit	Second Circuit	Third Circuit
ME - Maine MA - Massachusetts NH - New Hampshire PR - Puerto Rico RI - Rhode Island	CT - Connecticut NY - New York VT - Vermont	DE - Delaware NJ- New Jersey PA - Pennsylvania VI - The Virgin Islands
Fourth Circuit	**Fifth Circuit**	**Sixth Circuit**
MD - Maryland NC- North Carolina SC - South Carolina VA - Virginia WV - West Virginia	LA - Louisiana MS - Mississippi TX - Texas	KY - Kentucky MI - Michigan OH - Ohio TN - Tennessee
Seventh Circuit	**Eighth Circuit**	**Ninth Circuit**
IL - Illinois IN - Indiana WI - Wisconsin	AR - Arkansas IA - Iowa MN - Minnesota MO - Missouri NE - Nebraska ND - North Dakota SD - South Dakota	AK - Alaska AZ - Arizona CA - California GU - Guam HI - Hawaii ID - Idaho MT - Montana NV - Nevada MP - The Northern Mariana Islands OR - Oregon WA - Washington
Tenth Circuit	**Eleventh Circuit**	**District of Columbia Circuit**
CO - Colorado KS - Kansas NM - New Mexico OK - Oklahoma UT - Utah WY - Wyoming	AL - Alabama FL - Florida GA - Georgia	DC - District of Columbia **Federal Circuit**

Map 1.B

a court of equal authority within the same system. For example, a decision on a question of federal law by the California Supreme Court is only persuasive authority for a federal court. Further, a decision by the U.S. Court of Appeals for the Ninth Circuit on a question of federal law is only persuasive authority for the U.S. Court of Appeals for the First Circuit.

Holding v. Dictum

Another important distinction in a precedent-based system is between holding and dictum. The holding in an earlier case is binding. Dictum in an earlier case is not binding. A holding is a statement of law that is necessary to reach the result in a case. (British lawyers and judges, and those trained in British law, use the term "*ratio decidendi*" rather than the term "holding". The two terms are roughly equivalent.) An example of a holding is a statement that a police officer used unconstitutionally excessive force, and must therefore pay damages, because he used a taser against a person when the person was not resisting arrest. Dictum is a statement of law that is not necessary to reach the result. An example of dictum is a statement listing circumstances in which police officers may not use tasers during an arrest, but none of the listed circumstances is present in the case being decided.

The line between holding and dictum is not always perfectly clear. Further, some dictum has a special power. For example, lower federal courts pay very close attention to—and generally treat as binding—dictum by the U.S. Supreme Court.

Sometimes the holding in a case is not, in itself, sufficient to decide a later case, but the reasoning behind the holding will help a later court to reach a decision. For example, a court in a prior decision held that dynamite may not be stored in the hold of a passenger ship. In reaching that decision, the court had reasoned that the owner of the ship had a duty to keep his passengers safe. The question before the later court

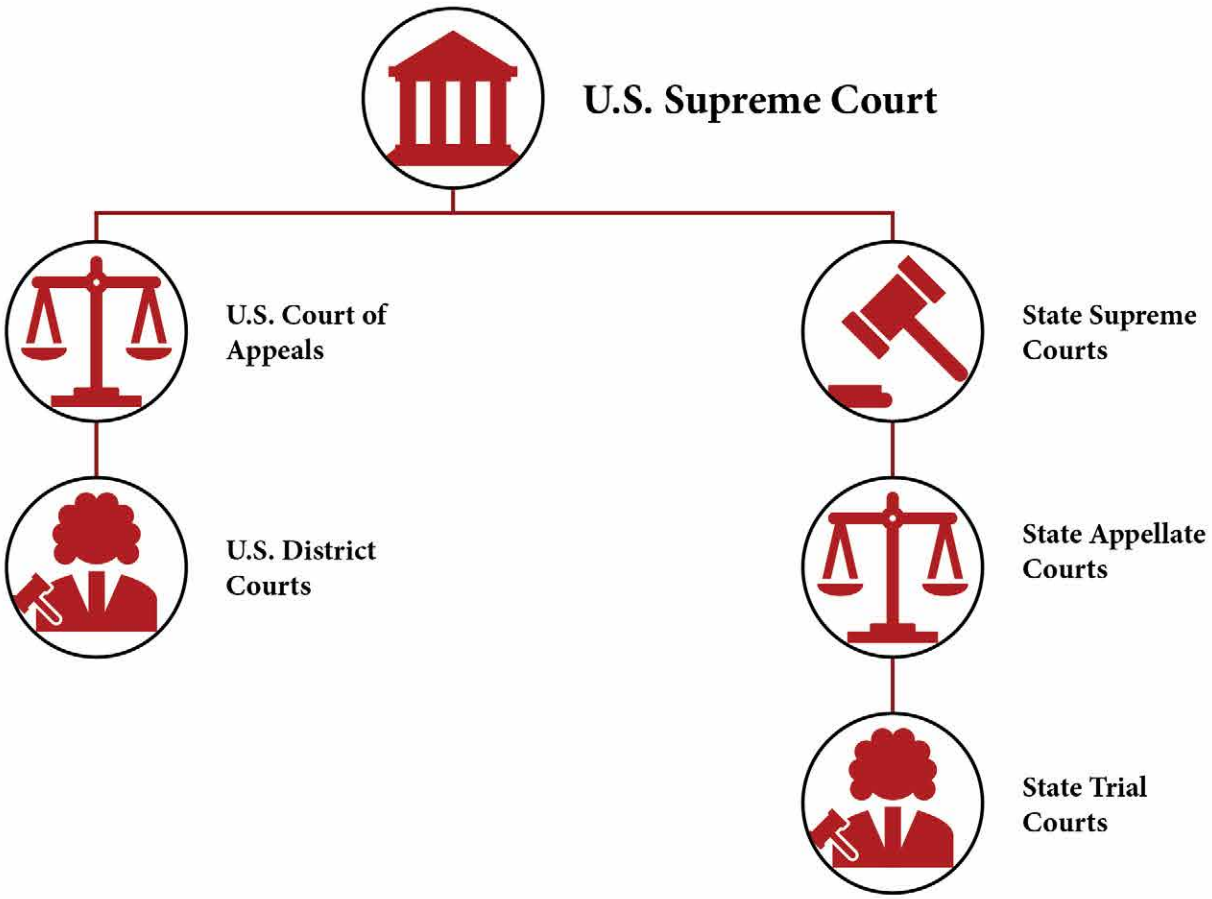


Chart 1: U.S. Judicial Hierarchy

is whether the owner of a passenger ship must make sure that employees do not have criminal records. The later court could reason from the obligation to keep passengers safe that the ship owner should screen prospective employees to make sure they don't have criminal records.

When Are Detailed Facts Necessary?

Depending on the nature of the legal rule at issue, a detailed consideration of the facts may or may not be necessary to decide a case. If the legal rule is clear and categorical, detailed facts are usually not necessary. For example, if the legal rule is that savings and loan banks must buy insurance to protect the money of their depositors, a court needs to know only that the bank is a savings and loan bank in order to hold that it must buy insurance. However, if the legal rule is stated very generally, a detailed comparison of facts from earlier cases is often necessary. For example, if the legal rule is that conspiracies in restraint of trade violate the anti-trust laws, we need to know what "restraint of trade" means. To know that, we need to have factual examples from earlier cases. For another example, if the legal rule is that a taser cannot be used on an unresisting person, we need to know what "unresisting" means. In one case, the person might have been 24 years old, with his hands in fists, coming toward the police officer rapidly. In that case, use of a taser was permitted. But what about a case in which the person was 74 years old (like me), with his hands open, and moving toward the police officer slowly?

Many American legal rules are stated very generally. This is true not only for judge-made common law rules, but also for statutory rules. American statutory rules are often stated generally—such as "restraint of trade" in the anti-trust statutes—with the expectation that the courts, in course of deciding many cases, will flesh out the rule and give it nuance. There is an advantage in writing some rules that way because clear and categorical rules can operate crudely, inefficiently, or unfairly. American legislatures write statutory rules broadly, in part because they cannot fully understand the circumstances that might arise, and in part because they generally trust courts to give nuanced and fair interpretations of the rules. In cases where a detailed consideration of the facts is necessary, a fairly lengthy opinion is often necessary. This will become immediately evident to you once you start reading American judicial opinions.

Concluding Remarks

No system is perfect, including ours. However, I can say that the American case-based system produces quite uniform results. One may see this, for example, in the decisions of the U.S. Court of Appeals for the Ninth Circuit, the court of which I am a member. Because it

Judge William A. Fletcher speaks to approximately 40 Chinese lawyers from different parts of China

is an appellate court, we use three judges to decide each case. Last year, my court decided almost 7,500 appeals. Almost 5,000 of these appeals were very easy. We were able to decide these appeals unanimously with no need for oral argument from the attorneys. A little over 2,500 of the appeals were sufficiently difficult that we scheduled them for oral argument. Even in these more difficult cases, I estimate that the judges were unanimous in their decision about ninety-five percent of the time. That is, in our case-based system—in which the judicial decisions often rely on detailed fact-based comparisons to apply broad general rules—we have a fairly high degree of determinacy and predictability.

I hope this has been helpful to you. Thank you for your attention. ■

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* The citation of this Experts *Connect*™ is: Judge William A. Fletcher, *Deciding Cases in the American Case-Based System*, 7 China Law Connect 1 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Dec. 2019, http://cgc.law.stanford.edu/commentaries/clc-7-201912-connect-9-william-fletcher.

The original, English version of this piece was edited by Andrew McKinley, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

This is an adapted version of Judge William A. Fletcher's speech delivered at a meeting with nearly 40 lawyers from different parts of China. The meeting was held at Stanford Law School on October 10, 2019. All of the notes were added by the editors.

1 "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, §1.

2 *See* Geographic Boundaries of United States Courts of Appeals and United States District Courts, United States Courts, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

3 "Of the 15 federal judicial impeachments in history, the most common charges were making false statements, favoritism toward litigants or special appointees, intoxication on the bench, and abuse of the contempt power." Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, Brennan Center. For Justice, Mar. 23, 2018, https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer.

4 For a complete list of federal judges who have been impeached, see the information provided by the Federal Judicial Center, at https://www.fjc.gov/node/7496.

5 For more information about the distinguished work of Judge Fletcher's mother, see Jordan Corrente Beck, *CGCP Interview: Judge William A. Fletcher*, 1 China Law Connect 57 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2018, http://cgc.law.stanford.edu/clc-spotlight/clc-1-201806-interview-1-jordan-corrente-beck.

6 For a discussion of the history as well as the tradeoffs of judicial elections, see David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265 (2008).

在美国基于案例的制度中判决案件*

William A. Fletcher法官
美国联邦第九巡回上诉法院法官
加州大学伯克利分校Richard W. Jennings Jr.法学教授

摘要

正如美国其他政府部门所体现的联邦制结构一样，美国司法制度具备了双重的系统：联邦法院系统和州法院系统。每个法院系统都有一个清晰的层次结构，其中下级法院必须遵循上级法院所作出的先例。最终的权威来自美国联邦最高法院（其裁决对联邦法律的所有问题均具约束性）和州最高法院（其裁决对州法律的问题具约束性）。为了在这分散的结构中实现统一性，法院公开其裁决。这对于美国基于案例的法律教育制度至关重要。

书面的裁决通常很长，部分原因是一些法律规则的陈述非常概括，这意味着应用这些规则时需要法院对事实进行详细说明。对事实的详细叙述使法院和律师可以将先前的裁决应用于新的法律问题。该制度的结果是形成了一套兼具统一性与可预测性的前后高度呼应的法律体系。

开场发言

感谢你们邀请我来向大家介绍如何在美国基于案例的制度中判决案件。当美国在19世纪上半叶寻求建立一个统一和可预测的商法体系时，我们做的最重要的事情之一就是发展司法裁决公开报告的制度。裁决的公开报告让律师和法官了解我们当时的法律是什么，也为法官提供一种方法以确保其日后判决案件时可以做到统一和可预测。这促成了我们今天的基于案例的制度。

为了更详细地说明我们的制度，我将首先描述美国司法制度的结构。然后，我会描述我们如何使用较早的案件所建立的先例来判决以后的案件。

美国司法制度的结构

联邦法院与州法院的对比

在美国的司法制度中，有联邦法院和州法院。联邦法院是根据美国宪法第三条设立的。[1] 州法院是根据各个州的宪法而设。

联邦法院分为三级。第一级是美国联邦地区法院。美国共有94个司法区。一个州可能有一个或多个司法区，这视乎该州的人口数量。在人口少的州，例如新罕布什尔州或内华达州，只有一个司法区。在人口多的州，比如加州，则有四个司法区（北区、东区、中区和南区）。诉讼当事人如有不满，可以向13个美国联邦上诉法院中的一个提出上诉。美国联邦最高法院处于联邦上诉等级中的最顶层。

地图1展示了联邦巡回法院。[2] 你会注意到，在美国东海岸，编号较小的巡回比在西部编号较大的巡回小得多。编号最小的巡回是在1789年我们的宪法制度开始时创建的，当时交通和通讯都很困难。随着国家的扩张，编号较大的巡回被建立而成。创建这些巡回时，交通和通讯已经变得更加发达。我们从骑马和写信发展到了用铁路和电报。我们现在有飞机和电子邮件。

州法院的组织方式与此类似。例如，在加州，有审判法院（称为高级法院），处理上诉的法院（称为上诉法院）和加州最高法院。

在联邦制度中，总统根据宪法第三条提名人士为联邦法官。如果参议院投票确认该被提名人，其将终身任职法官。该法官不能被免职，除非被弹劾。弹劾是极为罕见的（实际上只保留用于犯罪行为）。[3] 自1789年以来，只有少数联邦法官遭到弹劾。[4] 此制度旨在保护联邦法官免受政治影响。当然，政治考量会影响任命人选。但是一旦任命，联邦法官只听命于其对法律要求的尽心尽责的看法。法官没有强制性退休年龄。实际上，许多联邦法官在八十多岁时仍在职。我的母亲是美国联邦第九巡回上诉法院的联邦法官（与我所在的法院相同）。她一直都在审理案件，直到在89岁逝世前不久为止。[5]

与联邦法官不同，州法院的法官不是终身任命。各州对这些法官的任命和继续任职的方式各不相同。但总体而言，我可以说州法院的法官是由州长遴选的。之后，该法官必须不时参加选举和连任选举。我坦率地告诉你，法官参与选举和连任选举的要求是我们制度的一个弱点。[6] 律师和法官非常努力地保护法官使其不在选举中落败。确实，几乎所有州法院的法官都在被任命后再三成功当选。

但并非总是如此。例如，在1986年，加州最高法院的七名大法官中有三名败选。他们是由杰里·布朗（Jerry Brown）州长（在其第一次担任州长时）任命的，都属于比较自由的一派。一群商业利益关联者出资发起一场针对他们的竞选活动，将他们击败。当时的保守派Deukmejian州长将三人取代。加州最高法院

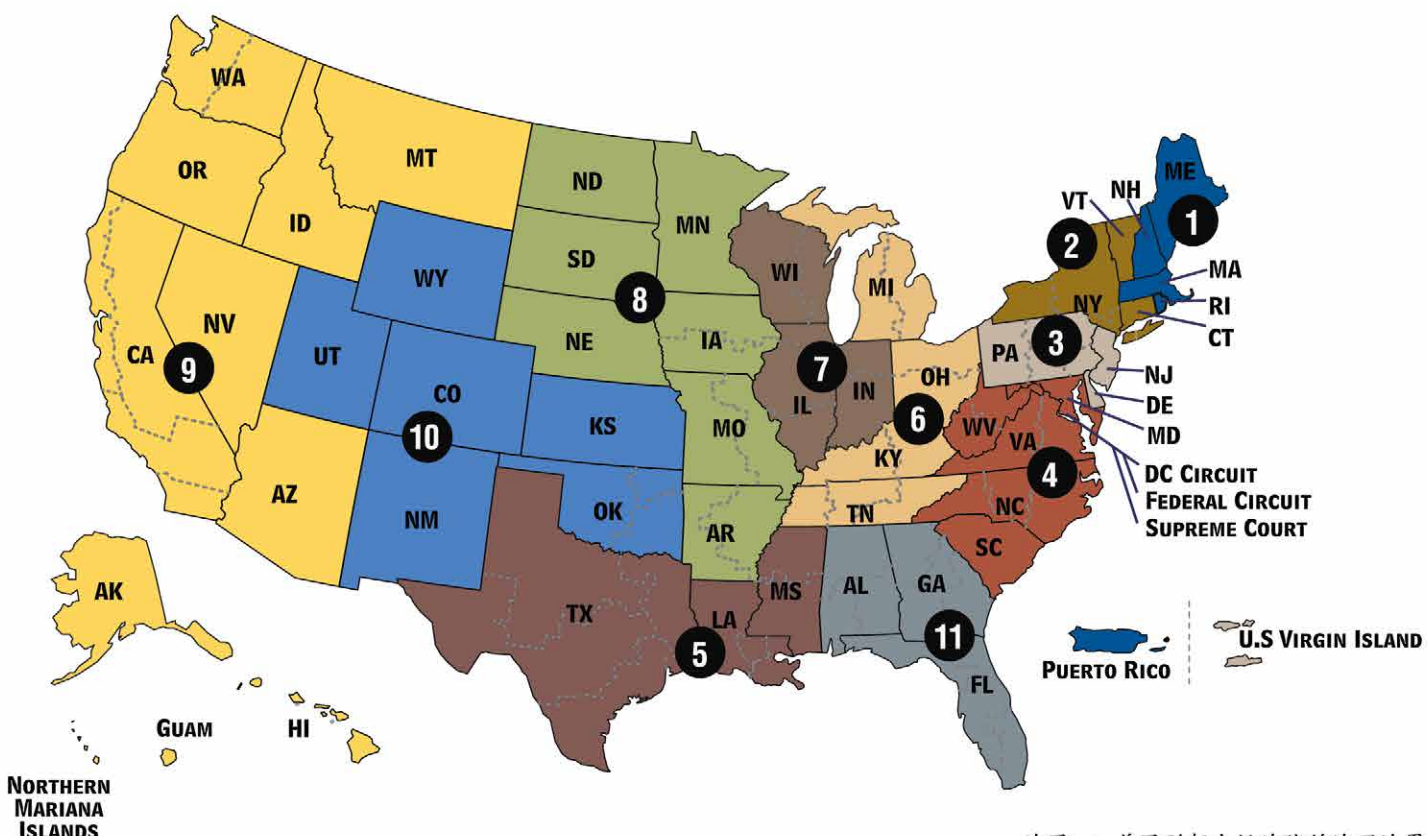
William A. Fletcher法官
美国联邦第九巡回上诉法院法官
加州大学伯克利分校Richard W. Jennings Jr.法学教授

William A. Fletcher法官于1991年2月1日宣誓成为美国联邦第九巡回上诉法院法官。1968年，他以极优的成绩毕业于哈佛学院，获得英国历史与文学学士学位。而后，他作为罗德学者在牛津大学学习，并于1970年获得英语语言和文学学士学位。1975年获得耶鲁法学院法律博士学位（J.D.）。1972年，他作为海军中尉从美国海军光荣退伍。

1976–1977年间，Fletcher法官在美国联邦最高法院担任William J Brennan Jr.法官阁下的法律书记。1977–1999年，其担任加州大学伯克利分校的法学教授，专研联邦法院和管辖权，以及民事诉讼。在获得联邦第九巡回上诉法院任命时，他是Richard W. Jennings Jr.法学教授。此外，他也是美国法律协会的会员。

Fletcher法官著作丰富，包括《自由裁量的宪法：机构性救济与司法合法性》（*The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982)）、《第十一修正案的历史解读》（*A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV.1033 (1983)）、《普通法与1789年司法法第34条》（*The General Common Law and Section 34 of the Judiciary Act of 1789*, 97 HARV. L. REV. 1513 (1984)）、《起诉身份的结构》（*The Structure of Standing*, 98 YALE L.J. 221 (1988)）、《第十一修正案：未尽事宜》（*The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000)）、《美国法院中的国际人权》（*International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007)）、《国际人权和美国的角色》（*International Human Rights and the Role of the United States*, 104 NW. U. L. REV. 293 (2010)）、《国会对联邦法院管辖权的权力：宪法第三条中“All”一词的意义》（*Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word 'All' in Article III*, 59 DUKE L.J. 929 (2010)）、《向 Betty Binns Fletcher 法官致敬》（*Tribute to Judge Betty Binns Fletcher*, 84 WASH. L. REV. 1 (2010)）、《我们破裂的死刑》（*Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805 (2014)）等。此外，他与 Geoffrey C. Hazard, Jr.、Stephen McG. Bundy、Andrew G. Bradt三位教授共同著有《诉状与程序》一书（*Pleading and Procedure* (11th ed., Foundation Press, 2015)）。

前大法官奥托·考斯（Otto Kaus）曾经说过，他在判决案件时尽力把选举的事抛之脑后，并且他相信自己从未基于政治考量判决案件。但是他开玩笑说，试图把选举的事抛之脑后就像试图忘记自己的浴缸里有一条鳄鱼。我熟知加州的许多州法官，我很高兴我可以说他们是极其优秀的法官。



地图1.A: 美国联邦上诉法院的地理边界

第一巡回	第二巡回	第三巡回
ME - 缅因州 MA - 马萨诸塞州 NH - 新罕布什尔州 PR - 波多黎各 RI - 罗得岛州	CT - 康涅狄格州 NY - 纽约州 VT - 佛蒙特州	DE - 特拉华州 NJ- 新泽西州 PA - 宾夕法尼亚州 VI - 维尔京群岛
第四巡回	**第五巡回**	**第六巡回**
MD - 马里兰州 NC - 北卡罗来纳州 SC - 南卡罗来纳州 VA - 弗吉尼亚州 WV - 西弗吉尼亚州	LA - 路易斯安那州 MS - 密西西比州 TX - 德克萨斯州	KY - 肯塔基州 MI - 密歇根州 OH - 俄亥俄州 TN - 田纳西州
第七巡回	**第八巡回**	**第九巡回**
IL - 伊利诺斯州 IN - 印第安纳州 WI - 威斯康辛州	AR - 阿肯色州 IA - 爱荷华州 MN - 明尼苏达州 MO - 密苏里州 NE - 内布拉斯加州 ND - 北达科他州 SD - 南达科他州	AK - 阿拉斯加州 AZ - 亚利桑那州 CA - 加利福尼亚州 GU - 关岛 HI - 夏威夷州 ID - 爱达荷州 MT - 蒙大拿州 NV - 内华达州 MP - 北马里亚纳群岛 OR - 俄勒冈州 WA - 华盛顿州
第十巡回	**第十一巡回**	**哥伦比亚特区巡回**
CO - 科罗拉多州 KS - 堪萨斯州 NM - 新墨西哥州 OK - 俄克拉荷马州 UT - 犹他州 WY - 怀俄明州	AL - 阿拉巴马州 FL - 佛罗里达州 GA - 乔治亚州	DC - 哥伦比亚特区 **联邦巡回**

地图1.B

州法院的法官比宪法第三条授权下的联邦法官多得多。整个国家总一共只有870位宪法第三条授权下的联邦法官。相比之下，仅加州就有2,000多名法官。

管辖权

我现在讲解管辖权，或者说是法院审理一个案件和作出判决的权力。联邦法院和州法院的管辖权有重叠。重叠的管辖权体系是很复杂的，而这体系是我们在1788年草拟宪法时作出政治妥协而形成的。该体系非常复杂，足以在法学院单独设立一个课程涵盖之。这门课程我已经教了四十多年。我会尝试在几分钟内给你们讲解一些我用一整个学期教授我的学生的内容。

联邦法律管辖许多但非全部的邻域。例如，联邦法律管辖知识产权（专利和版权）、反托拉斯、证券（股票的买卖）、运输的许多方面和破产。州法律管辖许多其它的邻域，包括合同、侵权、不动产和家庭关系（婚姻、离婚和子女监护权）。如果联邦法律与州法律之间存在重叠且两者不一致，则以联邦法律为准。

纠纷不会明确分为是完全受联邦法律所管辖或是完全受州法律所管辖。联邦法官判决联邦法律问题和州法律问题。同样地，州法官也会判决州法律问题和联邦法律问题。

从**图1**中可以看到，司法机关有两条等级线。美国联邦地区法院审理的案件可以上诉到美国联邦上诉法院，而且可能最终由美国联邦最高法院审理。始于加州高级法院的案件可以上诉至加州上诉法院，并可能最终由加州最高法院审理。加州最高法院的裁决有可能由美国联邦最高法院审理，但只能针对联邦法律问题。至于由加州最高法院判决的任何州法律的问题，该法院的裁决是最终的，美国联邦最高法院不能对其进行复审。

美国联邦最高法院审理的案件很少。在任何一年中，美国联邦最高法院只会审理来自全国的大约七十或八十个

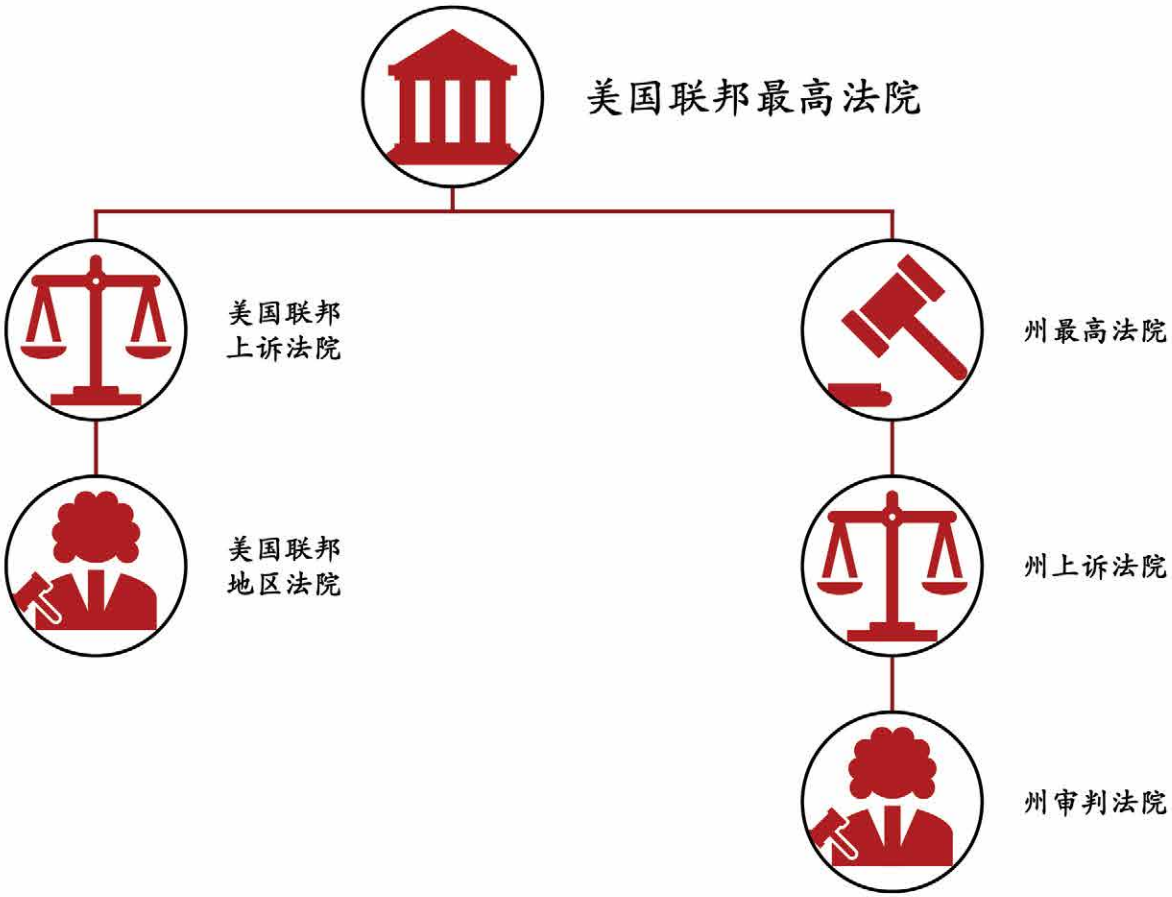


图1: 美国司法层次结构

案件。美国联邦最高法院的上诉管辖权几乎完全是自由裁量的。也就是说，美国联邦最高法院自由选择它想要判决的案件。它通常会选择案件以判决未解决的法律问题（例如，新的成文法律下的法律问题），以判决美国联邦上诉法院持不同解读的法律问题，以及改变对我们美国宪法的解读（这情况较罕见）。加州等大州的州最高法院也如美国联邦最高法院一样，判决相对较少的案件。这意味着，在实际操作中，美国联邦上诉法院和加州上诉法院的裁决几乎都是最终的裁决。

先例的使用

美国法院尝试一致地判决案件。它们尝试遵循先例——也就是了解较早的司法裁决，并以与先前裁决一致的方式判决日后的案件。

约束性权威与说服性权威的对比

在一个基于先例的制度中，一个重要的区别是具“约束性”权威的裁决与仅具“说服性”权威的裁决。对于具“约束性”权威的裁决，之后的法院必须遵循它，即使该法院不认同这裁决。对于具“说服性”权威的裁决，之后的法院只会在被这裁决的理由说服后才会遵循它。

在一个法院系统中，高级别法院的裁决对低级别法院而言，是具约束性的权威。例如，美国联邦最高法院的裁决对美国联邦上诉法院和美国联邦地区法院而言，是具约束性的。类似地，加州最高法院的裁决对加州上诉法院和加州高级法院而言，是具约束性的。美国联邦最高法院关于联邦法律的问题的裁决对联邦法院和州法院均具有约束性。

但是，一个系统中的法院的裁决，对另一系统中的法院或者同一系统中的同级别法院而言，只是具说服性的权威。例如，加州最高法院有关联邦法律的问题的裁决对联邦法院而言，仅是具说服性的权威。此外，美国联邦第九巡回上诉法院有关联邦法律的问题的裁决对美国联邦第一巡回上诉法院而言，仅是具说服性的权威。

裁决原则（Holding）[7]与意见（Dictum）的对比

在基于先例的制度中，另一个重要的区别是裁决原则与意见。前一案件的裁决原则是具约束性的。前一案件的裁决意见不具约束性。裁决原则是对案件达成审判结果所必需的法律声明。（英国律师和法官，以及英国法律培训出的人员，使用“*ratio decidendi*”（裁决理由）而非“holding”这词。这两个词大致意思一样。）一个说明裁决原则的例子是这一声明：警察使用违反宪法的过度武力就必须赔偿损失，这是因为他对不抗拒逮捕的人用泰瑟枪。意见是对案件达成审判结果所不需的法律声明。一个说明意见的例子是法官作出声明，列举警察在逮捕时不得使用泰瑟枪的情形，但没有一种情形在待决案件中出现。

William A. Fletcher法官与来自中国不同地区的约40名中国律师进行交流

裁决原则和意见之间的界限并不总是完全明确。此外，一些意见具有特殊的力量。例如，下级联邦法院非常注意美国联邦最高法院的意见，并通常视之为具约束性。

有时，一个案件的裁决原则本身不足以判决一个之后的案件，但是裁决原则背后的推理将帮助以后的法院达成裁决。例如，法院在一个先前的裁决中判定炸药不得存放在客船的船舱中。在得出该裁决时，法院的理由是该船的船主负有确保其乘客安全的责任。后来的法院所面对的问题是客船的船主是否必须确保雇员没有犯罪记录。后来的法院可以通过船主有义务确保乘客安全而推论出船主应筛选准员工，以确保他们没有犯罪记录。

何时需要详细的事实？

对事实的详细考虑是否必要取决于涉案的法律规则的性质。如果法律规则是清晰明确的，详细的事实通常不是必要的。例如，如果法律规则规定储蓄和贷款银行必须购买保险以保护其储户的钱，法院只需要知道该银行是储蓄和贷款银行，就可以认定它必须购买保险。但是，如果法律规则的陈述是非常概括，比较先前案例的详细事实通常是必要的。例如，如果法律规则规定限制贸易的合谋违反反托拉斯法，我们就需要知道“限制贸易”的含义。要知道这一点，我们需要先前案例的事实例子。再举另一例子，如果法律规则是泰瑟枪不能用在不抗拒逮捕的人身上，我们就需要知道“不抗拒”的含义。在一个案件中，当事人可能是24岁，双手紧握拳头，迅速向警察走来。在该案中，使用泰瑟枪被允许。但是，在另一个案件中，当事人是74岁（像我），其张开双手，并慢慢走向警察，该如何判决？

许多美国法律规则的陈述都非常概括。这不仅指法官制定的普通法规则，也指成文法规则。美国的成文法规则通常是概括陈述的——例如反托拉斯法中的“限制贸易”表述——并期望法院在判决很多案件的过程中，会充实规则兼给出细微差别。以这种方式编写一些规则是有优势的，因为清晰明确的规则可能会粗暴、低效或不公平地运行。美国立法机构概括地制定成文法规则，部分原因是他们不能完全理解可能出现的情况，部分原因是他们通常信任法院能对规则作出细微而公正的解释。在需要对事实进行详细考虑的情况下，通常冗长的意见是必须的。一旦你开始阅读美国司法意见，你便会立即明白这一点。

结语

没有一个制度是完美的，包括我们的制度。但是，我可以说，美国基于案例的制度产生了相当统一的结果。例如，人们可以从美国联邦第九巡回上诉法院的裁决中看到这一点，我就是该法院的一员。由于它是上诉法院，我们让三名法官来判决每个案件。去年，我的法院判决了将近7,500起上诉案件。这些上诉案件中有将近5,000个案件非常容易。我们能够一致判决这些上诉案件，而无需律师作出口头辩论。略多于2,500件的上诉案件是困难的，我们为它们安排了口头辩论。即使在这些较困难的案件中，我估计法官们在大约百分之九十五的情况下也作出一致裁决。也就是说，在我们的基于案例的制度中——当中，司法裁决往往依赖于基于事实的详细比较来适用概括性的规则——我们具有相当高的确定性和可预测性。

我希望上述内容对你们有所帮助。谢谢你们给予的专注。■

* 此专家*连接*™的引用是：William A. Fletcher法官，在美国基于案例的制度中判决案件，《中国法律连接》，第7期，第7页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2019年12月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-7-201912-connect-9-william-fletcher。

英文原文由Andrew McKinley、Nathan Harpainter和Mei Gechlik博士编辑。本中文版本由刘佳音、王峥和朱新玥翻译，并由黄莉莎、周子皓和熊美英博士最后审阅。载于本文的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

本文改编自William A. Fletcher法官在与来自中国不同地区的近40位律师的会议上所发表的讲话。该会议于2019年10月10日在斯坦福法学院举行。所有注释均由编辑添加。

[1] U.S. Const. art. III, §1。该条规定："美国的司法权归属于一个最高法院，以及国会可能会时不时规定和设立的下级法院"。

[2] *见*Geographic Boundaries of United States Courts of Appeals and United States District Courts, United States Courts, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf。

[3] Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, Brennan Center. For Justice, 2018年3月23日，https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer（指出"在历史上的15次联邦司法弹劾中，最常见的指控是做出虚假陈述、对诉讼人或特别任命人员偏袒、在审判时醉酒，以及滥用蔑视权力"）。

[4] 关于被弹劾的联邦法官的完整列表，见联邦司法中心所提供的信息，https://www.fjc.gov/node/7496。

[5] 关于Fletcher法官母亲的杰出工作的更多信息，见Jordan Corrente Beck, CGCP专访：William A. Fletcher法官，《中国法律连接》，第1期，第62页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2018年6月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-1-201806-interview-1-jordan-corrente-beck。

[6] 关于对司法选举的历史和权衡的讨论，见David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265（2008）。

[7] 译者注：原文"Holding"的定义是："A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision（法院针对对其裁决至关重要的法律问题所作出的决定；从这裁决得出的原则）"。*见Holding*, Black's Law Dictionary（Bryan A. Garner ed., 11th ed. 2019），第879页。基于此定义，"holding"一词在此翻译为"裁决原则"。

Some Observations About Judicial Precedents*

Judge Diane P. Wood
Chief Judge, United States Court of Appeals for the Seventh Circuit

Abstract

Legal traditions around the world have for a long period of time been largely divided into two groups: civil-law and common-law traditions. The civil-law tradition has been understood as one seeking to govern society through the establishment of an organized, coherent, and complete body of codes and statutes that are written to achieve specific goals. In contrast, the common-law tradition has generally been seen as empirical, with an emphasis on judicial decisions that gradually form the body of its law.

However, there has been a growing convergence between these two different legal traditions. Many common-law jurisdictions now base their legal systems on a comprehensive body of statutes, but then use precedential case law decisions to further flesh out the meaning of these statutes. Conversely, many civil-law jurisdictions are now permitting certain courts to issue decisions that are, to some extent, binding on lower courts. Against this backdrop, the release of Guiding Cases designated by the Supreme People's Court of China as having *de facto* binding effect, is another example of a country seeking to improve its legal system by supplementing legislation with judicial decisions. It will be interesting to study and contrast China's approach with other countries that are similarly trying to strike a balance between these two approaches.

Opening Remarks

It is a great honor to have the opportunity to participate in this important conference on China's Case Guidance System and Belt and Road Initiative. For a long time, our understanding was that China's legal system followed the civil-law model, under which the written codes and laws are not only the primary sources of law, but in many ways the only sources of law. That is the philosophy shared by the other great civil-law jurisdictions in the world, including most of Continental Europe and practically all of South America. The civil-law system is typically contrasted with the common-law approach that developed over the last millennium in Great Britain, and then spread through the countries that were once British colonies and, in many cases, are still linked closely to the United Kingdom through the Commonwealth, which has 53 member states.[1] The United States is also one of the many countries with a common-law inheritance.

History and Key Differences Between the Civil-Law and the Common-Law Systems

I would like to begin by reviewing some of the history and key differences between the civil-law and the common-law systems. The first difference relates to the practice of writing comprehensive codes—a defining characteristic of the civil-law tradition. This dates back to the Roman era and the Code of Justinian (also known as the *Corpus Juris Civilis*).[2] Centuries later, nations around the world, inspired by these efforts, developed their own wide-reaching codes, often with the goal of effecting broad societal reform. This is essentially a "top-down" approach, in which the legislature provides guidance for the courts, and ultimately for all members of society, on as many areas of concern as possible.

In contrast, the common law developed from the ground up. Historically, it began with specific orders from the King (known as writs) about particular subjects. Over time, the need to adapt the writs to new situations led judges to adopt the practice of case-by-case adjudication that is emblematic of the common law today.

The histories of these two systems set up one of the dichotomies to which comparative law scholars frequently point: the civil law is *rational* (that is, it sets up an organized and coherent system with a goal in mind), and the common law is *empirical* (that is, it develops—somewhat haphazardly—over time as a result of experience).

That is not the only way in which these systems can be contrasted with one another. Here are some other examples:

- The main source of law in the civil law is *codes* (wide-reaching, comprehensive); the "pure" common-law system created its law through *judicial decisions*, which in turn are based on precedent and analogy. Even today, when written law plays a very large role in the major common-law countries, the statutes and even constitutional provisions are fleshed out in judicial decisions, and those judicial decisions are *precedential*.

Judge Diane P. Wood
Chief Judge, United States Court of Appeals for the Seventh Circuit

Judge Diane P. Wood is the Chief Judge of the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer in Law at the University of Chicago Law School. She was appointed to the Court of Appeals for the Seventh Circuit by President William J. Clinton on June 30, 1995; she became Chief Judge on October 1, 2013. She has been on the University of Chicago Law School faculty since 1981, serving as Associate Dean from 1989 through 1992 and, in 1990, becoming the first woman at the Law School to be honored with a named chair, the Harold J. and Marion F. Green Chair in International Legal Studies.

Chief Judge Wood attended the University of Texas at Austin, earning her B.A. in 1971 (highest honors) and her J.D. in 1975 (Order of the Coif). She clerked for Judge Irving L. Goldberg on the U.S. Court of Appeals for the Fifth Circuit (1975–76) and for Justice Harry A. Blackmun of the U.S. Supreme Court (1976–77). After a brief period at the Office of the Legal Adviser of the U.S. State Department, she was an associate at Covington & Burling between 1978 and 1980 and then, from 1980 to 1981, taught as an assistant professor at the Georgetown University Law Center. From September 1993 until she joined the Court, Chief Judge Wood was Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice.

Chief Judge Wood is a Fellow of the American Academy of Arts & Sciences and chairs its Council; she is also on the Council of the American Law Institute. For many years she was also a member of the American Bar Association ("ABA"). Through the ABA, the Brookings Institution Project on Civil Justice Reform, and other avenues, she has worked on law reform projects in the United States.

Chief Judge Wood's areas of scholarly interest include antitrust law, international trade and business, and federal civil procedure. Representative works include the antitrust casebook *Antitrust and Trade Regulation*, now with Douglas Melamed, Randal Picker, and Philip Weiser (4th ed. 1997; 5th ed. 2003; 6th ed. 2010; 7th ed. 2018); *Merger Cases in the Real World: A Study of Merger Control Procedures*, with Richard Whish (OECD 1994) (a study of transnational merger regulation); *'Unfair' Trade Injury: A Competition-Based Approach*, 41 Stan. L. Rev. 1153 (1989); and *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. Rev. 1079 (2005). In addition, she has presented papers for the World Trade Organization, for the Organisation for Economic Cooperation and Development, and for many other audiences around the world.

- The civil law is *top-down* and *forward-looking* (or *ex-ante*); the common law is *bottom-up* and *reactive* (or *ex-post*).

- The civil law is *inquisitorial*, meaning that the judge has the duty to ascertain the facts of the case; the common law is *adversarial*, meaning that this task is left to the advocates for each side.

- The civil law recognizes a fundamental distinction between "public" and "private" law. (The former includes constitutional, administrative, and criminal law; the latter encompasses civil and commercial codes.) The common law is not so clearly divided.

- Civil-law judges are not bound by *stare decisis* and precedent, whereas common-law judges are.

Growing Convergence Between the Civil-Law and the Common-Law Systems

The distinctions discussed above are to a degree based on stereotypes that have become increasingly outdated. We have witnessed significant convergence between the two legal traditions, and China's Guiding Cases System illustrates another way in which the differences are blurring. In fact, one scholar has quipped, "talking about the common law and the civil law is like stressing coffee and cream when cappuccino is the norm".[3] Here are some recent trends:

- There are many codes in common-law jurisdictions. Such countries, including the United States and its constituent states, increasingly rely on written law, rather than judge-made doctrine. This written law includes the text of written constitutions, statutes, and administrative regulations.[4]

- Many civil-law countries have established courts with the authority to issue binding judgments and to articulate rationales for those judgments that also are binding on lower courts, parliaments, and the like.[5] Countries such as Spain, Germany, Belgium,[6] and Korea[7] have established constitutional courts that can invalidate statutes, something previously unknown to the civil-law tradition.

- In addition, there are more and more specialized courts in common-law countries. These types of court are well known in the civil-law jurisdictions, but were less common

Chief Judge Wood speaks at the conference titled "China's Case Guidance System and Belt & Road Initiative: Practical Insights and Prospects", which was held in Beijing on March 30, 2018

"We have witnessed significant convergence between the two legal traditions, and China's Guiding Cases System illustrates another way in which the differences are blurring."

in common-law areas. In the states of the United States, you can now find specialized courts focusing on topics including employment, tax, commercial matters, criminal matters, and family law.[8]

One of the most interesting examples of convergence can be found in the European Union ("EU"), which has a distinct judicial branch headed by the European Court of Justice.[9] In 1958, when this court was first established, the European Economic Community (as it then was called) consisted solely of civil-law countries: Belgium, France, Germany, Italy, Luxembourg, and The Netherlands. It was not until 1973 that the United Kingdom joined, bringing with it the common-law tradition. Indeed, there are some features of the European Court that reflect that civil-law background, most notably the fact that its decisions are always issued by the court, not under the authorship of individual judges, and it does not permit separate opinions, whether dissenting or concurring.

Nevertheless, from its earliest days, the Member States of the EU have recognized that the European Court of Justice has the power to issue precedential opinions. It was the Court, rather than a treaty, that spelled out the fact that European law is supreme over Member State law (in a case called *Costa v. ENEL*),[10] and thus in the case of a conflict between a measure of EU law and national law, national law must yield. It was also the Court, and not a written law, that announced that the Treaty of Rome has direct effect on individual persons and legal entities (in the *Van Gend & Loos v. Netherlands Inland Revenue* decision).[11] In short, European lawyers study the decisions of the European Court of Justice in the same way that U.S. lawyers study the decisions of the U.S. Supreme Court. And just as the U.S. Supreme Court has established, through judicial decisions, such fundamental rules as the power of judicial review, the European Court of Justice has done the same.[12]

Europe thus gives us an example of a predominantly civil-law system taking some steps in the common-law direction. But the common law is also changing. Since the late 1960s, both the state courts and the federal courts in the United States have made some interesting changes in the law of judicial precedent. The classic common-law approach was to allow every case to have precedential effect, for whatever it was

worth. But that has changed in the United States. Today, at the federal level, many judgments of the U.S. Courts of Appeals are designated "non-precedential". The judges decide which cases will be so designated. The non-precedential judgments are based on well-established rules of law that simply need to be applied to a new set of facts. (Lawyers are entitled to call these decisions to a court's attention, but they recognize that the court is not bound to follow them.) The same is true in the state courts. In Illinois, for example, the state supreme court has a rule under which the intermediate appellate court may issue a precedential opinion only if one of two criteria are satisfied: either (1) the decision establishes a new rule of law or modifies, explains, or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the appellate court.[13] All other dispositions are non-precedential.

Concluding Remarks

While the examples given here of judicial precedents are certainly not the same as China's Guiding Cases, one can catch glimpses of the same processes, in which the court issuing the opinion makes a decision about whether it should be designated as precedential and as something that other courts in the country should follow. As China develops its Guiding Cases System in a manner suited to its own needs, it will be interesting to study which cases are designated as Guiding Cases, how this contributes to the uniformity and consistency of the work of the Chinese judiciary, and how it educates the public at large. Once again, I appreciate this opportunity to attend, to share these thoughts with you, and to learn more about these fascinating developments in China. ■

"Europe thus gives us an example of a predominantly civil-law system taking some steps in the common-law direction. But the common law is also changing. Since the late 1960s, both the state courts and the federal courts in the United States have made some interesting changes in the law of judicial precedent."

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1 A complete list of the 53 member states can be found at the website of the Commonwealth Secretariat, at https://thecommonwealth.org/member-countries.

2 *See* Stavros Perentidis, *Code of Justinian*, *in* Encyclopedia of the Middle Ages (André Vauchez ed., James Clarke & Co., 2002). *See also* The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text (Bruce W. Frier ed., Fred H. Blume trans., Cambridge University Press, 2016). An online version of Justice Blume's original translation is available at http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/books/book1/index.html.

3 Mirjan Damaŝka, The Faces of Justice and State Authority (Yale University Press, 1986) at 241, *See also* Vivienne O'Connor, *Common Law and Civil Law Traditions*, Int'l Network to Promote the Rule of Law, Mar. 2012, https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf.

4 *See, e.g.*, Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale J. Int'l L. 435 (2000); J. Lyn Etrikin, *The Death of Common Law*, 42 Harv. J. L. & Pub. Pol'y 351 (2019); Eva Steiner, *Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge Too Far?*, 25 Stat. L.R. 209 (2004); David Brooke, *The Eclipse of the Common Law*, 28 ILTR 157 (2010). *See also* Guido Calabresi, A Common Law For The Age Of Statutes (1982), at 1 (noting that, starting with the New Deal, the United States has "gone from a legal system dominated by the common law, divined by the courts, to one in which statutes, enacted by legislatures, have become the primary source of law").

5 *See, e.g.*, Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, Stanford Law School China Guiding Cases Project, June 19, 2013, http://cgc.law.stanford.edu/commentaries/7-judge-colneric; Toshiaki Iimura, Ryu Takabayashi, & Christoph Rademacher, *The Binding Nature of Court Decisions in Japan's Civil Law System*, Stanford Law School China Guiding Cases Project, June 30, 2015, http://cgc.law.stanford.edu/commentaries/14-Iimura-Takabayashi-Rademacher; Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example*, Stanford Law School China Guiding Cases Project, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/17-Laurent-Cohen-Tanugi; Laura Baccaglini, Gabriella di Paolo, & Fulvio Cortese, *Judicial Precedent in the Italian Legal System: A Shift Toward a Stare Decisis Model?*, Stanford Law School China Guiding Cases Project, Apr. 7, 2017, http://cgc.law.stanford.edu/commentaries/19-baccaglini-di-paolo-cortese.

6 *See, e.g.*, Josephine De Jaegere et al., *Exploring the Deliberative Performance of a Constitutional Court in a Consociational Political System: A Theoretical and Empirical Analysis of the Belgian Constitutional Court*, *European Consortium for Political Research*, European Consortium For Political Research, 2017, https://ecpr.eu/Filestore/PaperProposal/1c16e505-e983-44c9-9935-8c573f521ab0.pdf; Lucia Dalla Pellegrina et al., *Litigating Federalism: An Empirical Analysis of Decisions of the Belgian Constitutional Court*, 13 Eur. Const. L. Rev. 305 (2017); Patricia Popelier & Josephine De Jaegere, *Evidence-Based Judicial Review of Legislation in Divided States: the Belgian Case*, 4 The Theory And Prac. Of Legis. 187 (2016).

7 The jurisdiction of the Constitutional Court of Korea, including its authority to adjudicate the constitutionality of statutes, is stated in the Constitutional Court Act, promulgated on Aug. 5, 1988, amended most recently on Mar. 20, 2018, http://english.ccourt.go.kr/cckhome/images/eng/main/constitutional_court_act.pdf.

8 For a discussion of specialized courts in California and New York, *see, e.g.*, Robert V. Wolf, *California's Collaborative Justice Courts: Building A Problem-Solving Judiciary*, California Courts, http://www.courts.ca.gov/documents/California_Story.pdf; Quintin Johnstone, *New York State Courts: Their Structure, Administration, and Reform Possibilities*, 43 N.Y.L. Sch. L. Rev. 915, 916–21 (2001), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2913&context=fss_papers.

9 *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 251, May 9, 2008, 2008 O.J. (C115) 47.

10 Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585.

11 Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1.

12 *See, e.g.*, Mariolina Eliantonio, The Influence of the ECJ's Case Law in Italy, Germany and England (Europa Law Publishing, 2008).

13 Ill. Sup. Ct. R. 23.

关于司法先例的一些观察*

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摘要

长期以来，世界各地的法律传统大致分为两类：大陆法和普通法传统。大陆法传统一直被理解为通过建立有组织的、连贯的、完整的、旨在实现特定目标的法典和法律条文来管理社会的一种传统。相反，普通法传统通常被认为是经验性的，着重于司法裁决而这些裁决逐渐形成了法律。

但是，这两种不同的法律传统之间的融合越来越多。现在，许多普通法管辖区的法律制度都以全面的法律条文为基础，但随后用具先例性的裁判进一步充实这些法律条文的含义。相反，许多大陆法管辖区现在允许某些法院作出在某种程度上对下级法院具有约束力的裁决。在这背景下，中国最高人民法院发布其指定为具有事实约束力的指导性案件，是一个国家尝试通过以司法裁判补充立法来改善其法律制度的另一个例子。研究中国的做法并将这做法与其他尝试在这两种传统之间寻求平衡的国家进行对比，将会很有趣。

开场发言

很荣幸有机会参加此次关于“中国案例指导制度和‘一带一路’倡议”的重要会议。长期以来，我们的理解是，中国的法律制度遵循大陆法系的模式，在此之下，成文的法典与法律不仅是主要的法律渊源，而且在许多情况下是唯一渊源。这是世界其他重要大陆法系管辖区所共有的理念，包括欧洲大陆大部分地区和几乎整个南美洲。大陆法系通常与普通法系相比较，后者是过去一千年在大不列颠发展起来的，之后传播到曾是英国殖民地的国家，并且在很多情况下，这些国家仍然通过有53个成员国的英联邦与英国紧密相连。[1] 美国也是继承了普通法系的众多国家之一。

大陆法系与普通法系的历史与关键差异

我想先回顾一下大陆法系与普通法系的一些历史及两者的关键差别。第一个差别是关于编撰综合性法典的实践——大陆法系传统的一个定义性特质。这可追溯到罗马时代和《查士丁尼法典》（Code of Justinian）（亦被称为《国法大全》（*Corpus Juris Civilis*））。[2] 几个世纪后，受到这些尝试启发的世界各国制定了它们各自影响深远的法典，其目标往往是为了实现广泛的社会变革。这本质上是一种“自上而下”的方式，即立法机关在尽可能多的关注领域中，为法院且最终为所有社会成员提供指导。

相反，普通法系是自下而上发展起来的。从历史上看，它始于国王关于特定事宜的具体命令（称为令状）。随着时间的推移，由于需要使令状适应新情况，这引导了法官们采用逐案裁决的做法，而这做法是当今普通法系的象征。

这两种体系的历史建构了比较法学者经常指出的一种二分法：大陆法是“理性的”（即，它怀着一个目标而建立了一套有组织且连贯一致的体系），普通法是“经验性的”（即，它是随着时间推移且基于经验而发展，当中多少有些偶然性）。

这并非是两种体系相互比较的唯一方式。以下是一些其他的例子：

- 大陆法系主要的法律渊源是“法典”（广泛而全面）；“纯粹的”普通法系通过“司法裁决”创造它的法律，而这些裁决是基于先例和类比。即使今天，当成文法在主要的普通法系国家扮演着非常重要的角色，法律条文甚至宪法性规定仍在司法裁决中得到充实，且这些司法裁决具有“先例性”。
- 大陆法系是“自上而下”且“前瞻的”（或“事前的”）；普通法系是“自下而上”且“反应式的”（或事后的）。
- 大陆法系是“审问性的”，意思是法官有责任查明案件事实；普通法系是“争辩性的”，意思是这一任务留给了各方律师。
- 大陆法系承认“公法”和“私法”之间的根本区别（前者包括宪法、行政法和刑法；后者则包含民法典和商法典）。普通法并没有如此清晰的划分。
- 大陆法系法官不受遵循先例原则和先例的约束，而普通法法官则受其约束。

大陆法系和普通法系日益融合

上面讨论的区别在一定程度上是基于益发过时的刻板印象。我们已目睹了这两种法律传统之间的重大融合，

Diane P. Wood 法官
美国联邦第七巡回上诉法院首席法官

Diane P. Wood法官是美国联邦第七巡回上诉法院的首席法官，也是芝加哥大学法学院的高级法律讲师。1995年6月30日，威廉·J·克林顿总统任命她为第七巡回上诉法院法官，她于2013年10月1日成为首席法官。自1981年以来，她一直在芝加哥大学法学院任教，并于1989年至1992年间担任副院长。1990年，她成为该法学院首位获得冠名教授荣誉的女性，被任命为Harold J.和Marion F. Green国际法律研究讲座教授。

Wood首席法官早年就读于德克萨斯大学奥斯汀分校，于1971年获得文学（最高荣誉）学士学位，1975年获得法律博士学位（J.D.），并入选“白帽协会”（Order of the Coif）。1975–1976年间，她在美国联邦第五巡回上诉法院担任Irving L. Goldberg法官的助理；1976–1977年间，她担任美国联邦最高法院Harry A. Blackmun大法官的助理。在美国国务院法律顾问办公室短暂任职后，她于1978–1980年间在美国科文顿·柏灵律师事务所（Covington & Burling）担任律师，随后于1980–1981年间在乔治城大学法律中心担任助理教授。从1993年9月起至她入职美国联邦第七巡回上诉法院之前，Wood首席法官是美国司法部反垄断局副助理司法部长。

Wood首席法官是美国艺术与科学学院（American Academy of Arts & Sciences）院士，并担任其理事会主席。她也是美国法律研究所理事会（Council of the American Law Institute）成员。多年来，她一直是美国律师协会（American Bar Association，“ABA”）的会员。通过ABA和布鲁金斯学会民事司法改革项目（Brookings Institution Project on Civil Justice Reform）及其他途径，她参与了多项美国法律改革项目。

Wood首席法官的学术兴趣领域包括反垄断法、国际贸易与商务以及联邦民事诉讼程序。代表作品包括：与Douglas Melamed、Randal Picker和Philip Weiser合著的题为《反垄断与贸易监管》（Antitrust and Trade Regulation）的反垄断案例汇编（1997年第4版、2003年第5版、2010年第6版、2018年第7版）；与Richard Whish合著的《现实世界中的并购案例：并购控制程序研究》（Merger Cases in the Real World: A Study of Merger Control Procedures）（经济合作与发展组织（OECD）1994年出版；这是一项关于跨国并购监管的研究）；《“不公平”的贸易伤害：一种基于竞争的方法》（‘Unfair’ Trade Injury: A Competition-Based Approach, 41 Stan. L. Rev. 1153 (1989)）；及《处于21世纪世界的18世纪宪法》（Our 18th Century Constitution in the 21st Century World, 80 N.Y.U. L. Rev. 1079 (2005)）。此外，她还为世界贸易组织、经济合作与发展组织和许多世界各地的观众做过论文报告。

而中国的指导性案例制度说明了这些差异正以另一种方式而变得模糊。事实上，一位学者曾打趣道：“谈论普通法和大陆法就像在卡布奇诺咖啡已成为标准时强调咖啡和奶油一样。”[3] 以下为最近的一些趋势：

- 在普通法管辖区有许多法典。这些国家，包括美国及其组成州，越来越依赖成文法，而非法官制定的原则。这里所指的成文法包括成文宪法、法律条文和行政法规的文本。[4]

- 很多大陆法系国家已建立了有权发布具有约束力的判决兼阐明这些判决的理由的法院，而这些理由亦对下级法院、议会等有约束力。[5] 比如，西班牙、德国、比利时[6]和韩国[7]等国已建立了能使法律条文无效的宪法法院，这是过去在大陆法系传统下所没有的。

- 此外，在普通法系国家有越来越多的专门法院。这类法院在大陆法系管辖区是常见的，但在普通法系地区则较为少见。在美国各州，你现在能找到专注于就业、税收、商事、刑事和家事法等主题的专门法院。[8]

一个最有趣的融合的例子可以在欧洲联盟（“欧盟”）找到。欧盟有一个由欧洲法院领导的独特的司法机构。[9] 1958年，当该法院最初成立时，欧洲经济共同体（当时的称谓）仅由大陆法系国家组成：比利时、法国、德国、意大利、卢森堡和荷兰。直到1973年英国加入，才为它带来了普通法传统。确实，欧洲法院的一些特征反映了该大陆法背景，最明显的事实是它的裁决总是以法院而不是法官个人的名义发布，并且不允许分开的意见，无论是反对还是同意的意见。

“我们已目睹了这两种法律传统之间的重大融合，而中国的指导性案例制度说明了这些差异正以另一种方式而变得模糊。”

尽管如此，欧盟成员国从欧洲法院成立之初就已承认了该法院有权发布先例性意见。是该法院而非条约指出了欧洲法高于成员国国内法的这一事实（*Costa诉ENEL*）；[10] 因此当一项欧盟法措施和国内法发生冲突时，国内法必须让步。也是该法院而非成文法宣布了《罗马条约》可直接影响个人和法律实体（*Van Gend & Loos诉Netherlands Inland Revenue*的裁决）。[11] 简而言之，欧洲律师研究欧洲法院裁决的方式与美国律师研究美国联邦最高法院裁决的方式相同。正如美国联邦最高法院通过司法裁决确立了司法审查权等基本规则一样，欧洲法院也这样做了。[12]

2018年3月30日，Wood首席法官在北京举行的题为“中国案例指导制度和‘一带一路’倡议：实务见解与前景”的会议上发言

> ***“因此，欧洲为我们提供了一个主要是大陆法的体系往普通法方向进发的例子。然而，普通法也正在改变。自1960年代末以来，美国的州法院和联邦法院都对司法先例的法律做了一些有趣的改变。”***

因此，欧洲为我们提供了一个主要是大陆法的体系往普通法方向进发的例子。然而，普通法也正在改变。自1960年代末以来，美国的州法院和联邦法院都对司法先例的法律做了一些有趣的改变。普通法的经典做法是允许每个案件都具有先例效力，无论其价值是什么。但这在美国已改变了。今天，在联邦一级，美国上诉法院的许多判决都被指定为“非先例性的”。法官决定哪些案件将被如此指定。“非先例性的”判决是基于已成熟完善的法律规则，而这些规则只需被适用于一组新的事实（律师有权提请法院注意这些裁决，但他们明白法院不受这些裁决约束）。州法院也是如此。例如，在伊利诺伊州，州最高法院规定中级上诉法院只有在满足下列两项标准之一时才可发布先例性意见：（1）该裁决确立了一项新的法律规则，或修改、解释或批判了现有法律规则；（2）该裁决解决、制造或避免了上诉法院内明显的权威冲突。[13] 所有其他处置都是非先例性的。

结语

虽然这里给出的司法先例的例子与中国的指导性案例肯定不同，但人们能瞥见同样的过程。在这一过程中，发布裁判的法院就是否应将其指定为先例且该国其他法院应遵循这裁判而作出决定。随着中国以适应自身需要的方式发展指导性案例制度，研究哪些案件被指定为指导性案例、这将如何有助于中国司法机构工作的统一性和一致性，以及如何教育广大公众都将会十分有趣。我再次感谢有机会参与这次会议，与你们分享这些想法，并对中国这些引人入胜的发展得到更多的了解。■

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英文原文由Straton Papagianneas、Jeremy Schlosser、Nathan Harpainter 和Mei Gechlik博士编。本中文版本由张磊、周子皓翻译，并由赵炜和熊美英博士最后审阅。载于本文的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

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[1] 53个成员国的完整列表可以在英联邦秘书处的网站上找到，网站是：https://thecommonwealth.org/member-countries。

[2] 见Stavros Perentidis, *Code of Justinian*, 载于Encyclopedia of the Middle Ages（André Vauchez 编，James Clarke & Co.，2002）。亦见The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text（Bruce W. Frier编，Fred H. Blume译，Cambridge University Press，2016）。Justice Blume的原始翻译在线版本可在此网站获得：http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/books/book1/index.html。

[3] Mirjan Damaška, The Faces of Justice and State Authority（Yale University Press，1986），第241页。亦见Vivienne O'Connor, *Common Law and Civil Law Traditions*, Int'l Network to Promote the Rule of Law，2012年3月，https://www.fjc.gov/sites/default/files/2015/Common%20and%20Civil%20Law%20Traditions.pdf。

[4] 见，例如，Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 Yale J. Int'l L. 435（2000）；J. Lyn Etrikin, *The Death of Common Law*, 42 Harv. J. L. & Pub. Pol'y 351（2019）；Eva Steiner, *Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge Too Far?*, 25 STAT. L.R. 209（2004）；David Brooke, *The Eclipse of the Common Law*，28 ILTR 157（2010）。亦见Guido Calabresi, A Common Law For The Age Of Statutes（1982），第1页（该文指出，从新政开始，美国"已从由普通法支配的、法院使之变得非凡的法律制度，变成一个立法机关制定的法律条文已经成为主要法律渊源的法律制度"。）

[5] 见，例如，Ninon Colneric, 无约束性先例的法律体系中的案例指导：以德国为例，斯坦福法学院中国指导性案例项目，2013年6月19日，http://cgc.law.stanford.edu/zh-hans/commentaries/7-judge-colneric；饭村敏明、高林龙、Christoph Rademacher, 日本大陆法体系中法院决定的拘束性，斯坦福法学院中国指导性案例项目，2015年6月30日，http://cgc.law.stanford.edu/zh-hans/commentaries/14-Iimura-Takabayashi-Rademacher；Laurent Cohen-Tanugi, 无具约束性的判例的法律制度中之案例法：法国的例子，斯坦福法学院中国指导性案例项目，2016年2月29日，http://cgc.law.stanford.edu/zh-hans/commentaries/17-Laurent-Cohen-Tanugi；Laura Baccaglini、Gabriella di Paolo、Fulvio Cortese, 意大利法律制度中的司法判例：转向遵循先例的模式？，斯坦福法学院中国指导性案例项目，2017年7月30日，http://cgc.law.stanford.edu/zh-hans/commentaries/19-baccaglini-di-paolo-cortese。

[6] 见，例如，Josephine De Jaegere等，*Exploring the Deliberative Performance of a Constitutional Court in a Consociational Political System: A Theoretical and Empirical Analysis of the Belgian Constitutional Court, European Consortium for Political Research*, European Consortium For Political Research，2017，https://ecpr.eu/Filestore/PaperProposal/1c16e505-e983-44c9-9935-8c573f521ab0.pdf；Lucia Dalla Pellegrina等，*Litigating Federalism: An Empirical Analysis of Decisions of the Belgian Constitutional Court*，13 Eur. Const. L. Rev. 305（2017）；Patricia Popelier、Josephine De Jaegere，*Evidence-Based Judicial Review of Legislation in Divided States: the Belgian Case*，4 The Theory And Prac. Of Legis. 187（2016）。

[7]《宪法法院法》规定了韩国宪法法院的管辖权，包括其裁定法律条文的合宪性的权力。见《宪法法院法》，1988年8月5日颁布，最近于2018年3月20日修正，http://english.ccourt.go.kr/cckhome/images/eng/main/constitutional_court_act.pdf。

[8] 关于对加利福尼亚州和纽约州专门法院的讨论，见，例如，Robert V. Wolf, *California's Collaborative Justice Courts: Building A Problem-Solving Judiciary*, California Courts，http://www.courts.ca.gov/documents/California_Story.pdf；Quintin Johnstone, *New York State Courts: Their Structure, Administration, and Reform Possibilities*，43 N.Y.L. Sch. L. Rev. 915，第916–21页（2001），https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2913&context=fss_papers。

[9] 见Consolidated Version of the Treaty on the Functioning of the European Union，第251条，2008年5月9日，2008 O.J. (C115) 47。

[10] Case 6/64，*Flaminio Costa诉E.N.E.L.*，1964 E.C.R. 585。

[11] Case 26/62，*NV Algemene Transport- en Expeditie Onderneming van Gend & Loos诉Netherlands Inland Revenue Administration*，1963 E.C.R. 1。

[12] 见，例如，Mariolina Eliantonio，The Influence of the ECJ's Case Law in Italy, Germany and England（Europa Law Publishing，2008）。

[13] Ill. Sup. Ct. R. 23。

How Guiding Case No. 49 Prompted Codification of Burden-Shifting Principles to Increase Protection of Trade Secrets*

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Abstract

China has taken strides to increase protection of intellectual property. Generally, these efforts have been successful. However, in some areas of intellectual property where China's discovery procedures are limited, intellectual property owners have difficulty in enforcing their rights. Courts and the national legislature in China have experimented with mechanisms for shifting the burden of proof in intellectual property disputes to better protect intellectual property rights. Recent developments, including data from specialized intellectual property courts in China, suggest that such efforts have resulted in greater protection of plaintiffs' intellectual property rights.

Introduction

In 2018, China spent RMB 1,965.7 billion in research and development, an increase of 11.6% from 2017.[1] In order to ensure that this significant investment in technology continues to bring dividends, strong protections are needed. Protection for patents in China is growing, as evidenced by the World Intellectual Property Organization's statistics that over 1.3 million patents were filed with the State Intellectual Property Office of China (renamed "China National Intellectual Property Administration" in August 2018[2]) in 2017, the highest number in the world during that period,[3] and by the nearly six-fold increase in intellectual property judicial decisions from 2010 to 2018.[4]

While improvements in patent protections are welcome, many important technologies are protected through other means such as trade secrets. Trade secrets are particularly important in protecting inventions that are not easily reverse engineered, such as artificial intelligence.[5] Trade secrets are thus highly important for protecting innovations.[6] It is, therefore, crucial for China to demonstrate improvements in the protection of trade secrets.

Chinese law does provide substantive protections for trade secrets; however, China's limited discovery mechanisms have impeded the efficacy of these protections. Fortunately, some of these deficiencies have been remedied by a recent trend of shifting the burden of proof from the plaintiff to the defendant in trade secrets disputes, with the related principles formally announced by the Supreme People's Court in Guiding Case No. 49 (*SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Infringement of a Computer Software Copyright*)[7] and ultimately codified as Article 32 of the *Anti-Unfair Competition Law of the People's Republic of China* (the "*Anti-Unfair Competition Law*") (see below).[8] Data from China's intellectual property courts[9] show that the adoption of similar burden-shifting rules related to patents has led to better protection of patent rights.[10] This experience suggests the potential significance of burden-shifting rules in the protection of trade secrets and other types of intellectual property, and the important role that Guiding Cases can play in developing China's intellectual property law.

From *SHI v. Huaren* (2007) to Guiding Case No. 49 (2015)

The trend of shifting the burden of proof from the plaintiff to the defendant in trade secret disputes began in a lawsuit brought around 2006 by SHI Honglin ("SHI") against Taizhou Huaren Electronic Information Co., Ltd. ("Huaren") for a possible theft of source code. Huaren was selling software based on source code remarkably similar to SHI's at a significantly lower price than that of SHI's products. In order to succeed in his lawsuit against Huaren, SHI, the plaintiff, had to prove that the source code of his computer software and that of Huaren's were the same or substantively the same.

According to discovery rules then in effect in China, the plaintiffs in cases involving trade secrets could not request that the defendants produce documents that might show evidence proving misappropriation. These rules did not present problems for cases in which the plaintiffs possessed clear evidence of misappropriation, such as a hack by defendants into the plaintiffs' network systems that left direct evidence. But for cases where the plaintiffs did not have direct evidence of misappropriation, the flaws in these discovery mechanisms were exposed.

That was exactly the challenge facing SHI. When the High People's Court of Jiangsu Province requested that the source code be presented for inspection, Huaren refused, expressing

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Before joining Microsoft, Ms. Bostick served as a federal prosecutor for over 11 years in three offices, including the offices in the Southern District of New York and the Northern District of California, as well as the Department of Justice office in Washington D.C. She is a member of the New York, California, and Washington D.C. bars.

"Chinese law does provide substantive protections for trade secrets; however, China's limited discovery mechanisms have impeded the efficacy of these protections. Fortunately, some of these deficiencies have been remedied by a recent trend of shifting the burden of proof from the plaintiff to the defendant in trade secrets disputes […]"

concerns about the loss of trade secrets and stating that it had stored the source code on a self-encrypted microcontroller that prevented the court or any other party from reading the code. In response, the court rendered the second-instance judgment,[11] essentially ruling that when an alleged intellectual property infringer refused to produce evidence without providing an adequate reason, then the burden would shift from the property holder to the alleged infringer to prove that the alleged infringer had not infringed.

The decision was selected by the Supreme People's Court for release in 2015 as Guiding Case No. 49. The "Reasons for the Adjudication" section of Guiding Case No. 49 captures the above-mentioned ruling well by stating (1) that SHI's evidence could prove that his software and Huaren's software were substantively the same, and "[therefore,] Huaren Company should bear the obligation of providing evidence to the contrary" and (2) that because Huaren could not provide contrary evidence to prove its assertion, it "should [therefore] bear the unfavorable consequences of failing to adduce evidence". The "Main Points of the Adjudication" of Guiding Case No. 49, as prepared by the Supreme People's Court, reads as follows:[12]

> In a situation where a defendant refuses to provide the source program or the object program of the allegedly infringing software, and, due to technical limitations, the object program cannot be read directly from the allegedly infringing product, if the design defects of the plaintiff's software and [those of] the defendant's software are basically the same, and if the defendant has no proper reasons to refuse to provide the

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In addition to her work on behalf of clients before courts, arbitration tribunals, and Chinese government agencies, Ms. Wang has served as an expert witness or as consulting counsel in numerous proceedings in different jurisdictions, including the United States, Hong Kong, and Singapore, regarding issues of Chinese law. Completely bilingual in English and Chinese and with a background in business administration, she is a trusted counsel to many of the world's leading international companies.

> source program or the object program of his[13] software for direct comparison, [the court] may, in consideration of the plaintiff's objective difficulty in adducing evidence, determine that the plaintiff's computer software and that of the defendant are substantively the same and that the defendant bears liability for infringement.

The "Main Points of the Adjudication" section of each Guiding Case is a section prepared by the Supreme People's Court to lay out the principles upon which the underlying decision of the Guiding Case was based. According to Article 9 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (the "*Detailed Implementing Rules*"), courts handling similar subsequent cases are expected to follow these main points (see **Sidebar 1**).[14]

From Cases Decided After *SHI v. Huaren* to Codification in 2019

An examination of events that occurred between the final decision of *SHI v. Huaren* and the codification of burden-shifting principles underlying the *SHI v. Huaren* decision reveals that remarkable efforts were made by legal actors in China during this 12-year period to advance the protection of intellectual property beyond trade secrets.

Regional Courts Were Likely Inspired by SHI v. Huaren

The path from *SHI v. Huaren* to Guiding Case No. 49 ran through a few other cases that were apparently inspired by the decision of *SHI v. Huaren*. Three cases are illustrative. In 2008, similar burden-shifting principles were applied by the High People's Court of Guangdong Province in a dispute over infringement of a computer software copyright in which the defendant was urged to present evidence.[15] In 2012, the High People's Court of Shanghai Municipality applied similar principles in a dispute over a vertical monopoly agreement.[16]

A more recent example is a 2013 case, in which the High People's Court of Zhejiang Province held a software licensee, who refused to produce the source code of the software, liable for pirating and selling licensor's software. The court ruled that when a defendant refuses to hand over the source code without a reasonable justification, the court can look to the evidence submitted by the plaintiff (i.e., the licensor) as well as indirect and circumstantial evidence to determine whether the defendant infringed upon the plaintiff's rights.[17]

Adoption of Burden-Shifting Principles in the Broader Intellectual Property Context Produces Results

Apart from the possibility of being inspired by *SHI v. Huaren*, the courts of the above three decisions likely felt confident about applying the burden-shifting principles because the principles had been used to resolve a similar issue in Chinese patent law regarding the protection of patented methods.

Chinese law recognizes patents for both products and methods. When an infringement case is brought against an allegedly infringing product, the evidence of infringement, the product itself, is relatively easy to procure and present to the court. However, when the alleged infringement is related to a method, it is often difficult for the owner of a patented method to prove that his method has been infringed upon.

To resolve this problem, in 2000, the Standing Committee of the National People's Congress passed an amendment to the 1992 version of the *Patent Law of the People's Republic of China* (the "*Patent Law*") to specify, *inter alia*:

> Where a patent infringement dispute involves an invention patent for a **method for the manufacture of a new product**, the unit or individual that manufactures the same product should **provide evidence** [showing] that the method for the manufacture of its/his product is different from the patented method […].(emphasis added)[18]

The above provision, which came into effect on July 1, 2001 (and is now part of Article 61 of the current *Patent Law*),[19] laid a good foundation for the burden-shifting mechanism

Sidebar 1:

Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"

Article 9

Where a case being adjudicated is, in terms of the basic facts and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level **should refer to the "Main Points of the Adjudication"** of that relevant Guiding Case to render its ruling or judgment (emphasis added).

Sidebar 2:

Several Provisions of the Supreme People's Court on Evidence in Civil Lawsuits

Article 4

In the infringement lawsuits listed below, the **burden of proof** is borne in accordance with the following provisions:

(1) [In] a patent infringement lawsuit arising from an invention patent for a method for the manufacture of a new product, the unit or individual that manufactures the same product **bears the burden to prove** that the method for the manufacture of its/his product is different from the patented method; (emphasis added)

but falls short of providing any explicit reference to the term "burden of proof". In December 2001, the Supreme People's Court issued a judicial interpretation to explicitly provide that in circumstances described above, an alleged infringer has the burden to prove that the method for the manufacture of his product is different from the patented method. In other words, the alleged infringer has the burden to prove that he did not infringe upon the invention patent for the method (see **Sidebar 2**).[20]

This judicial interpretation was followed by the Supreme People's Court's issuance of an important document in 2012 and another judicial interpretation in 2016.

In the 2012 document, the Supreme People's Court urged all of the courts in China to extend the burden-shifting mechanism to some situations regarding method patents, regardless of whether the method is for the manufacture of a new product (see **Sidebar 3**).[21] In the same document, the Supreme People's Court does strike a good balance: while emphasizing the need to reduce the method patentee's burden of proof, the highest court also exhorted all of the courts in China to pay attention to "protecting the interests of respondents [i.e., the alleged infringers] to prevent a party from abusing the evidence preservation system to illegally obtain trade secrets of others".

In 2016, a judicial interpretation was released to essentially provide that when the plaintiff has exhausted reasonable efforts to show the interests acquired by the alleged infringer from an alleged patent infringement and the alleged infringer fails to rebut the claim, the court may determine the amount of interests acquired (and, thereby, the amount of damages), based on the plaintiff's evidence.[22]

Sidebar 3:

Opinions on Several Issues Concerning Fully Using the Functional Role of the Adjudication of Intellectual Property Rights in Driving the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of the Economy

Paragraph 15:

[…In situations] where a product obtained using a patented method **is not a new product,** if the patentee can prove that the alleged infringer has manufactured the same product but cannot prove, after reasonable efforts, that the alleged infringer has indeed used the patented method, and if, based on the specific circumstances of the case together with known facts and daily life experiences, it can be determined that it is highly probable that the same product is produced by the patented method, [the court] may, in accordance with the relevant provisions of the judicial interpretation on evidence in civil lawsuits, no longer require the patentee to provide further evidence, [but require] **the alleged infringer to provide evidence [showing] that his manufacturing method is different from the patented method**. [...] (emphasis added).

"[…] it is worth noting that changes in the burden of proof have indeed empowered patent holders to effectively protect their technology. The significance of these changes to technology companies cannot be overstated."

The impact of the rules examined above is evident in the significant increase in the amount of damages awarded by China's intellectual property courts. These courts have adopted the approaches stated in these rules, along with other discovery mechanisms that look more like discovery mechanisms in developed jurisdictions. Among these improved mechanisms are granting litigants the power to request subpoena-like investigation orders and adopting rules similar to those underlying Guiding Case No. 49 to shift the burden of proof from the plaintiff to the defendant when the plaintiff has exhausted reasonable efforts to prove its case.

The significant increase in the amount of damages awarded by China's intellectual property courts was mainly revealed by a 2017 report.[23] According to the report, before the intellectual property courts were created, the average amount of total damages awarded in individual patent infringement cases nationwide was RMB 800,000. In contrast, the Beijing Intellectual Property Court, which applies the burden-shifting rules, awards on average RMB 1.41 million (over USD 200,000) in damages for individual patent infringement cases, and in December 2016, in its *Watchdata System Co., Ltd. v. Hengbao Co., Ltd.* decision,[24] the court issued a record award of RMB 50 million.

Understandably, the increases in damage awards may also be attributed to other improvements such as the presence of more qualified judges in the specialized intellectual property courts. Yet it is worth noting that changes in the burden of proof have indeed empowered patent holders to effectively protect their technology. The significance of these changes to technology companies cannot be overstated. Unlike physical theft, the cost of intellectual property piracy is very low for the thief, while exacting high costs on intellectual property owners. To incentivize good behavior, hefty punishments are needed to rectify this. The high damages awarded by the Beijing Intellectual Property Court do just that.

Codification of Burden-Shifting Principles Regarding Trade Secrets

In April 2019, the *Anti-Unfair Competition Law* was amended to include a new provision (i.e., Article 32), which covers burden-shifting principles such as those

found in Guiding Case No. 49 (see **Sidebar 4**).[25] While it is difficult to say with certainty the origin of this amendment, the success of the burden-shifting principles in judicial practice, as discussed above, likely gave the national legislature confidence to codify the principle.

Concluding Remarks

The journey from the adjudication of *SHI v. Huaren*—the underlying case of Guiding Case No. 49—to the codification of the burden-shifting principles, upon which *SHI v. Huaren* was based, is quite remarkable. The journey seems to have ended, but a few interesting issues are worthy of attention.

The Role of Local Courts in Helping Formulate Rules at the National Level

Most of the rules discussed in this article are national rules, either legislation enacted by the National People's Congress or judicial interpretations/documents issued by the Supreme People's Court. Courts in China that are below the Supreme People's Court cannot directly formulate rules with legal effect. However, the fact that *SHI v. Huaren* has apparently inspired several subsequent cases, that it was ultimately selected and reissued as Guiding Case No. 49, and that the Guiding Case led to the codification of the burden-shifting principles reveals that Guiding Cases are an important channel through which local courts' voices can be heard in the development of important rules.

The Value of Guiding Case No. 49 Has Not Been Reflected in Citations in Subsequent Cases

Despite the significance of Guiding Case No. 49, the authors have not been able to find a subsequent case that refers to Guiding Case No. 49.

One plausible reason is that the impact of the Guiding Case may have already been felt in disputes before lawsuits are brought. For example, if it is understood that the defendant bears the burden of proving that the trade secret was obtained through legitimate means, then the defendant will have less leverage and be more likely to settle before a lawsuit is brought.[26]

Another plausible reason is that, when a trade secret lawsuit occurs, there is actually no need to cite Guiding Case No. 49, given that the burden-shifting principles are now stated in Article 32 of the *Anti-Unfair Competition Law*.

That said, when there is a lawsuit that is outside the scope of Article 32 (e.g., copyright claims for software where infringement of a copyright in the source code is alleged) or that involves conduct that occurred before Article 32 was adopted, Guiding Case No. 49 could provide guidance and should still be cited. The fact that no such subsequent cases have been found reveals a bigger problem to be discussed in the following paragraphs.

Guiding Cases Have Been Underused and Increased Citation of These Cases Would Benefit Inventors

The reluctance to cite Guiding Cases is related in part to an interpretation of the first set of rules on Guiding Cases issued in 2010. There were questions about the proper interpretation of a requirement that courts *canzhao* (often translated as "refer to") the Guiding Cases in their judgments or rulings. It was unclear the extent to which courts could quote, cite, or reference the Guiding Cases in their decisions.[27] This ambiguity and judges' concerns about being held accountable for incorrect references to Guiding Cases were major factors leading to infrequent citations of Guiding Cases in subsequent cases.[28]

In response, in 2015, the Supreme People's Court issued the *Detailed Implementing Rules* to provide some clarifications, indicating that courts can cite the Guiding Cases as persuasive evidence for the reasoning in their judgments.[29] Since then, the number of subsequent cases using Guiding Cases has gradually increased, with a 2018 study identifying, by the end of 2017, 1,281 subsequent cases that explicitly mention Guiding Cases and these subsequent cases were adjudicated in different parts of the country. The study concluded that "the preliminary

Sidebar 4:

Article 32 of the *Anti-Unfair Competition Law*

In the civil trial proceedings for infringement of a trade secret, if the right holder of the trade secret provides preliminary evidence to prove that he has taken confidentiality measures for the claimed trade secret and reasonably indicates that the trade secret has been infringed upon, **the alleged infringer should prove** that the trade secret claimed by the right holder is not a type of trade secret as provided for in this Law.

Where the right holder of a trade secret provides preliminary evidence to reasonably indicate that the trade secret has been infringed upon, and provides any of the following evidence, **the alleged infringer should prove** that he did not have any act infringing upon the trade secret:

(1) There is evidence indicating that the alleged infringer has a channel or an opportunity to obtain the trade secret and that the information used [by the alleged infringer] is, in substance, the same as the trade secret;

(2) There is evidence indicating that the trade secret has been disclosed or used by the alleged infringer, or is at risk of being disclosed or used [by the alleged infringer];

(3) There is other evidence indicating that the trade secret has been infringed upon by the alleged infringer.

(emphasis added)

> ***"[…] the fact that* SHI v. Huaren *[…] was ultimately selected and reissued as Guiding Case No. 49, and that the Guiding Case led to the codification of the burden-shifting principles reveals that Guiding Cases are an important channel through which local courts' voices can be heard in the development of important rules."***

success of [Guiding Cases] seems to have provided fertile ground for the propagation of a case culture in China".[30]

While the above study is encouraging, approximately a third of those 1,281 subsequent cases mention Guiding Case No. 24, which is about damages associated with traffic accidents.[31] The same study only found 10 subsequent cases mentioning intellectual property, suggesting that Guiding Cases that deal with the minutiae of decisions or with fact patterns that are not as common or are more technical, are less likely to be cited by virtue of lack of opportunity. Encouragingly, the number of subsequent cases mentioning intellectual property Guiding Cases has reportedly increased to 51 by June 2019.[32] This trend, if it continues, would benefit inventors.

In summary, Guiding Case No. 49 illustrates that the importance of a Guiding Case may go beyond citations in subsequent cases, to the extent of helping bring about the codification of important legal principles. Yet, it is our hope that the use of the Guiding Cases, especially those related to intellectual property, continues to grow nationwide so that uniform application of law—a goal explicitly identified by the Supreme People's Court—can be achieved.[33] This is a goal that the three intellectual property courts, with their limited jurisdiction, cannot achieve, despite the practical significance of their judgments that is reflected in their impressive role in adopting burden-shifting rules to protect intellectual property. Chinese authorities have demonstrated utmost efforts in the recent legislative changes to intellectual property rules. We look forward to seeing similar efforts in increasing the citations of China's valuable Guiding Cases. ■

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1 National Bureau of Statistics of China, Statistical Communiqué of the People's Republic of China on the 2018 National Economic and Social Development, Feb. 28, 2019, http://www.stats.gov.cn/english/PressRelease/201902/t20190228_1651335.html. While it is not clear from the report what activities are categorized as "research and development", the activities are likely related to China's economic and social development, which is the focus of this report.

2 The change in name is reflected on the official website of the China National Intellectual Property Administration, at http://english.cnipa.gov.cn/aboutcnipa/index.htm. *See also China: SIPO has been Renamed to CNIPA*, European Patent Office, Sept. 5, 2018, https://www.epo.org/searching-for-patents/helpful-resources/asian/asia-updates/2018/20180905.html.

3 *Statistical Country Profiles: China*, World Intellectual Property Organization, https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN.

4 《2018年中国知识产权发展状况评价报告》 (*2018 Report on the State of Development of China's Intellectual Property Rights*), issued by the Intellectual Property Development & Research Center of the State Intellectual Property Office in June 2019, http://www.sipo.gov.cn/docs/20190624164519009878.pdf.

5 Jessica M. Meyers, *Artificial Intelligence and Trade Secrets*, American Bar Association, Feb. 2019, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/january-february/artificial-intelligence-trade-secrets-webinar.

6 *See* David S. Levine & Ted Sichelman, *Why Do Startups Use Trade Secrets?*, 94 Notre Dame L. Rev. 751 (2018), http://ndlawreview.org/wp-content/uploads/2019/01/6-Levine-Sichelman.pdf.

7 《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》 (*SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Infringement of a Computer Software Copyright*), 7 China Law Connect 61 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC49), Dec. 2019, http://cgc.law.stanford.edu/guiding-cases/guiding-case-49 (hereinafter "*EGC49*").

8 《中华人民共和国反不正当竞争法》 (*Anti-Unfair Competition Law of the People's Republic of China*), passed and issued on Sept. 2, 1993, effective as of Dec. 1, 1993, revised on Nov. 4, 2017, effective as of Jan. 1, 2018, amended on and effective as of Apr. 23, 2019, http://www.fdi.gov.cn/1800000121_23_74874_0_7.html.

9 《全国人大常委会关于在北京、上海、广州设立知识产权法院的决定》 (*Decision of the Standing Committee of the National People's Congress on the Establishment of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou*), passed on, issued on, and effective as of Aug. 31, 2014, http://npc.people.com.cn/n/2014/0901/c14576-25581035.html.

10 *See* Xiang Li, Chuanshu Xu, & Hui Zhang, *China's Specialized IP Courts*, Kluwer Patent Blog Apr. 10, 2017, http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts.

11 (2007) 苏民三终字第0018号民事判决 ((2007) Su Min San Zhong Zi No. 0018 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Dec. 17, 2007, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2007-su-min-san-zhong-zi-0018-civil-judgment.

12 *EGC49*, *supra* note 7, "Main Points of the Adjudication" section.

13 *EGC49*, *supra* note 7, translators' note (which reads: the terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it" and "its").

14 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english.

15 (2008) 粤高法民三终字第7号民事判决 ((2008) Yue Gao Fa Min San Zhong Zi No. 7 Civil Judgment), rendered by the High People's Court of Guangdong Province on Dec. 16, 2009, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/guangdong-2008-yue-gao-fa-min-san-zhong-zi-7-civil-judgment. This was a dispute over infringement of computer software copyright between Zhongshan Haiyin Computer System Co., Ltd. and Shenzhen Saiyin Yuangu Industrial Development Co., Ltd.

[16] (2012) 沪高民三（知）终字第63号民事判决 ((2012) Hu Gao Min San (Zhi) Zhong Zi No. 63 Civil Judgment), rendered by the High People's Court of Shanghai Municipality on Aug. 1, 2013, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/shanghai-2012-hu-gao-min-san-zhi-zhong-zi-63-civil-judgment. This was a dispute over a vertical monopoly agreement between Beijing Ruibang Yonghe Technology & Trade Co., Ltd. on the one side and Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd. on the other.

[17] (2013) 浙知终字第22号民事判决 ((2013) Zhe Zhi Zhong Zi No. 22 Civil Judgment), rendered by the High People's Court of Zhejiang Province on May 6, 2013, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/zhejiang-2013-zhe-zhi-zhong-zi-22-civil-judgment. This was a dispute over infringement of computer software copyright between Jinjingying Information Co., Ltd. on the one side and Shanghai Gaoying Information Technology Co., Ltd. et al. on the other.

[18] 《全国人民代表大会常务委员会关于修改〈中华人民共和国专利法〉的决定》 (*Decision of the Standing Committee of the National People's Congress on Amending the "Patent Law of the People's Republic of China"*), passed and issued on Aug. 25, 2000, effective as of July 1, 2001, http://www.gov.cn/gongbao/content/2000/content_60431.htm. The provision was Article 57 Paragraph 2.

[19] 《中华人民共和国专利法》 (*Patent Law of the People's Republic of China*), passed and issued on Mar. 12, 1984, effective as of Apr. 1, 1985, amended three times, most recently on Dec. 27, 2008, effective as of Oct. 1, 2009, http://www.gov.cn/flfg/2008-12/28/content_1189755.htm.

[20] 《最高人民法院关于民事诉讼证据的若干规定》 (*Several Provisions of the Supreme People's Court on Evidence in Civil Lawsuits*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 6, 2001, issued on Dec. 21, 2001, effective as of Apr. 1, 2002, amended on Dec. 16, 2008, effective as of Dec. 31, 2008, http://gsj.beijing.gov.cn/ztzl/bhzxtzz/flfg/201804/t20180413_1449003.html.

[21] 《最高人民法院印发〈关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见〉的通知》 (*Notice of the Supreme People's Court on the Printing for Release of the "Opinions on Several Issues Concerning Fully Using the Functional Role of the Adjudication of Intellectual Property Rights in Driving the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of the Economy"*), Paragraph 15, issued on and effective as of Dec. 16, 2011, http://rmfyb.chinacourt.org/paper/html/2011-12/21/content_37879.htm.

[22] 《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》 (*Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Patent Infringement Disputes*), Article 27, passed by the Adjudication Committee of the Supreme People's Court on Jan. 25, 2016, issued on Mar. 21, 2016, effective as of Apr. 1, 2016, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgzl/zlsfjs/1020172.htm.

[23] Xiang Li, Chuanshu Xu, & Hui Zhang, *supra* note 10.

[24] *See, e.g.*, Feng Xu & Feynman Z. Liang, *Chinese IP Court Hands Down Groundbreaking Damages Award; Boon to U.S. Companies with IP Interests in China*, Intellectual Property Alert, Dec. 19, 2016, https://www.whiteandwilliams.com/resources-alerts-Chinese-IP-Court-Hands-Down-Groundbreaking-Damages-Award-Boon-to-US-Companies-with-IP-Interests-in-China.html.

[25] *Anti-Unfair Competition Law of the People's Republic of China*, *supra* note 8.

[26] For a discussion of the positive impact of prior decisions on mediation of intellectual property disputes, see Dr. PIAO Yanhong & Judge JIANG Heping, *The Use of Cases in Judicial Mediation—Based on an Analysis of a Series of Intellectual Property Disputes*, 4 China Law Connect 1 (Mar. 2019), *also available at* Stanford Law School China Guiding Cases Project, Mar. 2019, http://cgc.law.stanford.edu/commentaries/clc-4-201903-27-piao-jiang.

[27] 《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, *available at* http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english. Article 7 provides: "People's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases."

[28] *See, e.g.*, Dr. Mei Gechlik, Li Huang, & Jennifer Ingram, *Propagation of a Case Culture in China and Potentially Beyond*, 2 China Law Connect 1 (Sept. 2018), *also available at* Stanford Law School China Guiding Cases Project, Sept. 2018, http://cgc.law.stanford.edu/commentaries/clc-2-201809-24-gechlik-huang-ingram; Dr. Mei Gechlik & David Wei Zhao, *Pursuing Legal Certainty under an Uncertain System: How Chinese Lawyers and Judges Use Intellectual Property Guiding Cases*, 6 China Law Connect 11 (Sept. 2019), *also available at* Stanford Law School China Guiding Cases Project, Sept. 2019, http://cgc.law.stanford.edu/commentaries/clc-6-201909-30-gechlik-zhao.

[29] *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*, *supra* note 14, Article 10 (making it clear that courts should cite an applicable Guiding Case as a "reason", but not as the "basis" of its decision).

[30] Dr. Mei Gechlik, Li Huang, & Jennifer Ingram, *supra* note 28.

[31] 《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》 (*RONG Baoying v. WANG Yang and Alltrust Insurance Co., Ltd. Jiangyin Branch, A Motor Vehicle Traffic Accident Liability Dispute*), Stanford Law School China Guiding Cases Project, English Guiding Case (EGC24), Apr. 4, 2014 Edition, http://cgc.law.stanford.edu/guiding-cases/guiding-case-24.

[32] Dr. Mei Gechlik & David Wei Zhao, *supra* note 28.

[33] *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, *supra* note 27, Preamble.

The CGCP's Call for Experts *Connect*™ Submissions

The China Guiding Cases Project (the "CGCP") of Stanford Law School has been tracking new developments that reveal China's changing place in the world. In June 2018, the CGCP launched *China Law Connect* ("*CLC*"; ISSNs 2576-1927 (print), 2576-1935 (online)), a bilingual quarterly journal with a focus on providing cutting edge and practical analyses of legal developments in China and the country's Belt and Road Initiative.

Building on the successful launch of *CLC*, the CGCP is committed to publishing in 2019 an expanded range of in-depth traditional commentaries, China Cases *Insights*™, and Experts Connect™ pieces that highlight the most up-to-date issues related to China and Chinese law. To this end, we announce a **Call for Experts *Connect*™ Submissions** on any of the following topics:

- any Guiding Case that has been released by the Supreme People's Court of China;
- artificial intelligence and law;
- the establishment of international commercial courts in China;
- U.S.–China trade developments;
- the new U.S.–Mexico–Canada Trade Agreement; and
- the Belt and Road Initiative, specifically, case studies illustrating successful "win-win" cooperation.

Given the significance of the above-mentioned developments, the CGCP welcomes submissions (ranging from 1,500 to 3,500 words, in English or Chinese, plus, if necessary, approximately 500 to 1,000 words for well-formatted footnotes) from practitioners and other experts inside and outside China on any of the above topics.

Authors of accepted submissions will receive editorial support from the CGCP and edited versions approved by authors will be published in English and Chinese as part of our Experts *Connect*™ series in a 2019 issue of *China Law Connect*. Among the commentaries featured in the journal, this series is dedicated to the views of Chinese and foreign experts on select legal issues presented for the benefit of legal practitioners, business professionals, and students around the world.

Interested contributors should direct queries, send completed submissions, or propose significant topics not listed above to **Jennifer Ingram, Managing Editor of the CGCP, at jaingram@stanford.edu**. Submissions are accepted on an ongoing basis.

中国指导性案例项目专家*连接*™诚挚邀稿

斯坦福法学院的中国指导性案例项目（China Guiding Cases Project；"CGCP"）努力追踪反映中国在世界上不断变化的地位的新发展。2018年6月，CGCP创办双语季刊《中国法律连接》（*China Law Connect*；"*CLC*"；ISSNs 2576-1927（印刷版）, 2576-1935（在线版）），旨在对中国法律发展及"一带一路"倡议提供前沿和实用分析。

在成功推出*CLC*的基础上，CGCP致力于2019年发布一系列广泛、深入的传统评论、中国案例*见解*™及专家*连接*™文章，重点分析与中国和中国法律相关的最新问题。为此，我们宣布**专家*连接*™诚挚邀稿**，涵盖以下主题：

- 任何由中国最高人民法院发布的指导性案例；
- 人工智能与法律；
- 中国国际商事法庭的设立；
- 美中贸易发展；
- 新的美国—墨西哥—加拿大贸易协定；
- "一带一路"倡议，特别是个案研究，说明该倡议如何成功实现"双赢"合作。

鉴于上述发展的重要性，CGCP欢迎来自中国国内外的法律执业者与其他专家提交稿件（1500至3500字，中英文皆可；如有必要，也可附上格式良好、约500至1000字的注释），探讨以上任何一个主题。

CGCP将为获选稿件的作者提供编辑支持，编辑后并经作者同意的文章将以中英双语形式发表在我们2019年《中国法律连接》专家*连接*™系列专栏。作为《中国法律连接》中评论性文章的一部分，该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益。

有兴趣的投稿者，请把查询、完整的稿件、或对以上未列出的重要主题的建议，发送至**CGCP执行编辑英珍妮女士，jaingram@stanford.edu**。我们持续接受投稿。

指导案例49号如何促使举证责任倒置原则被编纂为法律以加强对商业秘密的保护*

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摘要

中国已在加强知识产权保护上取得长足进步。总体而言，这些努力是成功的。然而，在一些证据开示程序还是不足的知识产权领域中，知识产权所有人难以行使其权利。中国法院和国家立法机关已在知识产权纠纷中尝试多种转移举证责任的机制来更好地保护知识产权。最新的进展，包括来自中国知识产权专门法院的数据，表明这些努力已使原告获得了更好的知识产权保护。

引言

2018年，中国“研究与试验发展”的经费支出为人民币19,657亿元，比2017年增长11.6%。[1] 为了确保对技术的重大投入能持续带来红利，强而有力的保护措施是必须的。专利保护在中国正不断加强。这从两方面得到证明：根据世界知识产权组织的统计数据，2017年有超过130万件专利申请提交至中国国家知识产权局，数量居世界同期的首位；[2] 并且自2010年至2018年，知识产权司法裁判数量增加了近六倍。[3]

专利保护的改进是值得欢迎的，但要注意许多重要技术是通过其他方式，例如商业秘密，而得到保护。商业秘密对于保护不易进行反向工程的发明，例如人工智能，尤其重要。[4] 换言之，商业秘密对于保护创新非常重要。[5] 因此，在保护商业秘密方面取得进展对中国而言是至关重要。

中国法律确实为商业秘密提供了实质性保护。但是，中国有限的证据开示机制削弱了这些保护的功效。可幸，最近在商业秘密纠纷中将举证责任从原告转移至被告的趋势，弥补了其中一些缺陷。最高人民法院将相关原则通过指导案例49号（《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》）正式宣布。[6] 该原则最终被编纂为《中华人民共和国反不正当竞争法》（“《反不正当竞争法》”）第三十二条（见下文）。[7] 来自中国知识产权法院[8]的数据显示，采用类似的、与专利有关的举证责任倒置规则已使专利权得到了更好的保护。[9] 这一经验意味着举证责任倒置规则在保护商业秘密和其他类型的知识产权方面的潜在重要性，以及指导性案例在中国知识产权法的发展上所能发挥的重要作用。

从《石鸿林诉华仁案》（2007）到指导案例49号（2015）

在商业秘密纠纷中，将举证责任从原告转移至被告的趋势始于一宗约于2006年由石鸿林向泰州华仁电子资讯有限公司（“华仁”）提起的、涉及源代码可能被盗的诉讼。华仁的软件所用的源代码与石鸿林的产品显著相似，但销售价格远低于石鸿林的产品。为了在对华仁的诉讼中获胜，原告石鸿林必须证明他的计算机软件源代码与华仁的源代码相同或实质相同。

根据当时在中国生效的证据开示规则，涉及商业秘密的案件的原告不能要求被告提供内容有可能证明盗用的文件。对于原告拥有确凿盗用证据的案件（例如，被告侵入原告的网络系统，留下了直接证据），这些规则并不构成问题。但对于原告没有直接盗用证据的案件，证据开示机制的这些缺陷就被暴露出来。

这正是石鸿林所面对的挑战。当江苏省高级人民法院要求提供源代码以供检查时，华仁予以拒绝，表示担心失去其商业秘密，并称已将源代码存储在一块带自加密的微控制器，故法院或其他人都不能读取该代码。对此，该院作出二审判决，[10] 其基本的裁决是：当被控侵犯知识产权的人在没有提供充分理由的情况下拒绝提供证据，举证责任便从知识产权所有人转移到被控侵权人，而被控侵权人需要证明其没有侵权。

2015年，最高人民法院将该判决作为指导案例49号予以发布。指导案例49号“裁判理由”部分通过说明以下内容清楚解释了上述判决：(1) 石鸿林的证据能够证明其软件与华仁的软件构成实质相同，“华仁公司应就此承担提供相反证据的义务”；(2) 因为华仁未能提供相反证据证明其主张，其“应当承担举证不能的不利后果”。最高人民法院为指导案例49号编制了如下“裁判要点”：[11]

> 在被告拒绝提供被控侵权软件的源程序或者目标程序，且由于技术上的限制，无

侧边栏1：

《〈最高人民法院关于案例指导工作的规定〉实施细则》

第九条

各级人民法院正在审理的案件，在基本案情和法律适用方面，与最高人民法院发布的指导性案例相类似的，**应当参照**相关指导性案例的**裁判要点**作出裁判。（强调后加）

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柏凯莉常驻北京，她领导微软大中华区的合规与诉讼团队。她是一系列广泛复杂的合规与诉讼事务中令人信赖的顾问。

通过项目、政策和救济策略，柏女士与其微软团队专注风险管理。她还领导微软的内部调查，包括FCPA、其他政府调查和诉讼。在担任目前的职务前，她从2007年7月到2014年10月担任微软亚太区的合规与诉讼总监。从2001年1月到2007年6月，她领导微软亚洲地区的知识产权和数字犯罪执行项目。柏女士已在微软亚太地区任职超过18年。

在加入微软前，柏女士在三个地区的办公室担任联邦检察官超过11年，包括纽约南部地区和加州北部地区办公室，以及在华盛顿特区的司法部办公室。她取得了纽约州、加州和华盛顿特区的法律执业资格。

> 法从被控侵权产品中直接读出目标程序的情形下，如果原、被告软件在设计缺陷方面基本相同，而被告又无正当理由拒绝提供其软件源程序或者目标程序以供直接比对，则考虑到原告的客观举证难度，可以判定原、被告计算机软件构成实质性相同，由被告承担侵权责任。

每个指导性案例的“裁判要点”都由最高人民法院编制，以列出指导性案例所代表的裁判的原则。根据《〈最高人民法院关于案例指导工作的规定〉实施细则》（“《实施细则》”）第九条的规定，法院审理类似后续案件时，应参照这些裁判要点（见**侧边栏1**）。[12]

从《石鸿林诉华仁案》判决后的案件到2019年的法律编纂

检视从《石鸿林诉华仁案》的最终判决到该案所依据的举证责任倒置原则被编纂为法律之间所发生的大事，可知在这十二年期间，中国的法律从业者在推进商业秘密以外的知识产权保护方面作出了非凡努力。

地区的法院可能从《石鸿林诉华仁案》得到启发

这条从《石鸿林诉华仁案》到指导案例49号的路径贯穿了其他一些明显受到《石鸿林诉华仁案》启发的案件。有三起案件具有说明性。2008年，广东省高级人民法院在一起侵害计算机软件著作权纠纷案中，适用了类似举证责任倒置原则，被告在该案中被要求提供证据。[13] 2012年，上海市高级人民法院在一起纵向垄断协议纠纷中适用了类似原则。[14]

一个最近的例子是2013年的一起案件，在该案中，浙江省高级人民法院认为一名拒绝提供软件源代码的软件被许可人对盗版和销售许可人软件负有责任。法院裁决指出，当被告在没有合理理由的情况下拒绝交出源代码时，法院可以审阅原告（即许可人）提交的证据，以及间接证据和情境证据，以认定被告是否侵犯了原告的权利。[15]

> ***“中国法律确实为商业秘密提供了实质性保护。但是，中国有限的证据开示机制削弱了这些保护的功效。可幸，最近在商业秘密纠纷中将举证责任从原告转移至被告的趋势，弥补了其中一些缺陷。”***

于更广的知识产权范围内采用举证责任倒置原则产生了成果

除可能受到《石鸿林诉华仁案》的启发外，作出上述三个判决的法院可能对适用举证责任倒置原则有信心，因为该原则已被用于解决中国专利法中的类似问题而该问题是关于方法专利保护的。

中国法律承认产品和方法专利。当提起的侵权诉讼是针对被诉侵权产品时，取得并把侵权证据（即该产品

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王晓萌律师领导方达律师事务所北京办公室的复杂诉讼争议解决团队。王律师的执业领域主要为复杂争议解决和中国法相关的合规调查。王律师经常代表客户处理大型跨境的诉讼仲裁程序。同时，王律师在国家秘密、信息合规及信息保护方面的经验在业内处于领先地位。

除了代表客户处理诉讼仲裁程序、与中国监管部门沟通之外，王律师还在不同的管辖区（包括美国、香港和新加坡）的程序中被指定为专家证人，就中国法律问题提供法律意见。王律师具有极强的中英文双语工作能力，并同时具有工商管理学位。王律师被多家知名跨国公司聘为法律顾问，并深受客户信任。

"但值得注意的是，举证责任的变化确实加强了专利持有人的能力，有效地保护其技术。这些变化对技术公司的重要性再怎么强调都没有夸大其词。"

本身）提交法院是相对容易的。但是，当被诉侵权的是一个方法时，方法专利的所有人通常很难证明其方法被侵权。

为了解决这一问题，2000年，全国人民代表大会常务委员会通过了一个修改1992年版《中华人民共和国专利法》（"《专利法》"）的决定，其中指出：

> [...]专利侵权纠纷涉及**新产品制造方法**的发明专利的，制造同样产品的单位或者个人应当**提供**其产品制造方法不同于专利方法的**证明**；[...]. （强调后加）[16]

于2001年7月1日生效的上述规定（其为现行《专利法》第六十一条的一部分），[17] 为举证责任倒置机制奠定了良好的基础，但未明确提及"举证责任"一词。2001年12月，最高人民法院发布的一项司法解释，明确规定在上述情形下，被诉侵权人负有证明其产品制造方法不同于专利方法的责任。换言之，被诉侵权人有责任证明其没有侵犯该方法的发明专利（见**侧边栏2**）。[18]

继该司法解释后，最高人民法院于2012年发布一份重要文件，并于2016年发布另一份司法解释。

在2012年的文件中，最高人民法院敦促中国所有法院将举证责任倒置机制扩展到一些涉及方法专利的情形，无论该方法是否用于新产品的制造（见**侧边栏3**）。[19] 在同一文件中，最高人民法院确实做到了很好的平衡：在强调需要减轻方法专利权人举证责任的同时，最高人民法院也提醒中国所有法院，要注意"保护被申请人[即：被诉侵权人]的利益，防止当事人滥用证据保全制度非法获取他人商业秘密"。

2016年发布的司法解释本质上规定了，当原告已尽合理努力来证明被诉侵权人从被诉专利侵权中获得的利益，且被诉侵权人未能反驳该主张，法院可根据原告的证据认定所获利益（及赔偿金额）。[20]

上述规则的影响力体现于中国知识产权法院所判决的损害赔偿额有显著增加。这些法院已采纳了这些规则中所述的方式，以及其他与发达司法管辖区类似的证据开示机制。这些改进的机制包括授予诉讼当事人要求类似传票的调查令的权力，以及采用类似指导案例49号所基于的规则，即当原告已尽合理努力来证明其案件时，举证责任从原告转移至被告。

上述的中国知识产权法院所判决的损害赔偿额有显著增加是由2017年的一份报告所揭示。[21] 根据该报告，知识产权法院成立前，全国单个专利侵权案件的平均损害赔偿额为人民币800,000元。相比之下，适用了举证责任倒置规则的北京知识产权法院，单个专利侵权案件的平均损害赔偿额为人民币141万元（逾200,000美元），而2016年12月，该法院在《北京握奇数据系统有限公司诉恒宝股份有限公司案》中，[22] 判决了创纪录的人民币5,000万的赔偿金。

当然，损害赔偿额的增加也可能归因于其他改进，例如在知识产权专门法院有更多合资格的法官。但值得注意的是，举证责任的变化确实加强了专利持有人的能力，有效地保护其技术。这些变化对技术公司的重要性再怎么强调都没有夸大其词。与盗窃实物不同，知识产权盗版对盗窃者来说成本很低，却让知识产权所有者付出高昂代价。为激励良好行为，需严厉惩罚

侧边栏2：

《最高人民法院关于民事诉讼证据的若干规定》

第四条

下列侵权诉讼，按照以下规定承担**举证责任**：

（1）因新产品制造方法发明专利引起的专利侵权诉讼，由制造同样产品的单位或者个人对其产品制造方法不同于专利方法**承担举证责任**；

（强调后加）

侧边栏3：

《最高人民法院印发〈关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见〉的通知》

15、[...]使用专利方法获得的产品**不属于新产品**，专利权人能够证明被诉侵权人制造了同样产品，经合理努力仍无法证明被诉侵权人确实使用了该专利方法，但根据案件具体情况，结合已知事实以及日常生活经验，能够认定该同样产品经由专利方法制造的可能性很大的，可以根据民事诉讼证据司法解释有关规定，不再要求专利权人提供进一步的证据，而**由被诉侵权人提供其制造方法不同于专利方法的证据**。[...]

（强调后加）

侧边栏4：

《反不正当竞争法》

第三十二条

在侵犯商业秘密的民事审判程序中，商业秘密权利人提供初步证据，证明其已经对所主张的商业秘密采取保密措施，且合理表明商业秘密被侵犯，**涉嫌侵权人应当证明**权利人所主张的商业秘密不属于本法规定的商业秘密。

商业秘密权利人提供初步证据合理表明商业秘密被侵犯，且提供以下证据之一的，**涉嫌侵权人应当证明**其不存在侵犯商业秘密的行为：

（一）有证据表明涉嫌侵权人有渠道或者机会获取商业秘密，且其使用的信息与该商业秘密实质上相同；

（二）有证据表明商业秘密已经被涉嫌侵权人披露、使用或者有被披露、使用的风险；

（三）有其他证据表明商业秘密被涉嫌侵权人侵犯。

（强调后加）

以纠正不当行为。北京知识产权法院作出的高额损害赔偿判决恰恰做到了这一点。

关于商业秘密的举证责任倒置原则的法律编纂

2019年4月，《反不正当竞争法》经过修正，增加了一项新规定（即第三十二条），涵盖了举证责任倒置原则，就如指导案例49号所基于的原则一样（见**侧边栏4**）。[23] 虽然难以肯定地说该项修正的由来，但以上讨论的举证责任倒置原则的成功司法实践，可能给了国家立法机关将其编纂为法律的信心。

结语

从《石鸿林诉华仁案》（即：指导案例49号所代表的案件）的审判到《石鸿林诉华仁案》所基于的举证责任倒置原则被编纂为法律，这一过程相当了不起。过程似乎已经结束，但几个有趣的问题却值得注意。

地区的法院在帮助制定全国性规则方面的角色

本文讨论的大多数规则是国家规则，无论是全国人民代表大会制定的立法，还是最高人民法院发布的司法解释/文件。在中国，最高人民法院以下的法院不能直接制定具有法律效力的规则。然而，《石鸿林诉华仁案》已显然启发了一些后续案件，且最终被选为指导案例49号而广泛发布，以及该指导性案例已经使举证责任倒置原则被编纂为法律等事实，揭示出指导性案例是一个重要渠道，而通过它在制定重要规则时，地区法院的声音可以被听到。

指导案例49号的价值没有体现在其被引用于后续案件中

尽管指导案例49号意义重大，但笔者还未能找到参照此案例的后续案件。

一个合理的原因是，在诉讼提起前，涉及争议的当事人已经感受到该指导性案例的影响。例如，如果明白到被告需要承担责任来证明商业秘密是通过适当途径获得的，那么被告会感到更少的支持，而更有可能在诉讼提起前达成和解。[24]

另一个合理的原因是，当商业秘密诉讼发生时，根本无需引用指导案例49号，这是由于《反不正当竞争法》第三十二条已经规定了举证责任倒置原则。

话虽如此，当有诉讼是超出《反不正当竞争法》第三十二条的范围（例如，对被诉侵犯软件源代码的版权作出版权主张）或在第三十二条通过之前已发生的诉讼，指导案例49号都能提供指导，并应被引用。然而，没有发现这样的后续案件的事实揭示了一个更大的问题，将在以下段落讨论。

> ***"[…]《石鸿林诉华仁案》[…]最终被选为指导案例49号而广泛发布，以及该指导性案例已经使举证责任倒置原则被编纂为法律等事实，揭示出指导性案例是一个重要渠道，而通过它在制定重要规则时，地区法院的声音可以被听到。"***

指导性案例未得到充分利用，而增加引用这些案例将使发明人受益

不愿引用指导性案例的部分原因是与2010年发布的第一套指导性案例规则的解释有关。对于法院在其判决或裁定中"参照"指导性案例这一要求的适当解释人们存在疑问。法院在裁判中能够引述、引用或参考指导性案例的程度，都不清楚。[25] 这种含糊不清的情况和法官对错误引用指导性案例而被追究责任的担忧，是导致指导性案例在后续案件中不常被引用的主要因素。[26]

对此，最高人民法院于2015年发布《实施细则》来作出一些澄清，表明法院在其裁判理由中能引用指导性案例作为有说服力的证据。[27] 此后，使用指导性案例的后续案件数量逐渐增加。2018年的一项研究发现，截止2017年底，中国不同地区共审判了1.281起明确提及指导性案例的后续案件。该研究得出结论，"[指导性案例的]初步成功似乎为全国案例文化的传播提供了肥沃的土壤"。[28]

虽然上述研究令人鼓舞，但前述1.281个后续案件约有三分之一提及了关于交通事故损害赔偿的指导案例24号。[29] 而同一研究只发现10个提及知识产权的后续案件，这意味着处理裁决细节或事实模式不常见或更技术性的指导性案例被引用的可能性较小，这是由于缺乏机会。令人鼓舞的是，到2019年6月，提及知识产权指导性案例的后续案件据报道已增至51起。[30] 这一趋势如果继续下去，将使发明者受益。

总之，指导案例49号说明指导性案例的重要性可能超出被后续案件引用的范围，而到达了有助于重要法律原则被编纂为法律的程度。然而，我们希望指导性案例（尤其是那些与知识产权有关）的使用，继续在全国范围内增长，从而使统一适用法律——最高人民法院明确确定的目标——能够实现。[31] 这一目标是三家只有有限管辖权的知识产权法院无法实现的，尽管它们的判决具有实际意义并反映于它们在采用举证责任倒置规则来保护知识产权时所发挥的令人印象深刻的作用。中国当局在最近对知识产权法规的立法修改中表现出极大的努力。我们期待在增加中国有价值的指导性案例的引用方面看到类似的努力。■

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* 此专家*连接*™的引用是：柏凯莉、王晓萌，指导案例49号如何促使举证责任倒置原则被编纂为法律以加强对商业秘密的保护，《中国法律连接》，第7期，第29页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2019年12月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-7-201912-connect-11-bostick-wang。英文原文由Nathan Harpainter和Mei Gechlik博士编辑。本中文版本由蒋柠蔚、林逸夫、刘佳音、吴作麒和应启宾翻译，并由李恺祺、朱新玥、赵炜和熊美英博士最后审阅。载于本文的意见作者对其负责，它们并不代表微软公司、方达律师事务所和中国指导性案例项目的意见。

[1] 中国国家统计局，中华人民共和国2018年国民经济和社会发展统计公报，2019年2月28日，http://www.stats.gov.cn/tjsj/zxfb/201902/t20190228_1651265.html。虽然本报告没有清楚指出什么活动被分类为“研究与试验发展”，但是鉴于本报告的重点，这些活动可能与中国的经济和社会发展有关。

[2] *Statistical Country Profiles: China*，World Intellectual Property Organization，https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN。

[3]《2018年中国知识产权发展状况评价报告》，2019年6月由国家知识产权局知识产权发展研究中心公布，http://www.sipo.gov.cn/docs/20190624164519009878.pdf。

[4] Jessica M. Meyers，*Artificial Intelligence and Trade Secrets*，American Bar Association，2019年2月，https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/january-february/artificial-intelligence-trade-secrets-webinar。

[5] 见David S. Levine、Ted Sichelman，*Why Do Startups Use Trade Secrets?*，94 Notre Dame L. Rev. 751（2018），http://ndlawreview.org/wp-content/uploads/2019/01/6-Levine-Sichelman.pdf。

[6]《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》，《中国法律连接》，第7期，第61页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC49），2019年12月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-49（以下简称“指导案例49号”）。

[7]《中华人民共和国反不正当竞争法》，1993年9月2日通过和公布，1993年12月1日起施行，2017年11月4日修订，2018年1月1日起施行，2019年4月23日修正，同日起施行，http://www.fdi.gov.cn/1800000121_23_74874_0_7.html。

[8]《全国人大常委会关于在北京、上海、广州设立知识产权法院的决定》，2014年8月31日通过和公布，同日起施行，http://npc.people.com.cn/n/2014/0901/c14576-25581035.html。

[9] 见Xiang Li、Chuanshu Xu、Hui Zhang，*China's Specialized IP Courts*，Kluwer Patent Blog，2017年4月10日，http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts。

[10]（2007）苏民三终字第0018号民事判决，2007年12月17日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2007-su-min-san-zhong-zi-0018-civil-judgment。

[11] 指导案例49号，注释6，裁判要点。

[12]《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese。

[13]（2008）粤高法民三终字第7号民事判决，2009年12月16日由广东省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/ guangdong-2008-yue-gao-fa-min-san-zhong-zi-7-civil-judgment。这是中山市海茵计算机系统有限公司和深圳市赛银远古实业发展有限公司之间的侵害计算机软件著作权纠纷案。

[14]（2012）沪高民三（知）终字第63号民事判决，2013年8月1日由上海市高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/ shanghai-2012-hu-gao-min-san-zhi-zhong-zi-63-civil-judgment。这是纵向垄断协议纠纷案，一方当事人为北京锐邦涌和科贸有限公司，另一方为强生（上海）医疗器材有限公司、强生（中国）医疗器材有限公司。

[15]（2013）浙知终字第22号民事判决，2013年5月6日由浙江省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/ zhejiang-2013-zhe-zhi-zhong-zi-22-civil-judgment。这是侵害计算机软件著作权纠纷案，一方当事人为金精盈资讯股份有限公司，另一方为上海高英信息技术有限公司等。

[16]《全国人民代表大会常务委员会关于修改〈中华人民共和国专利法〉的决定》，2000年8月25日通过和公布，2001年7月1日起施行，http://www.gov.cn/gongbao/content/2000/content_60431.htm。该规定是第五十七条第二款。

[17]《中华人民共和国专利法》，1984年3月12日通过和公布，1985年4月1日起施行，经三次修正，最新修正于2008年12月27日，2009年10月1日起施行，http://www.gov.cn/flfg/2008-12/28/content_1189755.htm。

[18]《最高人民法院关于民事诉讼证据的若干规定》，2001年12月6日由最高人民法院审判委员会通过，2001年12月21日公布，2002年4月1日起施行，并于2008年12月16日修正，2008年12月31日起施行，http://gsj.beijing.gov.cn/ztzl/bhzxtzz/flfg/201804/t20180413_1449003.html。

[19]《最高人民法院印发〈关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见〉的通知》，第15款，2011年12月16日公布，同日起施行，http://rmfyb.chinacourt.org/paper/html/2011-12/21/content_37879.htm。

[20]《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》，第二十七条，2016年1月25日由最高人民法院审判委员会通过，2016年3月21日公布，2016年4月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgzl/zlsfjs/1020172.htm。

[21] Xiang Li、Chuanshu Xu、Hui Zhang，注释9。

[22] *见，例如*，Feng Xu、Feynman Z. Liang，*Chinese IP Court Hands Down Groundbreaking Damages Award; Boon to U.S. Companies with IP Interests in China*，Intellectual Property Alert，2016年12月19日，https://www.whiteandwilliams.com/resources-alerts-Chinese-IP-Court-Hands-Down-Groundbreaking-Damages-Award-Boon-to-US-Companies-with-IP-Interests-in-China.html。

[23]《中华人民共和国反不正当竞争法》，注释7。

[24] 有关先前裁决对调解知识产权纠纷的积极影响的讨论，见朴艳红博士、江和平法官，案例在司法调解中的运用——基于知识产权系列案件的分析，《中国法律连接》，第4期，第11页（2019年3月），*亦见于*斯坦福法学院中国指导性案例项目，2019年 3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-4-201903-27-piao-jiang。

[25]《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2010年11月26日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20101126-chinese。第七条规定：“最高人民法院发布的指导性案例，各级人民法院审判类似案例时应当参照。”

[26] *见，例如*，熊美英博士、黄鹂、英珍妮，案例文化在中国内外的传播，《中国法律连接》，第2期，第15页（2018年9月），*亦见于*斯坦福法学院中国指导性案例项目，2018年 9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-2-201809-24-gechlik-huang-ingram；熊美英博士、赵炜，在不确定制度下追求法律确定性：中国律师和法官如何使用知识产权指导性案例，《中国法律连接》，第6期，第23页（2019年9月），*亦见于*斯坦福法学院中国指导性案例项目，2019年 9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-6-201909-30-gechlik-zhao。

[27]《〈最高人民法院关于案例指导工作的规定〉实施细则》，注释12，第十条（清楚表示法院应当将适用的指导性案例作为“理由”引述，但不作为裁判“依据”引用）。

[28] 熊美英博士、黄鹂、英珍妮，注释26。

[29]《荣宝英诉王阳、永诚财产保险股份有限公司江阴支公司机动车交通事故责任纠纷案》，斯坦福法学院中国指导性案例项目，中文指导性案例（CGC24），2014年2月11日（最终版本），http://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-24。

[30] 熊美英博士、赵炜，注释26。

[31]《最高人民法院关于案例指导工作的规定》，注释25，序言。

Submission Guidelines

China Law Connect ("*CLC*") is a quarterly journal of the China Guiding Cases Project (the "CGCP") of Stanford Law School aimed at advancing the understanding of Chinese law and increasing judicial transparency and accountability in China.

CLC welcomes submissions for publication in the following forms:

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2. China Cases *Insights*™
3. Experts *Connect*™

Submissions should satisfy the corresponding guidelines summarized here. For details, see https://cgc.law.stanford.edu/clc-submission-guidelines.

1. **Traditional commentaries**, which are usually longer and provide in-depth and/or extensive contributions to scholarship on China's Case Guidance System, the Belt & Road Initiative, and/or other matters related to China or Chinese law:
   - Typically 6,000–8,000 words, generally structured as called for by the substance (e.g., section headings, with one or two levels of subsection headings).
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投稿指引

《中国法律连接》（"《中法连》"）是斯坦福法学院中国指导性案例项目（"CGCP"）的季刊。该刊旨在促进对中国法律的理解，提高中国司法透明度和问责。

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1. **传统评论。**这些文章通常篇幅较长、更深入地探讨中国案例指导制度、一带一路倡议和其他与中国或中国法律相关的专题：
   - 篇幅一般为6000–8000字，围绕文章内容进行结构布局（例如，标题下分一至两级副标题）。
2. **中国案例*见解*™。**该系列旨在为法律和商业专业人士提供关于中国案例的简明实用信息、有见地的分析和不可或缺的要点，从而帮助这些专业人士的法律和商业实践：
   - 内容范围一般比传统评论小，仅讨论一个或几个法律案例（通常只是针对案例里的某些问题），文章结构设定为"要点"（约100字）、"概要"（500字内）、"分析"（2500字内）和"结论"（250字内）。
3. **专家*连接*™。**该系列专供中外专家就某些法律问题发表观点，让世界各地的法律从业人员、商业专业人士和学生能从中受益：
   - 投稿内容（1,500至3,500字，中英文皆可；如有必要，也可附上格式良好、约500至1000字的脚注）可以回应CGCP的特定邀稿（详情请访问：https://cgc.law.stanford.edu/zh-hans/event/clc-2019-call-for-submissions），也欢迎专家们自主撰文投稿。

Subsequent Cases Have Added Vitality to Guiding Case No. 33's Guidelines on "Malicious Collusion"*

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Abstract

Guiding Case No. 33 ("GC33") is one of a few Guiding Cases that have a significant number of subsequent cases. The author reviews all 26 subsequent judgments/rulings that explicitly mention GC33 and finds that some courts still need to improve in their responses to parties' references to Guiding Cases.

Through his analysis of two subsequent cases adjudicated by the Supreme People's Court of China, the author makes recommendations on how to increase the use of Guiding Cases. In addition, the author's analysis of other subsequent cases reveals that some of these cases actively explored the meaning of the Main Points of the Adjudication of GC33, showing the great efforts of relevant courts and lawyers in using GC33. This progressive attitude will help the long-term development of Guiding Cases.

Introduction

On December 18, 2014, the Supreme People's Court (the "SPC") released Guiding Case No. 33 (*Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*) ("GC33")[1] to clarify the standards for determining "malicious collusion" and to affirm that a contract is invalid if it is one through which a debtor and its affiliated company maliciously collude to transfer property for the purpose of evading a debt. GC33 also explains how relevant provisions of the *Contract Law of the People's Republic of China*[2] should be applied, resolving the issue regarding the disposition of property after a contract is affirmed to be invalid. Overall, GC33's clarifications of these issues are conducive to punishing dishonesty and debt evasion.[3]

As of the end of September 2019, five years after the release of GC33, the number of subsequent judgments/rulings ("SJ/Rs") of GC33 had reached 26, which is more than the number of SJ/Rs of many other Guiding Cases. Through an in-depth analysis of the overall characteristics of these SJ/Rs and of select cases, the author discusses the impetus behind and resistance facing the development of Guiding Cases, and offers, at the end of the article, corresponding suggestions.

The Origin of Guiding Case No. 33

The origin of GC33 is a dispute between Cargill International S.A. ("Cargill Company") and the Jinshi Group. The Jinshi Group consisted of six companies, two of which were Fujian Jinshi Vegetable Oil Producing Co., Limited ("Fujian Jinshi Company") and Dalian Jinshi Vegetable Oil Producing Co., Limited ("Dalian Jinshi Company").

Cargill Company had commercial cooperative relationships with the Jinshi Group. After some time, the two sides had a dispute. In the course of arbitration, they reached a certain *Settlement Agreement*. The agreement stipulated that the Jinshi Group would repay the debt owed to Cargill Company in installments over a period of five years and would mortgage the total assets of Fujian Jinshi Company, which was a part of the Jinshi Group, to Cargill Company to serve as security for the repayment of the debt.

On October 10, 2005, an arbitral award was rendered in accordance with the *Settlement Agreement*, affirming that the Jinshi Group should pay Cargill Company USD 13.37 million. On June 26, 2007, the Intermediate People's Court of Xiamen Municipality ruled to recognize and enforce the arbitral award. Afterwards, Cargill Company applied for compulsory enforcement of that award.

In May 2006, Fujian Jinshi Company, through the signing of a sale and purchase contract, transferred its principal property to its affiliated company, Fujian Tianyuan Biological Protein Technology Co., Ltd. ("Tianyuan Company"; later renamed "Chinatex Fujian Company"). Tianyuan Company transmitted the amount due to Fujian Jinshi Company's bank account and this amount was remitted on the same day to Dalian Jinshi Company, which, as mentioned above, was also a part of the Jinshi Group. In February 2008, Tianyuan Company transferred the property to Zhangzhou Development Zone Huifengyuan Trading Co., Ltd. ("Huifengyuan Company"). The aforesaid transactions resulted in Fujian Jinshi Company's loss of property that would have been used for enforcement of the arbitral award.

Cargill Company then brought suit in the High People's Court of Fujian Province, requesting that the court (1) affirm the invalidity of the contract for the sale and

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purchase of assets and the rights to use state-owned land signed by Fujian Jinshi Company and Chinatex Fujian Company and another contract of the same type signed by Chinatex Fujian Company and Huifengyuan Company, and (2) order Huifengyuan Company and Chinatex Fujian Company to return the property that they obtained under the aforementioned contracts to the original owner of the property.

On October 23, 2011, the High People's Court of Fujian Province rendered the (2007) Min Min Chu Zi No. 37 Civil Judgment,[4] affirming that the aforementioned contracts were invalid, and ordering Huifengyuan Company and Chinatex Fujian Company to return to Fujian Jinshi Company the rights to use state-owned land as well as the buildings and equipment obtained through the aforementioned contracts, respectively. The case was appealed to the SPC. On August 22, 2012, the SPC rendered the (2012) Min Si Zhong Zi No. 1 Civil Judgment,[5] rejecting the appeal and upholding the original judgment.

Eventually, this case was selected as GC33, with its Main Points of the Adjudication being:[6]

> 1. Where a debtor transfers [its] principal property to an affiliated company at a clearly unreasonably low price and the affiliated company, with knowledge of the debtor's indebtedness, does not actually pay consideration [for the principal property], [a people's court] may determine that the debtor and its affiliated company have maliciously colluded to harm the interests of [the debtor's] creditors. [The people's court] should then determine that the related property transfer contract is invalid.
>
> 2. Article 59 of the *Contract Law of the People's Republic of China* is [also] applicable to situations where a third party is the owner of property. Where a creditor has [only] an ordinary claim against a debtor, [a people's court] should, in accordance with Article 58 of the *Contract Law of the People's Republic of China*, order the property obtained through an invalid contract to be returned to the original owner of the property. [The people's court] cannot, based on Article 59, directly order that the debtor's property obtained by the debtor's affiliated company through a contract [in which they] "maliciously collude to harm the interests of a third party" be returned to [the debtor's] creditor.

Overall Characteristics of Subsequent Judgments/Rulings

Table 1 lists 26 SJ/Rs that explicitly mention GC33 (i.e., the Guiding Case is mentioned in any part of the judgment/ruling, whether the case name is identified in full or in part, or whether only the number of the Guiding Case is stated). The search for these SJ/Rs was conducted through September 30, 2019 by the author on the official "China Judgements [sic] Online" website ("中国裁判文书网"; http://wenshu.court.gov.cn).

Table 1 also lists who mentioned GC33 in each of these SJ/Rs: the parties (or their lawyers); the court, explicitly in the reasoning section titled "This Court opined" (see **grey rows**); and/or the court, in other sections of the SJ/R.

The following sections analyze these SJ/Rs by examining their distributions by year, level of court, and stage of adjudication proceeding, along with a review of how the courts handled situations where the parties mentioned GC33.

1. Distribution by Year

GC33 was released in December 2014. It was not until 2017 and 2018, however, that the numbers of SJ/Rs for this Guiding Case increased significantly (see **Table 2**). This increase was largely due to the fact that more parties or their lawyers cited GC33 (see **Table 1**). If only those SJ/Rs where the courts mentioned GC33 in the reasoning section are counted, ignoring the year 2017 (which saw five SJ/Rs), the number of SJ/Rs in each of the other years is one or two. The trend is relatively stable.

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court	Who Mentioned Guiding Case No. 33*
1	2015/9/17	(2015) Hai Min Nan Chu Zi No. 00258	Haicheng Municipality People's Court of Anshan Municipality, Liaoning Province	Party(/-ies)/ lawyer(s); Court (other section(s))
2	2015/12/22	(2015) Zhe Jia Min Zhong Zi No. 918	Intermediate People's Court of Jiaxing Municipality, Zhejiang Province	Party(/-ies)/ lawyer(s); Court (reasoning section)
3	2016/1/11	(2015) Quan Min Chu Zi No. 256	Intermediate People's Court of Quanzhou Municipality, Fujian Province	Party(/-ies)/ lawyer(s); Court (reasoning section)
4	2017/1/11	(2016) Yu 1303 Min Chu No. 1171	Wolong District People's Court of Nanyang Municipality, Henan Province	Court (reasoning section)
5	2017/3/28	(2016) Zhe 1102 Min Chu No. 5246	Liandu District People's Court of Lishui Municipality, Zhejiang Province	Court (reasoning section)
6	2017/6/7	(2016) Yu 0107 Min Chu No. 1156	Jiulongpo District People's Court of Chongqing Municipality	Court (reasoning section)
7	2017/6/13	(2017) Yue Min Zhong No. 7	High People's Court of Guangdong Province	Party(/-ies)/ lawyer(s)
8	2017/8/2	(2017) E 05 Min Zhong No. 1837	Intermediate People's Court of Yichang Municipality, Hubei Province	Party(/-ies)/ lawyer(s); Court (reasoning section)
9	2017/9/19	(2016) Zhe 0482 Min Chu No. 4052	Pinghu Municipality People's Court of Jiaxing Municipality, Zhejiang Province	Court (reasoning section)
10	2017/10/25	(2017) Yue 12 Min Chu No. 6	Intermediate People's Court of Zhaoqing Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)
11	2017/11/10	(2017) Yu 10 Min Zhong No. 2822	Intermediate People's Court of Xuchang Municipality, Henan Province	Party(/-ies)/ lawyer(s)
12	2017/12/8	(2017) E Min Shen No. 3004	High People's Court of Hubei Province	Party(/-ies)/ lawyer(s)
13	2018/3/14	(2018) Qing 0102 Min Chu No. 309	Chengdong District People's Court of Xining Municipality, Qinghai Province	Party(/-ies)/ lawyer(s)
14	2018/4/8	(2018) Yun 3102 Zhi Yi No. 4	Ruili Municipality People's Court of Dehong Dai and Jingpo Autonomous Prefecture, Yunnan Province	Party(/-ies)/ lawyer(s)
15	2018/5/25	(2018) Yue 17 Min Zhong No. 358	Intermediate People's Court of Yangjiang Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)
16	2018/7/10	(2018) Ji 04 Min Zhong No. 292	Intermediate People's Court of Liaoyuan Municipality, Jilin Province	Party(/-ies)/ lawyer(s)
17	2018/7/16	(2018) Yue 13 Min Zhong No. 1777	Intermediate People's Court of Huizhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)
18	2018/8/10	(2018) Ji Min Zhong No. 421	High People's Court of Hebei Province	Party(/-ies)/ lawyer(s)
19	2018/10/10	(2018) Yun 3102 Min Chu No. 448	Ruili Municipality People's Court of Dehong Dai and Jingpo Autonomous Prefecture, Yunnan Province	Party(/-ies)/ lawyer(s)
20	2018/11/22	(2016) Jing Min Zhong No. 250	High People's Court of Beijing Municipality	Party(/-ies)/ lawyer(s)
21	2018/12/17	(2018) Zui Gao Fa Min Shen No. 5607	Supreme People's Court	Party(/-ies)/ lawyer(s); Court (reasoning section)
22	2018/12/25	(2018) Zui Gao Fa Min Zhong No. 1178	Supreme People's Court	Party(/-ies)/ lawyer(s); Court (reasoning section)
23	2019/3/21	(2018) Yu 0581 Min Chu No. 5227	Linzhou Municipality People's Court of Anyang Municipality, Henan Province	Party(/-ies)/ lawyer(s)
24	2019/4/26	(2018) Jing 0113 Min Chu No. 25170	Shunyi District People's Court of Beijing Municipality	Party(/-ies)/ lawyer(s)
25	2019/6/21	(2019) Yun 0824 Min Shen No. 1	Jinggu Dai and Yi Autonomous County People's Court of Pu'er Municipality, Yunnan Province	Party(/-ies)/ lawyer(s)
26	2019/8/1	(2019) Zhe 02 Min Zhong No. 1354	Intermediate People's Court of Ningbo Municipality, Zhejiang Province	Party(/-ies)/ lawyer(s); Court (reasoning section)

*This column indicates who mentioned Guiding Case No. 33 in the subsequent judgment/ruling:
(1) the party(/-ies) or his/her/their lawyer(s) (marked as "Party(/-ies)/lawyer(s)");
(2) the adjudicating court in the reasoning section titled "This Court opined" (marked as "Court (reasoning section)"); and
(3) the adjudicating court in section(s) of the subsequent judgment/ruling other than the reasoning section (marked as "Court (other section(s))").
If two or more of the above situations happened, they are separated by ";".

Table 1: 26 Subsequent Judgments/Rulings Which Explicitly Mention Guiding Case No. 33 (identified through September 30, 2019)

Year of Adjudication	No. of SJ/Rs	Of These: No. of SJ/Rs Where Courts Mentioned Guiding Case No. 33 in the Reasoning Section
2015	2	1
2016	1	1
2017	9	5
2018	10	2
2019	4	1
Total	**26**	**10**

Table 2: Distribution of the 26 Subsequent Judgments/Rulings by Year of Adjudication

Level of Court	No. of SJ/Rs	Of These: No. of SJ/Rs Where Courts Mentioned Guiding Case No. 33 in the Reasoning Section
Supreme	2	2
High	4	0
Intermediate	9	4
Basic	11	4
Total	**26**	**10**

Table 3: Distribution of the 26 Subsequent Judgments/Rulings by Level of Court

Stage of Adjudication Proceeding	No. of SJ/Rs	Of These: No. of SJ/Rs Where Courts Mentioned Guiding Case No. 33 in the Reasoning Section
First Instance	12	5
Second Instance	11	4
Retrial	2	1
Enforcement	1	0
Total	**26**	**10**

Table 4: Distribution of the 26 Subsequent Judgments/Rulings by Stage of Adjudication Proceeding

2. Distribution by Level of Court

Table 3 shows the distribution of GC33's SJ/Rs rendered by people's courts at all levels in China. Looking at the level of court, the SJ/Rs handled by basic and intermediate courts account for the majority of all of these SJ/Rs. The result is the same if one only counts SJ/Rs where the courts mentioned GC33 in the reasoning section. This phenomenon is very encouraging, as the general impression is that the adjudication personnel of basic courts have weaker ability and less awareness regarding the use of cases[7] and they should, therefore, not be enthusiastic about using Guiding Cases. The statistics of this study, however, proves that this impression is out of touch with reality: the competence of the adjudication personnel of basic courts is increasing.

> ***"[…] the general impression is that the adjudication personnel of basic courts have weaker ability and less awareness regarding the use of cases and they should, therefore, not be enthusiastic about using Guiding Cases. The statistics of this study, however, proves that this impression is out of touch with reality […]."***

3. Distribution by Stage of Adjudication Proceeding

China utilizes an adjudication system in which the final decision in a case is made after two instances (handled by courts of two different tiers), subject to an exception that the parties may apply to a court superior to the second-instance court for retrial to correct, in accordance with law, errors in the second-instance decision. After judgments or rulings take effect, the parties may apply to a court for enforcement of the judgments or rulings.[8]

Table 4 shows the stage of adjudication proceeding of each SJ/R of GC33. Regardless of whether all 26 SJ/Rs are considered or whether only the 10 SJ/Rs where the courts mentioned GC33 in the reasoning section are counted, the frequency with which GC33 is used in the first- and second-instance proceedings does not differ greatly. In addition, the parties in one SJ/R also mentioned GC33 in the enforcement procedure. This indicates that the use of GC33 is not limited to traditional first-instance and second-instance processes, but has appeared in various types of adjudication proceedings.

4. Courts' Attitudes Toward Parties' Citations of GC33 in Subsequent Judgments/Rulings

With respect to how courts should use Guiding Cases, Articles 9 and 11 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (the "*Detailed Implementing Rules*") released on May 13, 2015 provide specific requirements:[9] "[w]here a case being adjudicated is […] similar to a Guiding Case", the court "**should** refer to the 'Main Points of the Adjudication' of that relevant Guiding Case to render its ruling or judgment."; when a party cites a Guiding Case, "the personnel handling the case **should**, in [providing] the reasons for the adjudication, **respond** [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so]" (emphasis added) (see **Sidebar**). The word "should" reflects the SPC's high expectations for the development and use of Guiding Cases.[10] However, in view of the fact that Guiding Cases are not a source of Chinese law, the SPC also emphasizes in Article 10 of the *Detailed Implementing Rules* that Guiding Cases can only be "quote[d]" by a court "as a

reason for its adjudication", but not "cite[d]" "as the basis of its adjudication" (see **Sidebar**).[11]

An examination of the 26 SJ/Rs of GC33 shows that they were all rendered after the *Detailed Implementing Rules* came into effect (see **Table 1**). In addition, the author analyzes the courts' attitudes toward the use of GC33 in these SJ/Rs: whether the attitudes were in line with the requirements of the above-mentioned *Detailed Implementing Rules*, or whether there were some deficiencies.

In 22 (84.6%) of the SJ/Rs, the parties or their lawyers cited GC33, but the courts of only six of these SJ/Rs (i.e., 27.3% of 22) responded to the mention of this Guiding Case in the reasoning section. The data indicate that courts at all levels still have room for improvement with respect to their responses to parties' citations of Guiding Cases.

In the remaining four (15.4%) SJ/Rs, the parties or their lawyers did not mention GC33, but it is delightful to see that the courts took the initiative to consider GC33.

Analysis of Individual Subsequent Cases

Apart from analyzing the overall characteristics of the 26 SJ/Rs of GC33, the author has also carefully reviewed these SJ/Rs and selected some of them to discuss two aspects: (1) how did the SPC deal with the situation in which the parties mentioned GC33 but the court did not respond, and (2) how did courts of these SJ/Rs comprehend the Main Points of the Adjudication of GC33?

1. *How Did the SPC deal with the Situation in which the Parties Mentioned Guiding Case No. 33 but the Court did not Respond?*

Two of the 26 SJ/Rs of GC33 were rendered by the SPC and both involved the situation in which the parties mentioned GC33 but the court did not respond to the mention of this Guiding Case.

The first was a civil ruling involving a review by retrial.[12] A party was dissatisfied with the second-instance judgment and applied to the SPC for retrial. One of the grounds was that in the second-instance proceeding, the party submitted GC33 to the court to support the party's defense, but the second-instance court did not respond in the reasoning section of the ruling whether it had "referred to" GC33. The party argued that this "is contrary to [Article 11 of the *Detailed Implementing Rules*]; it is a serious error in the application of law and should be corrected". In a civil ruling rendered on December 17, 2018, the SPC decided:

> Although the second-instance court did not respond, with explanations, in the reasoning section whether it had referred to the Guiding Case, the *Detailed Implementing Rules* **are neither laws nor judicial interpretations** and **the failure to apply the *Detailed Implementing Rules* is not an error in the application of law.** (emphasis added)

The SPC's ruling is reasonable. It is indeed true that a failure to apply the *Detailed Implementing Rules* cannot be considered an error "in the application of law", but is it considered to be a type of "error" that, as such, should be corrected?

Interestingly, eight days later, on December 25, 2018, the SPC shed some light on the above question in its judgment rendered in another case mentioning GC33.[13] In this case, the appellant claimed that the third party in the first-instance proceeding had argued that GC33 should be "referred to", but the first-instance court did not respond, in violation of Article 11 of the *Detailed Implementing Rules*. In the judgment, the SPC stated:

> In the first-instance judgment, [the court]'s **failure to respond in the reasoning section** as to whether it had referred to the Guiding Case **is certainly inappropriate**. However, the Guiding Case is not applicable in this case. Therefore, the first-instance judgment's

Sidebar:

Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"

Article 9

Where a case being adjudicated is, in terms of the basic facts and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level **should** refer to the **"Main Points of the Adjudication"** of that relevant Guiding Case to render its ruling or judgment.

Article 10

Where a people's court at any level refers to a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case **as a reason for its adjudication**, but not cite [the Guiding Case] **as the basis of its adjudication**.

Article 11

In the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases. Where a relevant Guiding Case is quoted in the adjudication document, [the personnel] should, in the part [of the document where they provide] reasons for their adjudication, quote the serial number and the "Main Points of the Adjudication" of the Guiding Case.

Where a public prosecution organ, a party to a case and his defender, or a litigation agent quotes a Guiding Case as a ground [for the] prosecution (litigation) or defense, the personnel handling the case **should**, in [providing] the reasons for the adjudication, **respond** [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so].

(emphasis added)

> lack of response did not affect the result of the adjudication. (emphasis added)

In other words, the SPC's judgment clearly pointed out that it was an error for the first-instance court to not apply Article 11 of the *Detailed Implementing Rules* (i.e., the court did not respond, with explanations, in the reasoning section of its judgment whether it had referred to the Guiding Case mentioned by a party). However, this error could be accepted in the above case because GC33 was not applicable to the case, and the first-instance court's lack of response did not affect the outcome.

The above statement may send the wrong message to other courts. As a result, courts at all levels would be unlikely to treat the requirements of Article 11 of the *Detailed Implementing Rules* seriously. When Court A decides that the Guiding Case mentioned by a party does not apply, Court A is likely to not mention this in its response, considering that even if it is found, in a second-instance proceeding or retrial, to have violated Article 11 of the *Detailed Implementing Rules*, Court A's judgment will not be reversed solely on this ground. Of course, the court that handles the second-instance proceeding or retrial may find that Court A has made the wrong decision and the relevant Guiding Case should have been applied, thus reversing Court A's judgment. However, if neither party continues the legal battle by pursuing a second-instance proceeding or retrial, Court A's judgment will take effect, and the party's efforts in citing the Guiding Case will have been completely in vain.

Clearly, the above situation will seriously affect the development of Guiding Cases. Therefore, in the author's opinion, it would have been better if, on the basis of its statement that the lack of response "is certainly inappropriate", the SPC had further indicated that this error "should be corrected" to let the relevant judges know that they should correct the error of failing to provide any response to parties' mention of a Guiding Case. This approach will signal to courts at all levels that they should emphasize Guiding Cases, and thereby help the development of the Guiding Cases System.

2. *How Did Courts of Subsequent Cases Comprehend the Main Points of the Adjudication of Guiding Case No. 33?*

The SJ/Rs of GC33 also reveal how courts and lawyers, through judicial practices, have explored the meaning of GC33's Main Points of the Adjudication to increase the guiding effect of these main points. Take the first paragraph of GC33's Main Points of the Adjudication as an example. It provides:

> Where a debtor transfers [its] principal property to **an affiliated company** at a clearly unreasonably low price and the affiliated company, **with knowledge** of the debtor's indebtedness, **does not actually pay consideration** [for the principal property], [a people's court] may determine that the debtor and its affiliated company have **maliciously colluded** to harm the interests of [the debtor's] creditors. [The people's court] should then determine that the related property transfer contract is invalid. (emphasis added)

The courts of a few SJ/Rs made different explorations to interpret the above paragraph.

(1) An affiliated company has "knowledge" of the debtor's indebtedness; "malicious collusion"

As shown in the judgments of some SJ/Rs of GC33, the greater the degree of affiliation between entities (e.g., one company is a shareholder of the other company or natural persons involved are familiar with each other), the more likely it is for a court to determine that an affiliated company has "knowledge" of the debtor's indebtedness and has entered into "malicious collusion" with the debtor. In addition, the determination of the existence of such "knowledge" and "malicious collusion" is not merely based on the equity and personnel connections between entities, but also on other factors, such as how closely the interests of these companies are intertwined.[14]

> ***"[…] the SPC's judgment clearly pointed out that it was an error for the first-instance court to not apply Article 11 of the Detailed Implementing Rules (i.e., the court did not respond, with explanations, in the reasoning section of its judgment whether it had referred to the Guiding Case mentioned by a party)."***

(2) An affiliated company "does not actually pay consideration"

According to the above-mentioned facts of GC33, Fujian Jinshi Company (the debtor) transferred, through a contract, its primary property to its affiliated company, Tianyuan Company. Tianyuan Company transmitted the amount due to Fujian Jinshi Company's bank account and this amount was remitted on the same day to Dalian Jinshi Company, which was a part of the Jinshi Group (Fujian Jinshi Company was also a part of the group). Because the price paid to Fujian Jinshi Company was remitted on the same day, the court considered that the affiliated company did "not actually pay consideration".

Among the SJ/Rs of GC33, there is a case in which the court interpreted the phrase "does not actually pay consideration" broadly to also mean "does not fully pay consideration". In the

case numbered (2016) Yu 1303 Min Chu No. 1171, because the amount received by the transferor of the property was found to be an "unreasonably low price" and the creditor's interests were also harmed, the court still determined the situation as one in which the affiliated company did "not actually pay consideration" and applied the Main Points of the Adjudication of GC33.

(3) "Affiliated company"

Although the term "affiliated company" is used in the Main Points of the Adjudication of GC33 to refer to the recipient of the transferred property, the court of a subsequent case considered that a recipient of this type also includes all "stakeholders", including affiliated natural persons (such as close relatives). In the case numbered (2016) Zhe 1102 Min Chu No. 5246, the debtor transferred his shares to his wife and son. The court decided that given that "the transfer of equity occurred between [close relatives], the three defendants should be stakeholders, based on the rule of daily experience". In the end, the court referred to GC33 and determined that, due to malicious collusion and harm to the creditors' interests, the agreement on the transfer of shares from the husband to his wife and son was invalid. This court's broad application of the Main Points of the Adjudication of GC33 suggests that sometimes a court may focus on the jurisprudence and spirit behind these points. This phenomenon is worthy of further study.

It is evident from the above discussion that courts in the SJ/Rs attached great importance to the Main Points of the Adjudication of GC33, and hoped to fully use the guiding effect of these points in these SJ/Rs. The issues regarding various topics, including how to master the interpretation of the Main Points of the Adjudication and whether they should be interpreted broadly or narrowly, need to be explored through more specific cases. What is certain, however, is that the efforts of courts and lawyers in using GC33, as reflected in these SJ/Rs, will help the long-term development of Guiding Cases.

Concluding Remarks

It can be seen from GC33 and its 26 SJ/Rs that a Guiding Case can reduce the uncertainty of the existing law, and its subsequent cases can further enrich the content of the "Main Points of the Adjudication", adding vitality to the Guiding Case itself.

In addition, the 26 SJ/Rs of GC33 have revealed that an increasing number of parties are willing to cite GC33 and request that the court respond and explain, in accordance with the *Detailed Implementing Rules*, the applicability of GC33. This is encouraging. On the other hand, some courts did not follow the *Detailed Implementing Rules* to make such a response, and this may affect the development and promotion of Guiding Cases.

The author hopes that courts at all levels in China can clearly respond to parties' citations of Guiding Cases so as to ensure the implementation of the *Detailed Implementing Rules* in judicial practice. Only in this way can the Guiding Cases System be an effective supplement to China's statutes and help the country's development of a new stage in the rule of law. ■

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[1] 《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》 (*Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*), 7 China Law Connect 51 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC33), Dec. 2019, http://cgc.law.stanford.edu/guiding-cases/guiding-case-33 (hereinafter "*Guiding Case No. 33*").

[2] 《中华人民共和国合同法》 (*Contract Law of the People's Republic of China*), passed and issued on Mar. 15, 1999, effective as of Oct. 1, 1999, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm.

[3] *See* 最高人民法院案例指导工作办公室、民四庭 (The Office for the Work on Case Guidance and the Fourth Civil Tribunal of the Supreme People's Court), 指导案例33号《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》的理解与参照 (*Understanding and Referring to Guiding Case No. 33, Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*), 《人民司法・案例》 (The People's Judicature・Cases), Issue No. 18, at 8 (2015).

[4] The first-instance judgment has not been found and may have been excluded from publication.

[5] (2012) 民四终字第1号民事判决 ((2012) Min Si Zhong Zi No. 1 Civil Judgment), rendered by the Supreme People's Court on Aug. 22, 2012, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2012-min-si-zhong-zi-1-civil-judgment.

[6] For more information about the case, see *Guiding Case No. 33*, *supra* note 1.

[7] *See, e.g.*, 李永芝、王珊珊 (LI Yongzhi & WANG Shanshan), 类案检索机制在基层法院适用困境与路径构建 (*The Difficulty of Applying the Similar Cases Search Mechanism in Basic Courts and Development Pathways*), 《北京市顺义区人民法院网》 Beijing Shunyi District People's Court Web), Sept. 20, 2018, http://bjsyfy.chinacourt.gov.cn/article/detail/2018/12/id/3606559.shtml.

[8] *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), Articles 10, 199, and 224, passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[9] 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english (hereinafter "*Detailed Implementing Rules*").

[10] In the 14th specification of the *Specifications on Legislative Techniques (Trial) (I)*, the Commission of Legislative Affairs of the Standing Committee of the National People's Congress points out:

> There are no substantive differences between the meaning of "should" and "must". In expressing obligatory norms, laws generally use "should", rather than "must".

Although this document is only for "relevant departments' reference at work", and it remains unclear whether it can be used to interpret the Supreme People's Court's *Detailed Implementing Rules*, it can be seen from the content of the 14th specification that the word "should" has some importance in the Chinese legal system. *See* 《全国人民代表大会常务委员会法制工作委员会关于印送〈立法技术规范（试行）（一）〉的函》 (*Letter of the Commission of Legislative Affairs of the Standing Committee of the National People's Congress on Printing and Delivering "Specifications on Legislative Techniques (Trial) (I)"*), issued on and effective as of Dec. 28, 2009, http://www.samr.gov.cn/fgs/tzgg/200912/t20091228_294948.html.

[11] *See also* 《最高人民法院关于加强和规范裁判文书释法说理的指导意见》 (*The Guiding Opinions of the Supreme People's Court on Strengthening and Standardizing the Interpretation of Laws and the Reasoning in Adjudication Documents*), issued by the Supreme People's Court on June 1, 2018, effective as of June 13, 2018, http://www.court.gov.cn/zixun-xiangqing-101552.html. Paragraph 13 of the Opinions reads:

> Apart from basing [their adjudication] on provisions of laws, regulations, and judicial interpretations, judges may use the following **bases of arguments to expound** the reasons for [their] adjudication so as to improve the legitimacy and acceptability of the adjudication conclusions: **Guiding Cases** issued by the Supreme People's Court; […] (emphasis added).

Article 10 of the *Detailed Implementing Rules*, however, specifies: "[…the court] should quote the Guiding Case **as a reason for its adjudication**, but not cite [the Guiding Case] as the basis of its adjudication" (emphasis added). The two expressions are slightly different, and it is worth considering whether they have different meanings. At present, the Supreme People's Court is actively improving the Guiding Cases System. An ideal approach is to unify expressions regarding the use of Guiding Cases so as to reduce misunderstanding.

[12] (2018) 最高法民申5607号民事裁定 ((2018) Zui Gao Fa Min Shen No. 5607 Civil Ruling), rendered by the Supreme People's Court on Dec. 17, 2018, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-shen-5607-civil-ruling.

[13] (2018) 最高法民终1178号民事判决 ((2018) Zui Gao Fa Min Zhong No. 1178 Civil Judgment), rendered by the Supreme People's Court on Dec. 25, 2018, full text available on the Stanford Law School China Guiding Cases Project's website, at https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-zhong-1178-civil-judgment.

[14] (2015) Zhe Jia Min Zhong Zi No. 918, (2016) Yu 1303 Min Chu No. 1171, and (2018) Yue 13 Min Zhong No. 1777.

Appendix: 26 Subsequent Judgments/Rulings Which Explicitly Mention Guiding Case No. 33 (identified through September 30, 2019)

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Link
1	2015/9/17	(2015) Hai Min Nan Chu Zi No. 00258	https://cgc.law.stanford.edu/judgments/liaoning-2015-hai-min-nan-chu-zi-00258-civil-judgment
2	2015/12/22	(2015) Zhe Jia Min Zhong Zi No. 918	https://cgc.law.stanford.edu/judgments/zhejiang-2015-zhe-jia-min-zhong-zi-918-civil-judgment
3	2016/1/11	(2015) Quan Min Chu Zi No. 256	https://cgc.law.stanford.edu/judgments/fujian-2015-quan-min-chu-zi-256-civil-judgment
4	2017/1/11	(2016) Yu 1303 Min Chu No. 1171	https://cgc.law.stanford.edu/judgments/henan-2016-yu-1303-min-chu-1171-civil-judgment
5	2017/3/28	(2016) Zhe 1102 Min Chu No. 5246	https://cgc.law.stanford.edu/judgments/zhejiang-2016-zhe-1102-min-chu-5246-civil-judgment
6	2017/6/7	(2016) Yu 0107 Min Chu No. 1156	https://cgc.law.stanford.edu/judgments/chongqing-2016-yu-0107-min-chu-1156-civil-judgment
7	2017/6/13	(2017) Yue Min Zhong No. 7	https://cgc.law.stanford.edu/judgments/guangdong-2017-yue-min-zhong-7-civil-judgment
8	2017/8/2	(2017) E 05 Min Zhong No. 1837	https://cgc.law.stanford.edu/judgments/hubei-2017-e-05-min-zhong-1837-civil-judgment
9	2017/9/19	(2016) Zhe 0482 Min Chu No. 4052	https://cgc.law.stanford.edu/judgments/zhejiang-2016-zhe-0482-min-chu-4052-civil-judgment
10	2017/10/25	(2017) Yue 12 Min Chu No. 6	https://cgc.law.stanford.edu/judgments/guangdong-2017-yue-12-min-chu-6-civil-judgment
11	2017/11/10	(2017) Yu 10 Min Zhong No. 2822	https://cgc.law.stanford.edu/judgments/henan-2017-yu-10-min-zhong-2822-civil-judgment
12	2017/12/8	(2017) E Min Shen No. 3004	https://cgc.law.stanford.edu/judgments/hubei-2017-e-min-shen-3004-civil-ruling
13	2018/3/14	(2018) Qing 0102 Min Chu No. 309	https://cgc.law.stanford.edu/judgments/qinghai-2018-qing-0102-min-chu-309-civil-judgment
14	2018/4/8	(2018) Yun 3102 Zhi Yi No. 4	https://cgc.law.stanford.edu/judgments/yunnan-2018-yun-3102-zhi-yi-4-enforcement-ruling
15	2018/5/25	(2018) Yue 17 Min Zhong No. 358	https://cgc.law.stanford.edu/judgments/guangdong-2018-yue-17-min-zhong-358-civil-judgment
16	2018/7/10	(2018) Ji 04 Min Zhong No. 292	https://cgc.law.stanford.edu/judgments/jilin-2018-ji-04-min-zhong-292-civil-judgment
17	2018/7/16	(2018) Yue 13 Min Zhong No. 1777	https://cgc.law.stanford.edu/judgments/guangdong-2018-yue-13-min-zhong-1777-civil-judgment
18	2018/8/10	(2018) Ji Min Zhong No. 421	https://cgc.law.stanford.edu/judgments/hebei-2018-ji-min-zhong-421-civil-judgment
19	2018/10/10	(2018) Yun 3102 Min Chu No. 448	https://cgc.law.stanford.edu/judgments/yunnan-2018-yun-3102-min-chu-448-civil-judgment
20	2018/11/22	(2016) Jing Min Zhong No. 250	https://cgc.law.stanford.edu/judgments/beijing-2016-jing-min-zhong-250-civil-judgment
21	2018/12/17	(2018) Zui Gao Fa Min Shen No. 5607	https://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-min-shen-5607-civil-ruling
22	2018/12/25	(2018) Zui Gao Fa Min Zhong No. 1178	https://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-min-zhong-1178-civil-judgment
23	2019/3/21	(2018) Yu 0581 Min Chu No. 5227	https://cgc.law.stanford.edu/judgments/henan-2018-yu-0581-min-chu-5227-civil-judgment
24	2019/4/26	(2018) Jing 0113 Min Chu No. 25170	https://cgc.law.stanford.edu/judgments/beijing-2018-jing-0113-min-chu-25170-civil-judgment
25	2019/6/21	(2019) Yun 0824 Min Shen No. 1	https://cgc.law.stanford.edu/judgments/yunnan-2019-yun-0824-min-shen-1-civil-ruling
26	2019/8/1	(2019) Zhe 02 Min Zhong No. 1354	https://cgc.law.stanford.edu/judgments/zhejiang-2019-zhe-02-min-zhong-1354-civil-judgment

后续裁判为指导案例33号对“恶意串通”的指引增添了生命力*

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摘要

指导案例33号是少数具有相当多后续裁判的指导性案例。本文作者检视了所有26个明确提及指导案例33号的后续裁判，发现部分法院对当事人提出指导性案例的情况未能作出适当回应，有改进空间。通过对两个由最高人民法院审判的后续裁判进行个案分析，作者对如何提高指导性案例的使用率提出建议。此外，作者对其他后续裁判的分析，展示了一些后续裁判对指导案例33号的裁判要点作出了积极探索；这表明了相关法院、律师对使用指导案例33号付出了大量努力。这种积极态度有助指导性案例的长远发展。

引言

2014年12月18日，最高人民法院（“最高法”）发布指导案例33号《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》，[1] 明确了“恶意串通”的认定标准，确认了债务人与其关联公司恶意串通转让财产以逃避债务的合同无效，解释了《中华人民共和国合同法》[2]相关规定应如何适用，解决了合同无效后财产处理的问题，有利于惩治失信与逃债的行为。[3]

截至2019年9月底，指导案例33号的后续裁判在五年间达到了26个，这比其他许多指导性案例的后续裁判数量要多。通过对这些后续裁判的总体特征和个别案件的深入分析，作者讨论指导性案例发展所面临的动力与阻力，并在文末提出相应的建议。

指导案例33号的由来

指导案例33号源自瑞士嘉吉国际公司（“嘉吉公司”）与金石集团的争议。金石集团由六公司组成，其中两公司为福建金石制油有限公司（“福建金石公司”）和大连金石制油有限公司（“大连金石公司”）。

嘉吉公司与金石集团存在商业合作关系。之后，两者发生争议。对此，在仲裁过程中，双方达成《和解协议》，约定金石集团在五年内分期偿还债务，并将旗下福建金石公司的全部资产抵押给嘉吉公司，作为偿还债务的担保。2005年10月10日，根据该《和解协议》，相关仲裁机构作出裁决，确认金石集团应向嘉吉公司支付1337万美元。2007年6月26日，福建省厦门市中级人民法院裁定承认和执行该仲裁裁决。随后，嘉吉公司申请强制执行该裁决。

2006年5月，福建金石公司通过签订买卖合同，将其主要财产转让给了其关联公司——福建田源生物蛋白科技有限公司（“田源公司”；后更名为“中纺福建公司”）。田源公司支付的价款即日从福建金石公司的账户汇出至金石集团旗下的大连金石公司。2008年2月，田源公司将该财产转让给漳州开发区汇丰源贸易有限公司（“汇丰源公司”）。上述交易导致福建金石公司最后并无可供执行的财产。

嘉吉公司遂向福建省高级人民法院提起诉讼，请求：确认福建金石公司与中纺福建公司之间，以及中纺福建公司与汇丰源公司之间签订的国有土地使用权及资产买卖合同无效；判令汇丰源公司、中纺福建公司将其取得的合同项下财产返还给财产所有人。

福建省高级人民法院于2011年10月23日作出（2007）闽民初字第37号民事判决，[4] 确认上述合同无效；判令汇丰源公司与中纺福建公司分别向福建金石公司返还因上述合同而取得的国有土地使用权与资产。案件上诉至最高法，其于2012年8月22日作出（2012）民四终字第1号民事判决，[5] 驳回上诉，维持原判。

最终，该案被选为指导案例33号，其裁判要点为：[6]

1. 债务人将主要财产以明显不合理低价转让给其关联公司，关联公司在明知债务人欠债的情况下，未实际支付对价的，可以认定债务人与其关联公司恶意串通、损害债权人利益，与此相关的财产转让合同应当认定为无效。

2. 《中华人民共和国合同法》第五十九条规定适用于第三人为财产所有权人的情形，在债权人对债务人享有普通债权的情况下，应当根据《中华人民共和国合同法》第五十八条的规定，判令因无效合同取得的财产返还给原财产所有人，而不能根据第五十九条规定直接判令债务人的关联公司因“恶意串通，损害第三人利益”的合同而取得的债务人的财产返还给债权人。

后续裁判的总体特征

表1列出了26个明确提及指导案例33号的后续裁判（即：在裁判文书的任何部分中提及该指导性案例，不论是案例名称的全部或部分被提及，或仅提及指导案例案号）。作者是在“中国裁判文书网”

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（http://wenshu.court.gov.cn）官方网站上进行搜索，搜索期以2019年9月30日为止。

表1亦列出谁于后续裁判中提及指导案例33号：当事人（或其律师）；审判法院在题为“本院认为”的说

序号	审判日期	后续裁判号	审判法院	谁提及指导案例33号*
1	2015/9/17	（2015）海民南初字第00258号	辽宁省鞍山市海城市人民法院	当事人/律师；法院（其他部分）
2	2015/12/22	（2015）浙嘉民终字第918号	浙江省嘉兴市中级人民法院	当事人/律师；法院（说理部分）
3	2016/1/11	（2015）泉民初字第256号	福建省泉州市中级人民法院	当事人/律师；法院（说理部分）
4	2017/1/11	（2016）豫1303民初1171号	河南省南阳市卧龙区人民法院	法院（说理部分）
5	2017/3/28	（2016）浙1102民初5246号	浙江省丽水市莲都区人民法院	法院（说理部分）
6	2017/6/7	（2016）渝0107民初1156号	重庆市九龙坡区人民法院	法院（说理部分）
7	2017/6/13	（2017）粤民终7号	广东省高级人民法院	当事人/律师
8	2017/8/2	（2017）鄂05民终1837号	湖北省宜昌市中级人民法院	当事人/律师；法院（说理部分）
9	2017/9/19	（2016）浙0482民初4052号	浙江省嘉兴市平湖市人民法院	法院（说理部分）
10	2017/10/25	（2017）粤12民初6号	广东省肇庆市中级人民法院	当事人/律师
11	2017/11/10	（2017）豫10民终2822号	河南省许昌市中级人民法院	当事人/律师
12	2017/12/8	（2017）鄂民申3004号	湖北省高级人民法院	当事人/律师
13	2018/3/14	（2018）青0102民初309号	青海省西宁市城东区人民法院	当事人/律师
14	2018/4/8	（2018）云3102执异4号	云南省德宏傣族景颇族自治州瑞丽市人民法院	当事人/律师
15	2018/5/25	（2018）粤17民终358号	广东省阳江市中级人民法院	当事人/律师
16	2018/7/10	（2018）吉04民终292号	吉林省辽源市中级人民法院	当事人/律师
17	2018/7/16	（2018）粤13民终1777号	广东省惠州市中级人民法院	当事人/律师
18	2018/8/10	（2018）冀民终421号	河北省高级人民法院	当事人/律师
19	2018/10/10	（2018）云3102民初448号	云南省德宏傣族景颇族自治州瑞丽市人民法院	当事人/律师
20	2018/11/22	（2016）京民终250号	北京市高级人民法院	当事人/律师
21	2018/12/17	（2018）最高法民申5607号	最高人民法院	当事人/律师；法院（说理部分）
22	2018/12/25	（2018）最高法民终1178号	最高人民法院	当事人/律师；法院（说理部分）
23	2019/3/21	（2018）豫0581民初5227号	河南省安阳市林州市人民法院	当事人/律师
24	2019/4/26	（2018）京0113民初25170号	北京市顺义区人民法院	当事人/律师
25	2019/6/21	（2019）云0824民申1号	云南省普洱市景谷傣族彝族自治县人民法院	当事人/律师
26	2019/8/1	（2019）浙02民终1354号	浙江省宁波市中级人民法院	当事人/律师；法院（说理部分）

*本栏显示谁于后续裁判提及指导案例33号：
（1）当事人（或其律师）（标记为“当事人/律师”）；
（2）审判法院在题为“本院认为”的说理部分（标记为“法院（说理部分）”）；
（3）审判法院在说理部分以外的其他部分（标记为“法院（其他部分）”）。
如果上述两种或以上情况发生，则用“；”分隔。

表1：26个明确提及指导案例33号的后续裁判（截至2019年9月30日）

理部分中提及该案例（见**灰色行**）；或/和审判法院在“本院认为”说理部分以外的其他部分。

以下各节会通过按裁判年份、法院级别、裁判程序阶段的分布，以及法院如何处理涉及当事人提出指导案例33号的情况来分析这些后续裁判。

1. 裁判年份分布

指导案例33号在2014年12月发布。要到2017年、2018年，后续裁判的数量才大大增加（见**表2**）。这一数量的增加主要是由于更多的当事人或其律师引用该指导案例（见**表1**）。而如果仅统计法院在说理部分提及指导案例33号的后续裁判数量，除2017年有5个外，其他年份的数量都维持在1至2个，相对较为稳定。

2. 法院级别分布

表3显示了中国各级人民法院作出指导案例33号后续裁判的情形。从法院级别来看，基层与中级法院处理的后续裁判占到了全部的大部分。如果仅统计法院在说理部分提及指导案例33号的后续裁判，结果亦是如此。这一现象是非常令人鼓舞的。因为一般印象是基层法院的办案人员在案例使用方面的能力、意识较弱，[7] 因此其对指导性案例的使用应不太积极，但本调研从数字证明该印象需要改变：基层法院的办案人员的能力正在增加。

3. 裁判程序阶段分布

中国采用两审终审制，但是当事人可以再向二审法院的上级法院申请再审，依法纠错。裁判生效后，当事人可以向法院申请执行裁判。[8]

表4显示了指导案例33号后续裁判所处的裁判程序阶段。无论是在所有26个后续裁判中或是10个法院在说理部分提及指导案例33号的后续裁判中，指导案例33号在一审、二审程序中的使用频率并无太大的差异。此外，当事人也在一个后续裁判的执行程序中提及过指导案例33号，这说明指导性案例的使用已经不仅仅限于传统的一审、二审程序，而是已出现在各类的裁判程序之中。

4. 后续裁判中法院面对援引指导案例33号的态度

针对法院应如何使用指导性案例，2015年5月13日公布的《〈最高人民法院关于案例指导工作的规定〉实施细则》（“《实施细则》”）第九条和第十一条提出了具体要求：[9] 如果法院“审理的案件[...]与指导性案例相类似”，法院“**应当**参照相关指导性案例的裁判要点作出裁判”；在当事人引述指导性案例时，“案件承办人员**应当**在裁判理由中**回应**是否参照了该指导性案例并说明理由”（强调后加）（见**侧边栏**）。“应当”一词体现了最高法对指导性案例的发展与使用具有很高的期望。[10] 但是，鉴于指导性案例不是中国的法律渊源，最

裁判年份	后续裁判数量	其中：法院于说理部分提及指导案例33号的后续裁判数量
2015	2	1
2016	1	1
2017	9	5
2018	10	2
2019	4	1
总数	**26**	**10**

表2：26个后续裁判（按裁判年份分布）

法院级别	后续裁判数量	其中：法院于说理部分提及指导案例33号的后续裁判数量
最高	2	2
高级	4	0
中级	9	4
基层	11	4
总数	**26**	**10**

表3：26个后续裁判（按法院级别分布）

裁判程序阶段	后续裁判数量	其中：法院于说理部分提及指导案例33号的后续裁判数量
一审	12	5
二审	11	4
再审	2	1
执行程序	1	0
总数	**26**	**10**

表4：26个后续裁判（按裁判程序阶段分布）

侧边栏：

《〈最高人民法院关于案例指导工作的规定〉实施细则》

第九条

各级人民法院正在审理的案件，在基本案情和法律适用方面，与最高人民法院发布的指导性案例相类似的，**应当**参照相关指导性案例的**裁判要点**作出裁判。

第十条

各级人民法院审理类似案件参照指导性案例的，应当将指导性案例**作为裁判理由**引述，但**不作为裁判依据**引用。

第十一条

在办理案件过程中，案件承办人员应当查询相关指导性案例。在裁判文书中引述相关指导性案例的，应在裁判理由部分引述指导性案例的编号和裁判要点。

公诉机关、案件当事人及其辩护人、诉讼代理人引述指导性案例作为控（诉）辩理由的，案件承办人员**应当**在裁判理由中**回应**是否参照了该指导性案例并说明理由。

（强调后加）

> ***"[…]一般印象是基层法院的办案人员在案例使用方面的能力、意识较弱，因此其对指导性案例的使用应不太积极，但本调研从数字证明该印象需要改变[…]。"***

高法亦于第十条强调指导性案例只能作为"裁判理由引述"、"不作为裁判依据引用"（见**侧边栏**）。[11]

通过检视指导案例33号的26个后续裁判，作者发现它们都在《实施细则》生效后作出（见**表1**）。此外，作者分析了这些后续裁判的法院对于使用指导案例33号的态度——是符合上述《实施细则》的要求，还是有所不足？

在22个（84.6%）后续裁判中，当事人或其律师引述了指导案例33号，但其中只有6个（即22个的27.3%）后续裁判，法院在裁判理由中作出回应。这一数据表明，各级法院在回应当事人引述指导性案例方面仍有待改进。

在余下的4个（15.4%）后续裁判中，当事人或其律师未提及指导案例33号，但法院主动考虑该指导性案例，这是令人欣喜的。

后续裁判的个案分析

除了分析指导案例33号的26个后续裁判的总体特征，作者也仔细查阅这些后续裁判并选取了一些个案就两方面作出讨论：（1）最高法如何处理当事人提出指导案例33号但法院未作回应的情况，以及（2）后续裁判如何理解指导案例33号的裁判要点。

1. 最高法如何处理当事人提出指导案例33号但法院未作回应的情况

指导案例33号的26个后续裁判中有两个是由最高法审判，且都涉及当事人提出指导性案例但法院未作回应的情况。

第一个案件是涉及再审审查的民事裁定。[12] 一方当事人不满二审判决，向最高法申请再审。其中一个理由是：二审中该当事人向法院提交了指导案例33号作为抗辩理由，但是二审法院并未在裁判理由中回应是否参照该指导案例，"故有悖于[《实施细则》第十一条]的规定，法律适用严重错误，应当予以纠正"。对此，最高法在2018年12月17日作出民事裁定，认为：

> 二审法院虽然未在裁判理由中回应是否参照了该指导性案例并说明理由，但该实施细则**并非法律亦非司法解释，未适用该实施细则，不属于适用法律错误**。
> （强调后加）

最高法的裁定结论合理。诚然，未适用该实施细则，不能属于"适用法律"错误，但它算是一种"错误"而应当予以纠正吗？

有趣的是，最高法在八天后，即2018年12月25日，对另一提及指导案例33号的案件所作出的民事判决，给以上问题提供了一点线索。[13] 在该案，上诉人主张，一审第三人在一审中提出应当参照指导案例33号，但一审法院未对此回应，违反了《实施细则》第十一条的规定。对此，最高法作出判决：

> 一审判决**未在裁判理由中回应**是否参照了该指导性案例**确有不妥**，但本案并不适用该指导性案例，故一审判决未予回应并不影响裁判结果。
> （强调后加）

换言之，最高法的判决清楚指出，未适用《实施细则》第十一条（即：法院没有在裁判理由中回应是否参照了被提出的指导性案例并说明理由）是一种错误。但这错误在上述案件可以被接受，因为该案件根本不适用指导案例33号，一审法院未予回应不影响该案的裁判结果。

以上表述可能会向其他法院发送错误信息。各级法院很可能会不重视《实施细则》第十一条的要求。当甲法院认为当事人提出的指导性案例不适用，甲法院很可能不作任何回应，因为考虑到就算在二审或再审时甲法院被指违反《实施细则》第十一条，甲法院的裁判也不会因此而推翻。当然，处理二审或再审的法院很可能认为甲法院判断错误，相关指导性案例其实是适用的，因此而推翻甲法院的裁判。但若当事人根本不继续争取二审或再审，甲法院的裁判便生效了，而当事人引述指导性案例的努力就完全白费了。

显而易见，上述情况会严重影响指导性案例的发展。所以，作者认为，若最高法能在表明这种做法"确有不妥"的基础上，进一步作出"应予纠正"的表态来让相关法官清楚知道其应纠正不回应的错误，那么这会给各级法院发出一个应重视指导性案例的信号，继而帮助指导性案例制度的发展。

2. 后续裁判如何理解指导案例33号的裁判要点

指导案例33号的后续裁判也揭示了法院、律师如何通过司法实务，深入探讨该指导性案例的裁判要点，以增加其指导功能。例如，指导案例33号的裁判要点的第一段落是：

> 债务人将主要财产以明显不合理低价转让给其**关联公司**，关联公司在**明知**债务人欠债的情况下，**未实际支付对价**的，可以认定债务人与其关联公司**恶意串通**、损害债权人利益，与此相关的财产转让合同应当认定为无效。
> （强调后加）

对此裁判要点的解释，后续案件作出不同探索。

（1）关联公司“明知”债务人欠债、“恶意串通”

从指导案例33号的一些后续案件的判决中可知，实体之间的关联（例如，一公司是另一公司股东或自然人之间相互熟悉）程度越大，法院认定关联公司“明知”债务人欠债和与债务人“恶意串通”的可能性就越高。此外，“明知”和“恶意串通”的认定不能只看实体之间的股权、人事方面的关联，还需综合其他因素，例如公司之间的利益捆绑关系。[14]

（2）关联公司“未实际支付对价”

根据上述指导案例33号的案情，福建金石公司（债务人）通过合同，将主要财产转让给其关联公司，即田源公司。田源公司把价款支付给福建金石公司，但该价款即日便从福建金石公司的账户汇出至金石集团旗下的大连金石公司（福建金石公司也在同一集团旗下）。因为支付给福建金石公司的价款即日便汇出，法院认为这是“未实际支付对价”。

指导案例33号的后续裁判中，也存在有法院把“未实际支付对价”延伸至“未完全支付对价”的情况。在（2016）豫1303民初1171号中，由于转让财产一方所收到的价款构成了“不合理低价”，债权人的利益也受损害，故法院仍把该情况认定为“未实际支付对价”，并参照指导案例33号的裁判要点。

（3）“关联公司”

虽然指导案例33号的裁判要点将财产转让的对象表述为“关联公司”，但有后续裁判的法院将财产转让的对象扩大至包括关联自然人（例如近亲属）在内的所有“利益相关方”。在（2016）浙1102民初5246号中，债务人向其妻儿转让股份，法院认为“股权转让发生在[近亲属]之间，根据日常经验法则，三被告应属利益相关方”。最终，法院参照指导案例33号，认定因恶意串通、损害债权人利益，丈夫向妻儿转让股份的协议无效。法院对指导性案例裁判要点的这种扩大适用，反映出法院有时候会强调裁判要点背后的法理、精神，这种现象值得我们进一步研究。

> ***“[...]最高法的判决清楚指出，未适用《实施细则》第十一条（即：法院没有在裁判理由中回应是否参照了被提出的指导性案例并说明理由）是一种错误。”***

从以上的讨论可以看到，后续裁判对指导案例33号裁判要点的重视，并希望能把裁判要点对后续审判的指导功能充分发挥。当中怎样掌握裁判要点的解释、应该是广义还是狭义等等，需要通过更多的具体案件慢慢探索。但可以肯定的是，这些后续裁判所展示的法院、律师对使用指导案例33号所付出的努力，会帮助指导性案例的长远发展。

结论

由指导案例33号及其26个后续裁判可以看出，指导性案例不仅能够减少现有法律的不确定性，其后续裁判也可进一步充实本身“裁判要点”的内容，为指导性案例增添生命力。

此外，指导案例33号的26个后续裁判揭示了，越来越多的当事人愿意援引该指导性案例，并要求法院根据《实施细则》对该指导性案例是否适用作出回应，令人鼓舞。但另一方面，部分法院在审判中未根据《实施细则》作出这样的回应，这可能会影响指导性案例的发展和推广。

作者希望中国各级法院能够明确回应当事人对指导性案例的引述，使《实施细则》在司法实践中得到落实。只有这样，指导性案例制度才能作为中国成文法体系的有效补充，推进中国新阶段的法治建设。■

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* 此中国案例*见解*™的引用是：宋肇屹，后续裁判为指导案例33号对“恶意串通”的指引增添了生命力，《中国法律连接》，第7期，第43页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2019年12月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-7-201912-insights-7-zhaoyi-song。中文原文由熊美英博士编辑。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》，《中国法律连接》，第7期，第51页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC33），2019年12月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-33（以下简称“指导案例33号”）。

2 《中华人民共和国合同法》，1999年3月15日通过和公布，1999年10月1日起施行，http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm。

3 *见*最高人民法院案例指导工作办公室、民四庭，指导案例33号《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》的理解与参照，《人民司法·案例》，第18期，第8页（2015）。

4 一审判决书尚未找到，有可能已被排除在公布范围之外。

5 （2012）民四终字第1号民事判决，2012年8月22日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/spc-2012-min-si-zhong-zi-1-civil-judgment。

6 关于该案的更多内容，见指导案例33号，注释1。

7 *见，例如*，李永芝、王珊珊，类案检索机制在基层法院适用困境与路径构建，《北京市顺义区人民法院网》，2018年9月20日，http://bjsyfy.chinacourt.gov.cn/article/detail/2018/12/id/3606559.shtml。

8 *见*《中华人民共和国民事诉讼法》，第十条、第一百九十九条、第二百二十四条，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html。

9 《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese（以下简称“《实施细则》”）。

[10] 在《立法技术规范（试行）（一）》的第14个规范中，全国人民代表大会常务委员会法制工作委员会指出：

> “应当”与“必须”的含义没有实质区别。法律在表述义务性规范时，一般用“应当”，不用“必须”。

尽管此文件仅供“各有关部门”“工作中参考”，而且其是否能用于解释最高人民法院的《实施细则》仍然存在疑问，但从第14个规范的内容可以看到在中国法律制度中，“应当”一词含有一定的重要性。*见*《全国人民代表大会常务委员会法制工作委员会关于印送〈立法技术规范（试行）（一）〉的函》，2009年12月28日公布，同日起施行，http://www.samr.gov.cn/fgs/tzgg/200912/t20091228_294948.html。

[11] *亦见*《最高人民法院关于加强和规范裁判文书释法说理的指导意见》，2018年6月1日由最高人民法院公布，2018年6月13日起施行，http://www.court.gov.cn/zixun-xiangqing-101552.html。该意见第十三段落的表述是：

> 除依据法律法规、司法解释的规定外，法官可以运用下列**论据论证裁判理由**，以提高裁判结论的正当性和可接受性：最高人民法院发布的**指导性案例**；[…]。（强调后加）

而《实施细则》第十条则指出：“[…]应当将指导性案例**作为裁判理由**引述，但不作为裁判依据引用”（强调后加）。两者表述略有不同，其是否有不同的含义，值得注意。目前，最高人民法院正积极完善指导性案例制度，最理想的做法是统一对关于如何使用指导性案例的表述，减少误解。

[12] （2018）最高法民申5607号民事裁定，2018年12月17日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-shen-5607-civil-ruling。

[13] （2018）最高法民终1178号民事判决，2018年12月25日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-zhong-1178-civil-judgment。

[14] （2015）浙嘉民终字第918号、（2016）豫1303民初1171号、（2018）粤13民终1777号。

附录：26个明确提及指导案例33号的后续裁判（截至2019年9月30日）

序号	审判日期	后续裁判号	链接
1	2015/9/17	（2015）海民南初字第00258号	https://cgc.law.stanford.edu/zh-hans/judgments/liaoning-2015-hai-min-nan-chu-zi-00258-civil-judgment
2	2015/12/22	（2015）浙嘉民终字第918号	https://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2015-zhe-jia-min-zhong-zi-918-civil-judgment
3	2016/1/11	（2015）泉民初字第256号	https://cgc.law.stanford.edu/zh-hans/judgments/fujian-2015-quan-min-chu-zi-256-civil-judgment
4	2017/1/11	（2016）豫1303民初1171号	https://cgc.law.stanford.edu/zh-hans/judgments/henan-2016-yu-1303-min-chu-1171-civil-judgment
5	2017/3/28	（2016）浙1102民初5246号	https://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2016-zhe-1102-min-chu-5246-civil-judgment
6	2017/6/7	（2016）渝0107民初1156号	https://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2016-yu-0107-min-chu-1156-civil-judgment
7	2017/6/13	（2017）粤民终7号	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-min-zhong-7-civil-judgment
8	2017/8/2	（2017）鄂05民终1837号	https://cgc.law.stanford.edu/zh-hans/judgments/hubei-2017-e-05-min-zhong-1837-civil-judgment
9	2017/9/19	（2016）浙0482民初4052号	https://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2016-zhe-0482-min-chu-4052-civil-judgment
10	2017/10/25	（2017）粤12民初6号	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-12-min-chu-6-civil-judgment
11	2017/11/10	（2017）豫10民终2822号	https://cgc.law.stanford.edu/zh-hans/judgments/henan-2017-yu-10-min-zhong-2822-civil-judgment
12	2017/12/8	（2017）鄂民申3004号	https://cgc.law.stanford.edu/zh-hans/judgments/hubei-2017-e-min-shen-3004-civil-ruling
13	2018/3/14	（2018）青0102民初309号	https://cgc.law.stanford.edu/zh-hans/judgments/qinghai-2018-qing-0102-min-chu-309-civil-judgment
14	2018/4/8	（2018）云3102执异4号	https://cgc.law.stanford.edu/zh-hans/judgments/yunnan-2018-yun-3102-zhi-yi-4-enforcement-ruling
15	2018/5/25	（2018）粤17民终358号	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-17-min-zhong-358-civil-judgment
16	2018/7/10	（2018）吉04民终292号	https://cgc.law.stanford.edu/zh-hans/judgments/jilin-2018-ji-04-min-zhong-292-civil-judgment
17	2018/7/16	（2018）粤13民终1777号	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-13-min-zhong-1777-civil-judgment
18	2018/8/10	（2018）冀民终421号	https://cgc.law.stanford.edu/zh-hans/judgments/hebei-2018-ji-min-zhong-421-civil-judgment
19	2018/10/10	（2018）云3102民初448号	https://cgc.law.stanford.edu/zh-hans/judgments/yunnan-2018-yun-3102-min-chu-448-civil-judgment
20	2018/11/22	（2016）京民终250号	https://cgc.law.stanford.edu/zh-hans/judgments/beijing-2016-jing-min-zhong-250-civil-judgment
21	2018/12/17	（2018）最高法民申5607号	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-shen-5607-civil-ruling
22	2018/12/25	（2018）最高法民终1178号	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-zhong-1178-civil-judgment
23	2019/3/21	（2018）豫0581民初5227号	https://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-0581-min-chu-5227-civil-judgment
24	2019/4/26	（2018）京0113民初25170号	https://cgc.law.stanford.edu/zh-hans/judgments/beijing-2018-jing-0113-min-chu-25170-civil-judgment
25	2019/6/21	（2019）云0824民申1号	https://cgc.law.stanford.edu/zh-hans/judgments/yunnan-2019-yun-0824-min-shen-1-civil-ruling
26	2019/8/1	（2019）浙02民终1354号	https://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2019-zhe-02-min-zhong-1354-civil-judgment

瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案

Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid

指导案例33号
（最高人民法院审判委员会讨论通过
2014年12月18日发布）*

Guiding Case No. 33
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court Released on December 18, 2014)**

关键词

民事
确认合同无效
恶意串通
财产返还

Keywords

Civil
Affirmation of the Invalidity of a Contract
Malicious Collusion
Return of Property

裁判要点

1. 债务人将主要财产以明显不合理低价转让给其关联公司，关联公司在明知债务人欠债的情况下，未实际支付对价的，可以认定债务人与其关联公司恶意串通、损害债权人利益，与此相关的财产转让合同应当认定为无效。

2.《中华人民共和国合同法》第五十九条规定适用于第三人为财产所有权人的情形，在债权人对债务人享有普通债权的情况下，应当根据《中华人民共和国合同法》第五十八条的规定，判令因无效合同取得的财产返还给原财产所有人，而不能根据第五十九条规定直接判令债务人的关联公司因“恶意串通，损害第三人利益”的合同而取得的债务人的财产返还给债权人。

Main Points of the Adjudication

1. Where a debtor transfers [its] principal property to an affiliated company at a clearly unreasonably low price and the affiliated company, with knowledge of the debtor's indebtedness, does not actually pay consideration [for the principal property], [a people's court] may determine that the debtor and its affiliated company have maliciously colluded to harm the interests of [the debtor's] creditors. [The people's court] should then determine that the related property transfer contract is invalid.

2. Article 59 of the Contract *Law of the People's Republic of China* is [also] applicable to situations where a third party is the owner of property. Where a creditor has [only] an ordinary claim against a debtor, [a people's court] should, in accordance with Article 58 of the *Contract Law of the People's Republic of China*, order the property obtained through an invalid contract to be returned to the original owner of the property. [The people's court] cannot, based on Article 59, directly order that the debtor's property obtained by the debtor's affiliated company through a contract [in which they] "maliciously collude to harm the interests of a third party" be returned[1] to [the debtor's] creditor.

相关法条

1.《中华人民共和国合同法》第五十二条第二项[2]

2.《中华人民共和国合同法》第五十八条、第五十九条

Related Legal Rule(s)

1. Article 52 Item 2 of the *Contract Law of the People's Republic of China*[3]

2. Article 58 and Article 59 of the *Contract Law of the People's Republic of China*

基本案情

瑞士嘉吉国际公司（Cargill International SA，简称嘉吉公司）与福建金石制油有限公司（以下简称福建金石公司）以及大连金石制油有限公司、沈阳金石豆业有限公司、四川金石油粕有限公司、北京珂玛美嘉粮油有限公司、宜丰香港有限公司（该六公司以下统称金石集团）存在商业合作关系。嘉吉公司因与金石集团买卖大豆发生争议，双方在国际油类、种子和脂类联合会仲裁过程中于2005年6月26日达成《和解协议》，约定金石集团将在五年内分期偿还债务，并将金石集团旗下福建金石公司的全部资产，包括土地使用权、建筑物和固着物、所有的设备及其他财产抵押给嘉吉公司，作为偿还债务的担保。2005年10月10日，国际油类、种子和脂类联合会根据该《和解协议》作出第3929号仲裁裁决，确认金石集团应向嘉吉公司支付1337万美元。2006年5月，因金石集团未履行该仲裁裁决，福建金石公司也未配合进行资产抵押，嘉吉公司向福建省厦门市中级人民法院申请承认和执行第3929号仲裁裁决。2007年6月26日，厦门市中级人民法院经审查后裁定对该仲裁裁决的法律效力予以承认和执行。该裁定生效后，嘉吉公司申请强制执行。

2006年5月8日，福建金石公司与福建田源生物蛋白科技有限公司（以下简称田源公司）签订一份《国有土地使用权及资产买卖合同》，约定福建金石公司将其国有土地使用权、厂房、办公楼和油脂生产设备等全部固定资产以2569万元人民币（以下未特别注明的均为人民币）的价格转让给田源公司，其中国有土地使用权作价464万元、房屋及设备作价2105万元，应在合同生效后30日内支付全部价款。王晓琪和柳锋分别作为福建金石公司与田源公司的法定代表人在合同上签名。福建金石公司曾于2001年12月31日以482.1万元取得本案所涉32138平方米国有土地使用权。2006年5月10日，福建金石公司与田源公司对买卖合同项下的标的物进行了交接。同年6月15日，田源公司通过在中国农业银行漳州支行的账户向福建金石公司在同一银行的账户转入2500万元。福建金

Basic Facts of the Case

Cargill International S.A.[4] ([hereinafter] referred to as "Cargill Company") had commercial cooperative relationships with Fujian Jinshi Vegetable Oil Producing Co., Limited[5] (hereinafter referred to as "Fujian Jinshi Company"), Dalian Jinshi Vegetable Oil Producing Co., Limited, Shenyang Jinshi Bean Industry Co., Ltd., Sichuan Jinshi Oil Draff Co., Ltd., Beijing Kema Meijia Grains and Oils Co., Ltd., and Yifeng Hong Kong Co., Ltd.[6] (these six companies are hereinafter collectively referred to as the "Jinshi Group").

Because Cargill Company had a dispute with the Jinshi Group over the sale and purchase of soybeans, both sides, in the course of arbitration [conducted by] the Federation of Oils, Seeds and Fats Associations Ltd.,[7] reached a [certain] *Settlement Agreement* on June 26, 2005. [The *Settlement Agreement*] stipulated that the Jinshi Group would repay the debt [owed to Cargill Company] in installments over a period of five years and would mortgage the total assets of Fujian Jinshi Company, which was a part of the Jinshi Group, including land-use rights, buildings and fixtures, all equipment, and other property, to Cargill Company to serve as security for the repayment of the debt. On October 10, 2005, the Federation of Oils, Seeds and Fats Associations Ltd. rendered the No. 3929 Arbitral Award in accordance with the *Settlement Agreement*, affirming that the Jinshi Group should pay Cargill Company USD 13.37 million.

In May 2006, because the Jinshi Group had not performed [its obligations under] the arbitral award and because Fujian Jinshi Company had not cooperated in mortgaging its assets, Cargill Company applied to the Intermediate People's Court of Xiamen Municipality, Fujian Province, to recognize and enforce the No. 3929 Arbitral Award. On June 26, 2007, the Intermediate People's Court of Xiamen Municipality, after review, ruled to recognize the legal validity of the arbitral award and to enforce it. After the ruling became effective, Cargill Company applied for compulsory enforcement.

On May 8, 2006, Fujian Jinshi Company and Fujian Tianyuan Biological Protein Technology Co., Ltd.[8] (hereinafter referred to as "Tianyuan Company") signed the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land*, stipulating that Fujian Jinshi Company would transfer its rights to use [certain] state-owned land and [the ownership of] all of [its] fixed assets, including factory buildings, office buildings, and grease production equipment, to Tianyuan Company at a price of RMB 25.69 million (hereinafter [all currency] that is not specifically noted is in RMB). [Of the RMB 25.69 million,] the rights to use state-owned land were priced at RMB 4.64 million and the buildings and equipment were priced at RMB 21.05 million. All payments were to be made in full within 30 days of the contract's coming into effect. Respectively serving as the statutory representatives of Fujian Jinshi Company and Tianyuan Company, WANG Xiaoqi and LIU Feng signed the contract.

Fujian Jinshi Company had obtained the rights to use the 32,138 square meters of state-owned land involved in this case for RMB 4.821 million on December 31, 2001. On May 10, 2006, Fujian Jinshi Company and

石公司当日从该账户汇出1300万元、1200万元两笔款项至金石集团旗下大连金石制油有限公司账户，用途为往来款。同年6月19日，田源公司取得上述国有土地使用权证。

Tianyuan Company carried out the handover of the subject matter of the sale and purchase contract. On June 15 of the same year, Tianyuan Company transmitted RMB 25 million through its account at the Zhangzhou Branch of the Agricultural Bank of China[9] to the account that Fujian Jinshi Company had at the same bank. On the same day, Fujian Jinshi Company remitted two sums of funds, RMB 13 million and RMB 12 million, from its account to the account of Dalian Jinshi Vegetable Oil Producing Co., Limited, which was a part of the Jinshi Group, and the sums were marked as incoming/outgoing funds. On June 19 of the same year, Tianyuan Company obtained a certificate for the aforementioned rights to use state-owned land.

2008年2月21日，田源公司与漳州开发区汇丰源贸易有限公司（以下简称汇丰源公司）签订《买卖合同》，约定汇丰源公司购买上述土地使用权及地上建筑物、设备等，总价款为2669万元，其中土地价款603万元、房屋价款334万元、设备价款1732万元。汇丰源公司于2008年3月取得上述国有土地使用权证。汇丰源公司仅于2008年4月7日向田源公司付款569万元，此后未付其余价款。

On February 21, 2008, Tianyuan Company and Zhangzhou Development Zone Huifengyuan Trading Co., Ltd.[10] (hereinafter referred to as "Huifengyuan Company") signed a [certain] *Sale and Purchase Contract*, stipulating that Huifengyuan Company would purchase the aforementioned land-use rights, as well as the buildings and equipment on the land, at a total price of RMB 26.69 million. [Of the RMB 26.69 million,] the price of the land[-use rights] was RMB 6.03 million, the price of the buildings was RMB 3.34 million, and the price of the equipment was RMB 17.32 million. In March 2008, Huifengyuan Company obtained a certificate for the aforementioned rights to use state-owned land. Huifengyuan Company only paid Tianyuan Company RMB 5.69 million on April 7, 2008; thereafter, the remaining amount was not paid.

田源公司、福建金石公司、大连金石制油有限公司及金石集团旗下其他公司的直接或间接控制人均为王政良、王晓莉、王晓琪、柳锋。王政良与王晓琪、王晓莉是父女关系，柳锋与王晓琪是夫妻关系。2009年10月15日，中纺粮油进出口有限责任公司（以下简称中纺粮油公司）取得田源公司80%的股权。2010年1月15日，田源公司更名为中纺粮油（福建）有限公司（以下简称中纺福建公司）。

The direct or indirect control persons of Tianyuan Company, Fujian Jinshi Company, Dalian Jinshi Vegetable Oil Producing Co., Limited, and the other companies under the Jinshi Group were WANG Zhengliang, WANG Xiaoli, WANG Xiaoqi, and LIU Feng. WANG Zhengliang was the father of WANG Xiaoqi and WANG Xiaoli, while LIU Feng was the husband of WANG Xiaoqi. On October 15, 2009, Chinatex Grains and Oils Imp. & Exp. Co., Ltd.[11] (hereinafter referred to as "Chinatex Grains and Oils Company") acquired an 80% shareholding in Tianyuan Company. On January 15, 2010, Tianyuan Company changed [its] name to Chinatex Grains and Oils (Fujian) Co., Ltd. (hereinafter referred to as "Chinatex Fujian Company").

汇丰源公司成立于2008年2月19日，原股东为宋明权、杨淑莉。2009年9月16日，中纺粮油公司和宋明权、杨淑莉签订《股权转让协议》，约定中纺粮油公司购买汇丰源公司80%的股权。同日，中纺粮油公司（甲方）、汇丰源公司（乙方）、宋明权和杨淑莉（丙方）及沈阳金豆食品有限公司（丁方）签订《股权质押协议》，约定：丙方将所拥有汇丰源公司20%的股权质押给甲方，作为乙方、丙方、丁方履行"合同义务"之担保；"合同义务"系指乙方、丙方在《股权转让协议》及《股权质押协议》项下因"红豆事件"而产生的所有责任和义务；"红豆事件"是指嘉吉公司与金石集团就进口大豆中掺杂红豆原因而引发的金石集团涉及的一系列诉讼及仲裁纠纷以及与此有关的涉及汇丰

Huifengyuan Company was incorporated on February 19, 2008. The original shareholders were SONG Mingquan and YANG Shuli. On September 16, 2009, Chinatex Grains and Oils Company, along with SONG Mingquan and YANG Shuli, signed a [certain] *Agreement for the Transfer of Shareholding*, stipulating that Chinatex Grains and Oils Company would purchase an 80% shareholding in Huifengyuan Company. On the same day, Chinatex Grains and Oils Company (Party A), Huifengyuan Company (Party B), SONG Mingquan and YANG Shuli ([together as] Party C), and Shenyang Golden Bean Co., Ltd.[12] (Party D) signed a [certain] *Agreement for the Pledge of Shareholding*, stipulating that: [first,] Party C was to pledge its 20% shareholding in Huifengyuan Company to Party A as guarantee that Party B, Party C, and Party D were to fulfill [their] "contractual obligations"; [second,] the term "contractual obligations" was to refer to all responsibilities and obligations of Party B and Party C arising from the "Red Bean Incident" under the *Agreement for the Transfer of Shareholding* and the *Agreement for the Pledge of Shareholding*; [third,] the [term] "Red Bean Incident" was to refer to the

源公司的一系列诉讼及仲裁纠纷。还约定，下述情形同时出现之日，视为乙方和丙方的“合同义务”已完全履行：1.因“红豆事件”而引发的任何诉讼、仲裁案件的全部审理及执行程序均已终结，且乙方未遭受财产损失；2.嘉吉公司针对乙方所涉合同可能存在的撤销权因超过法律规定的最长期间（五年）而消灭。2009年11月18日，中纺粮油公司取得汇丰源公司80%的股权。汇丰源公司成立后并未进行实际经营。

series of litigation and arbitration disputes involving the Jinshi Group that was triggered by Cargill Company and the Jinshi Group['s inquiry into] the reason for imported soybeans being mixed with red beans and the related series of litigation and arbitration disputes involving Huifengyuan Company. [The agreement] also stipulated that the "contractual obligations" of Party B and Party C would be considered performed in full on the [first] day when both of the following circumstances were present:

1. All handling and enforcement procedures of any litigation and arbitration cases brought about by the "Red Bean Incident" conclude without Party B suffering [any] property loss; [and]

2. Cargill Company's potential right to revoke the contract involving Party B becomes extinct on the expiration of the maximum period provided by law (five years).

On November 18, 2009, Chinatex Grains and Oils Company obtained an 80% shareholding in Huifengyuan Company. Huifengyuan Company did not carry out actual operations after its incorporation.

由于福建金石公司已无可供执行的财产，导致无法执行，嘉吉公司遂向福建省高级人民法院提起诉讼，请求：一是确认福建金石公司与中纺福建公司签订的《国有土地使用权及资产买卖合同》无效；二是确认中纺福建公司与汇丰源公司签订的国有土地使用权及资产《买卖合同》无效；三是判令汇丰源公司、中纺福建公司将其取得的合同项下财产返还给财产所有人。

Since Fujian Jinshi Company no longer had property available for enforcement, making enforcement impossible, Cargill Company then brought suit in the High People's Court of Fujian Province, requesting that [the court]: first, affirm the invalidity of the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land* signed by Fujian Jinshi Company and Chinatex Fujian Company;[13] second, affirm the invalidity of the *Sale and Purchase Contract* for the rights to use state-owned land and [for the ownership of certain] assets signed by Chinatex Fujian Company[14] and Huifengyuan Company; and third, order Huifengyuan Company and Chinatex Fujian Company to return the property that they obtained under the [aforementioned] contracts to the owner of the property.

裁判结果

福建省高级人民法院于2011年10月23日作出（2007）闽民初字第37号民事判决，[15] 确认福建金石公司与田源公司（后更名为中纺福建公司）之间的《国有土地使用权及资产买卖合同》、田源公司与汇丰源公司之间的《买卖合同》无效；判令汇丰源公司于判决生效[16]之日起三十日内向福建金石公司返还因上述合同而取得的国有土地使用权，中纺福建公司于判决生效之日起三十日内向福建金石公司返还因上述合同而取得的房屋、设备。宣判后，福建金石公司、中纺福建公司、汇丰源公司提出上诉。最高人民法院于2012年8月22日作出（2012）民四终字第1号民事判决，[17] 驳回上诉，维持原判。

Results of the Adjudication

On October 23, 2011, the High People's Court of Fujian Province rendered the (2007) Min Min Chu Zi No. 37 Civil Judgment,[18] affirming that the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land* between Fujian Jinshi Company and Tianyuan Company (later renamed Chinatex Fujian Company) and the *Sale and Purchase Contract* between Tianyuan Company and Huifengyuan Company were invalid; ordering Huifengyuan Company to return to Fujian Jinshi Company, within 30 days of the judgment's coming into effect,[19] the rights to use state-owned land obtained through the aforementioned contracts; and [ordering] Chinatex Fujian Company to return to Fujian Jinshi Company, within 30 days of the judgment's coming into effect, the buildings and equipment obtained through the aforementioned contracts.

After the judgment was pronounced, Fujian Jinshi Company, Chinatex Fujian Company, and Huifengyuan Company appealed. On August 22, 2012, the Supreme People's Court rendered the (2012) Min Si Zhong Zi No. 1 Civil Judgment,[20] rejecting the appeal and upholding the original judgment.

裁判理由[21]

最高人民法院认为：[23]因嘉吉公司注册登记地在瑞士，[24]本案系涉外案件，各方当事人对适用中华人民共和国法律审理本案没有异议。本案源于债权人嘉吉公司认为债务人福建金石公司与关联企业田源公司、田源公司与汇丰源公司之间关于土地使用权以及地上建筑物、设备等资产的买卖合同，因属于《中华人民共和国合同法》第五十二条第二项“恶意串通，损害国家、集体或者第三人利益”的情形而应当被认定无效，并要求返还原物。本案争议的焦点问题是：福建金石公司、田源公司（后更名为中纺福建公司）、汇丰源公司相互之间订立的合同是否构成恶意串通、损害嘉吉公司利益的合同？本案所涉合同被认定无效后的法律后果如何？

一、关于福建金石公司、田源公司、汇丰源公司相互之间订立的合同是否构成“恶意串通，损害第三人利益”的合同

首先，福建金石公司、田源公司在签订和履行《国有土地使用权及资产买卖合同》的过程中，其实际控制人之间系亲属关系，且柳锋、王晓琪夫妇分别作为两公司的法定代表人在合同上签署。因此，可以认定在签署以及履行转让福建金石公司国有土地使用权、房屋、设备的合同过程中，田源公司对福建金石公司的状况是非常清楚的，对包括福建金石公司在内的金石集团因“红豆事件”被仲裁裁决确认对嘉吉公司形成1337万美元债务的事实是清楚的。

其次，《国有土地使用权及资产买卖合同》订立于2006年5月8日，其中约定田源公司购买福建金石公司资产的价款为2569万元，国有土地使用权作价464万元、房屋及设备作价2105万元，并未根据相关会计师事务所的评估报告作价。一审法院根据福建金石公司2006年5月31日资产负债表，以其中载明固定资产原价44042705.75元、扣除折旧后固定资产净值为32354833.70元，而《国有土地使用权及资产买卖合同》中对房屋及设备作价仅

Reasons for the Adjudication[22]

The Supreme People's Court opined:[25] because Cargill Company's place of registration was in Switzerland,[26] this case was a foreign-related case. None of the parties objected to the application of the law of the People's Republic of China in handling this case.

This case arose from creditor Cargill Company's claim that the circumstances surrounding the sale and purchase contracts between debtor Fujian Jinshi Company and [its] affiliated enterprise, Tianyuan Company, and between Tianyuan Company and Huifengyuan Company for the land-use rights and [other] assets, including the buildings and equipment on the land, were of the type [provided] in Article 52 Item 2 of the *Contract Law of the People's Republic of China*—"[the parties to the contract] maliciously collude to harm the interests of the State, the collective, or a third party"—and [therefore] their invalidity should be affirmed. [Cargill Company] also demanded the return of the original property. In this case, the issues that were the focal points of the dispute were: did the contracts entered into among Fujian Jinshi Company, Tianyuan Company (later renamed Chinatex Fujian Company), and Huifengyuan Company constitute contracts [arising from] malicious collusion to harm the interests of Cargill Company? What were the legal consequences after the contracts involved in the case were affirmed to be invalid?

1. On [the issue of] whether the contracts entered into among Fujian Jinshi Company, Tianyuan Company, and Huifengyuan Company constituted contracts [arising from] "malicious collusion to harm the interests of a third party"

First, in the course of signing and performing the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land*, there were [already] familial relationships between the actual control persons [of the parties to the contract], Fujian Jinshi Company and Tianyuan Company. In addition, LIU Feng and WANG Xiaoqi, the couple, served as the statutory representatives of the two companies in signing the contract. Therefore, it could be determined that in the course of signing and performing the contract to transfer Fujian Jinshi Company's rights to use state-owned land, buildings, and equipment, Tianyuan Company was acutely aware of Fujian Jinshi Company's situation and was aware of the fact that an arbitral award confirmed that, due to the "Red Bean Incident", the Jinshi Group, of which Fujian Jinshi Company was a part, owed a debt of USD 13.37 million to Cargill Company.

Second, the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land* was concluded on May 8, 2006. It stipulated, among other things, that the price for Tianyuan Company to purchase Fujian Jinshi Company's assets was RMB 25.69 million and priced the rights to use state-owned land at RMB 4.64 million and the buildings and equipment at RMB 21.05 million. [These items] were not priced in accordance with relevant accounting firms' appraisal reports.[27] Based on the balance sheet of Fujian Jinshi Company as of May 31, 2006, which clearly stated that the original price of the fixed assets was RMB 44,042,705.75 and the net value of the fixed assets after depreciation was RMB 32,354,833.70, and [the fact] that the buildings

2105万元，认定《国有土地使用权及资产买卖合同》中约定的购买福建金石公司资产价格为不合理低价是正确的。在明知债务人福建金石公司欠债权人嘉吉公司巨额债务的情况下，田源公司以明显不合理低价购买福建金石公司的主要资产，足以证明其与福建金石公司在签订《国有土地使用权及资产买卖合同》时具有主观恶意，属恶意串通，且该合同的履行足以损害债权人嘉吉公司的利益。

and equipment were only priced at RMB 21.05 million in the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land*, the first-instance court determined that the price stipulated in the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land* for the purchase of Fujian Jinshi Company's assets was unreasonably low. [This determination] was correct. Tianyuan Company purchased Fujian Jinshi Company's principal assets at a clearly unreasonably low price in a situation where it clearly knew that debtor Fujian Jinshi Company owed a large debt to creditor Cargill Company. This was sufficient to prove that, when [Tianyuan Company] signed the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land* with Fujian Jinshi Company, it had subjective malice and [that this] was a type of malicious collusion. Moreover, the performance of that contract could harm the interests of creditor Cargill Company.

第三，《国有土地使用权及资产买卖合同》签订后，田源公司虽然向福建金石公司在同一银行的账户转账2500万元，但该转账并未注明款项用途，且福建金石公司于当日将2500万元分两笔汇入其关联企业大连金石制油有限公司账户；又根据福建金石公司和田源公司当年的财务报表，并未体现该笔2500万元的入账或支出，而是体现出田源公司尚欠福建金石公司“其他应付款”121224155.87元。一审法院据此认定田源公司并未根据《国有土地使用权及资产买卖合同》向福建金石公司实际支付价款是合理的。

Third, although Tianyuan Company transferred RMB 25 million [from its account] to Fujian Jinshi Company's account at the same bank after signing the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land*, that transfer did not indicate the purpose of the funds. In addition, on that same day, Fujian Jinshi Company remitted two sums of money totaling RMB 25 million to the account of its affiliated enterprise, Dalian Jinshi Vegetable Oil Producing Co., Limited. Moreover, the financial statements of Fujian Jinshi Company and Tianyuan Company reflected neither the inflow nor the outflow of the RMB 25 million, but instead, reflected that Tianyuan Company still owed Fujian Jinshi Company "other payables" amounting to RMB 121,224,155.87. It was reasonable for the first-instance court to determine on this basis that Tianyuan Company had not actually paid Fujian Jinshi Company the [purchase] price in accordance with the *Contract for the Sale and Purchase of Assets and the Rights to Use State-Owned Land.*

第四，从公司注册登记资料看，汇丰源公司成立时股东构成似与福建金石公司无关，但在汇丰源公司股权变化的过程中可以看出，汇丰源公司在与田源公司签订《买卖合同》时对转让的资产来源以及福建金石公司对嘉吉公司的债务是明知的。《买卖合同》约定的价款为2669万元，与田源公司从福建金石公司购入该资产的约定价格相差不大。汇丰源公司除已向田源公司支付569万元外，其余款项未付。一审法院据此认定汇丰源公司与田源公司签订《买卖合同》时恶意串通并足以损害债权人嘉吉公司的利益，并无不当。

Fourth, looking at the company registration information, the composition of Huifengyuan Company's shareholders at the time of incorporation seemed unrelated to Fujian Jinshi Company. However, it was apparent from the changes in Huifengyuan Company's shareholding that when Huifengyuan Company signed the *Sale and Purchase Contract* with Tianyuan Company, [Huifengyuan Company] was clearly aware of the source of the transferred assets and the debt owed by Fujian Jinshi Company to Cargill Company. The price stipulated in the *Sale and Purchase Contract* was RMB 26.69 million, which was not very different from the agreed price at which Tianyuan Company purchased those assets from Fujian Jinshi Company. Apart from the RMB 5.69 million paid to Tianyuan Company, Huifengyuan Company did not pay any other portion of the price. It was not improper for the first-instance court to determine on this basis that Huifengyuan Company and Tianyuan Company maliciously colluded when they signed the *Sale and Purchase Contract* and [that such an arrangement] could harm the interests of creditor Cargill Company.

综上，福建金石公司与田源公司签订的《国有土地使用权及资产买卖合同》、田源公司与汇丰源公司签订的《买卖合同》，属于恶意串通、损害嘉吉公司利益的合同。根据合

In summary, the *Contract for the Sale and Purchase ofAssets and the Rights to Use State-Owned Land* signed by Fujian Jinshi Company and Tianyuan Company and the *Sale and Purchase Contract* signed by Tianyuan Company and Huifengyuan Company were contracts

同法第五十二条第二项的规定，均应当认定无效。

that [arose from] malicious collusion and that harmed the interests of Cargill Company. In accordance with Article 52 Item 2 of the *Contract Law*, both [contracts] should be affirmed to be invalid.

二、关于本案所涉合同被认定无效后的法律后果

2. On [the issue of] the legal consequences after the contracts involved in the case were affirmed to be invalid

对于无效合同的处理，人民法院一般应当根据合同法第五十八条“合同无效或者被撤销后，因该合同取得的财产，应当予以返还；不能返还或者没有必要返还的，应当折价补偿。有过错的一方应当赔偿对方因此所受到的损失，双方都有过错的，应当各自承担相应的责任”的规定，判令取得财产的一方返还财产。本案涉及的两份合同均被认定无效，两份合同涉及的财产相同，其中国有土地使用权已经从福建金石公司经田源公司变更至汇丰源公司名下，在没有证据证明本案所涉房屋已经由田源公司过户至汇丰源公司名下、所涉设备已经由田源公司交付汇丰源公司的情况下，一审法院直接判令取得国有土地使用权的汇丰源公司、取得房屋和设备的田源公司分别就各自取得的财产返还给福建金石公司并无不妥。

With respect to the handling of invalid contracts, people's courts should generally order the party that obtained the property to return the property in accordance with Article 58 of the *Contract Law*[:]

> After a contract is [determined to be] invalid or is revoked, property obtained as a result of the contract should be returned. [Where the property] cannot be returned or the return is unnecessary, an amount equivalent to the value [of the property] should be reimbursed. The party at fault should pay the other party compensation for resulting losses suffered. If both parties are at fault, [they] should bear their corresponding liabilities.

The two contracts involved in this case were both affirmed to be invalid. The property involved in the two contracts was the same, among which the rights to use state-owned land had already been transferred from Fujian Jinshi Company to and [registered] under the name of Huifengyuan Company through Tianyuan Company. [Considering that] there was no evidence to prove that [the titles of] the buildings involved in this case had already been passed to and [registered] under the name of Huifengyuan Company through Tianyuan Company and that the equipment involved [in this case] had already been delivered to Huifengyuan Company by Tianyuan Company, it was not improper for the first-instance court to directly order Huifengyuan Company, which obtained the rights to use state-owned land, and Tianyuan Company, which obtained the buildings and the equipment, to return to Fujian Jinshi Company the property that each had obtained.

合同法第五十九条规定：“当事人恶意串通，损害国家、集体或者第三人利益的，因此取得的财产收归国家所有或者返还集体、第三人。”该条规定应当适用于能够确定第三人为财产所有权人的情况。本案中，嘉吉公司对福建金石公司享有普通债权，本案所涉财产系福建金石公司的财产，并非嘉吉公司的财产，因此只能判令将系争财产返还给福建金石公司，而不能直接判令返还给嘉吉公司。[28]

Article 59 of the *Contract Law* provides:

> Where parties maliciously collude to harm the interests of the State, the collective, or a third party, property obtained as a result shall be confiscated by the State or returned to the collective or the third party.

This provision should be applicable to situations where a third party can be determined to be the owner of the property. In this case, Cargill Company had an ordinary claim against Fujian Jinshi Company. The property involved in this case was the property of Fujian Jinshi Company, not the property of Cargill Company. Therefore, [the court] could only order that the property in dispute be returned to Fujian Jinshi Company, but could not directly order [the property] to be returned[29] to Cargill Company.[30]

CGCP 备注

《中华人民共和国合同法》

第五十二条

有下列情形之一的，合同无效：

（一）一方以欺诈、胁迫的手段订立合同，损害国家利益；

（二）恶意串通，损害国家、集体或者第三人利益；

（三）以合法形式掩盖非法目的；

（四）损害社会公共利益；

（五）违反法律、行政法规的强制性规定。

第五十八条

合同无效或者被撤销后，因该合同取得的财产，应当予以返还；不能返还或者没有必要返还的，应当折价补偿。有过错的一方应当赔偿对方因此所受到的损失，双方都有过错的，应当各自承担相应的责任。

第五十九条

当事人恶意串通，损害国家、集体或者第三人利益的，因此取得的财产收归国家所有或者返还集体、第三人。■

CGCP Notes

Contract Law of the People's Republic of China

Article 52

A contract shall be invalid under any of the following circumstances:

(1) the contract is concluded by a party's use of fraud or coercion to harm the interests of the State;

(2) [the parties to the contract] maliciously collude to harm the interests of the State, the collective, or a third party;

(3) an illegal purpose is covered up in a legal form;

(4) [the contract] harms social and public interests;

(5) [the contract] violates mandatory provisions of laws and administrative regulations.

Article 58

After a contract is [determined to be] invalid or is revoked, property obtained as a result of the contract should be returned. [Where the property] cannot be returned or the return is unnecessary, an amount equivalent to the value [of the property] should be reimbursed. The party at fault should pay the other party compensation for resulting losses suffered. If both parties are at fault, [they] should bear their corresponding liabilities.

Article 59

Where parties maliciously collude to harm the interests of the State, the collective, or a third party, property obtained as a result shall be confiscated by the State or returned to the collective or the third party. ■

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* 此案例的中文引用是：《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》，《中国法律连接》，第7期，第51页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC33），2019年12月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-33。

案例原文载于：《中国法院网》，http://www.chinacourt.org/article/detail/2014/12/id/1520780.shtml。*亦见*《最高人民法院关于发布第八批指导性案例的通知》，2014年12月18日公布，同日起施行，http://rmfyb.chinacourt.org/paper/html/2014-12/20/content_91856.htm?div=-1。

除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》 (*Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid*), 7 China Law Connect 51 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC33), Dec. 2019, http://cgc.law.stanford.edu/guiding-cases/guiding-case-33.

The original, Chinese version of this case is available at 《中国法院网》 (www.chinacourt.org), http://www.chinacourt.org/article/detail/2014/12/id/1520780.shtml. *See also* 《最高人民法院关于发布第八批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Eighth Batch of Guiding Cases*), issued on and effective as of Dec. 18, 2014, http://rmfyb.chinacourt.org/paper/html/2014-12/20/content_91856.htm?div=-1.

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[1] The term "返还" ("returned") is used here, but "delivered" might be the term meant; "returned" suggests that the property was once owned by the creditor.

[2] 《中华人民共和国合同法》，1999年3月15日通过和公布，1999年10月1日起施行，http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm。

[3]《中华人民共和国合同法》 (*Contract Law of the People's Republic of China*), passed and issued on Mar. 15, 1999, effective as of Oct. 1, 1999, http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm.

[4] The name "瑞士嘉吉国际公司" is translated herein as "Cargill International S.A." in accordance with the English name appearing on the company's website, at http://www.cargill.com/worldwide/switzerland/.

[5] The name "福建金石制油有限公司" is translated herein as "Fujian Jinshi Vegetable Oil Producing Co., Limited" in accordance with the English name appearing in an e-announcement issued on July 8, 2005 by the Hong Kong Companies Registry, at http://www.gld.gov.hk/egazette/pdf/20050927/cgn200509273214.pdf.

[6] The names "大连金石制油有限公司", "沈阳金石豆业有限公司", "四川金石油粕有限公司", "北京珂玛美嘉粮油有限公司", and "宜丰香港有限公司" are translated herein literally as "Dalian Jinshi Vegetable Oil Producing Co., Limited", "Shenyang Jinshi Bean Industry Co., Ltd.", "Sichuan Jinshi Oil Draff Co., Ltd.", "Beijing Kema Meijia Grains and Oils Co., Ltd.", and "Yifeng Hong Kong Co., Ltd.", respectively. These companies do not appear to have official English names.

[7] The name "国际油类、种子和脂类联合会" is translated herein as "the Federation of Oils, Seeds and Fats Associations Ltd." in accordance with the English name appearing on the organization's website, at http://www.fosfa.org/about-us.

[8] The name "福建田源生物蛋白科技有限公司" is translated herein literally as "Fujian Tianyuan Biological Protein Technology Co., Ltd.". The company does not appear to have an official English name.

[9] The name "中国农业银行" is translated here as "Agricultural Bank of China" in accordance with the English name appearing on the company's website, http://www.abchina.com/cn.

[10] The name "漳州开发区汇丰源贸易有限公司" is translated herein literally as "Zhangzhou Development Zone Huifengyuan Trading Co., Ltd.". The company does not appear to have an official English name.

[11] The name "中纺粮油进出口有限责任公司" is translated herein as "Chinatex Grains and Oils Imp. & Exp. Co., Ltd." in accordance with the English name appearing on the company's website, at http://www.chinatex.com/tabid/168/Default.aspx.

[12] The name "沈阳金豆食品有限公司" is translated here literally as "Shenyang Golden Bean Co., Ltd.". The company does not appear to have an official English name.

[13] As mentioned in preceding paragraphs, the contract was signed by Tianyuan Company, whose name was subsequently changed to "Chinatex Grains and Oils (Fujian) Co., Ltd.", the abbreviation of which, as used in this Guiding Case, is "Chinatex Fujian Company".

[14] *Id.*

[15] 一审判决书尚未找到，有可能已被排除在公布之外。

[16]《中华人民共和国民事诉讼法》第一百五十五条规定，"最高人民法院的判决、裁定，以及依法不准上诉或者超过上诉期没有上诉的判决、裁定，是发生法律效力的判决、裁定。"见《中华人民共和国民事诉讼法》，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html。

[17]（2012）民四终字第1号民事判决，2012年8月22日由最高人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/spc-2012-min-si-zhong-zi-1-civil-judgment（以下简称"《二审判决》"）。

[18] The first-instance judgment has not been found and may have been excluded from publication.

[19] The original text reads "判决生效" ("the judgment's coming into effect"). According to Article 155 of the *Civil Procedure Law of the People's Republic of China*, judgments and rulings that have come into effect are judgments and rulings of the Supreme People's Court as well as judgments and rulings which, according to law, may not be appealed or which have not been appealed within the prescribed time limit. *See*《中华人民共和国民事诉讼法》(*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[20]（2012）民四终字第1号民事判决 ((2012) Min Si Zhong Zi No. 1 Civil Judgment), rendered by the Supreme People's Court on Aug. 22, 2012, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2012-min-si-zhong-zi-1-civil-judgment (hereinafter "*Second-Instance Judgment*").

[21] 本部分的黄色亮点由中国指导性案例项目添加，以展示该项目对本指导性案例和其所依据的最终判决（即：《二审判决》，注释17）的比较。以黄色突出显示的表述/信息并不用于最终判决的"本院认为"部分。最高人民法院将这些表述/信息用于指导性案例中，可能是为了改进该案例的推理部分，继而再归纳成"裁判要点"。

[22] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the final judgment upon which this Guiding Case is based (i.e., *Second-Instance Judgment*, *supra* note 20). Expressions/details highlighted in yellow were not used in the "This Court Opines" section of the final judgment. The Supreme People's Court likely included these expressions/details in the Guiding Case for the purpose of improving the Guiding Case's reasoning section, from which the "Main Points of the Adjudication" section was derived.

[23]《二审判决》，注释17。

[24] 最终判决（即：《二审判决》，注释17）没有明确解释是"因嘉吉公司注册登记地在瑞士"，所以本案系涉外案件。指导案例33号清楚说明这一点。

[25] *Second-Instance Judgment*, *supra* note 20.

[26] The final judgment (i.e., *Second-Instance Judgment*, *supra* note 20) does not explicitly state that this case was a foreign-related case "because Cargill Company's place of registration was in Switzerland". Guiding Case No. 33 makes this point clear.

[27] The plural form is used here because, according to the final judgment, more than one accounting firm prepared appraisal reports. *See Second-Instance Judgment*, *supra* note 20.

[28] 本指导性案例没有提供此信息："生效裁判审判人员：陈纪忠、高晓力、沈红雨"。见《二审判决》，注释17。

[29] The term "返还" ("returned") is used here, but "delivered" might be the term meant; "returned" suggests that the property was once owned by Cargill Company.

[30] This Guiding Case does not provide this information: "Adjudication personnel of the effective judgment: CHEN Jizhong, GAO Xiaoli, and SHEN Hongyu". *See Second-Instance Judgment*, *supra* note 20.

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石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案

SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Infringement of a Computer Software Copyright

指导案例49号
（最高人民法院审判委员会讨论通过
2015年4月15日发布）*

Guiding Case No. 49
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on April 15, 2015)**

关键词

民事
侵害计算机软件著作权
举证责任
侵权对比
缺陷性特征

Keywords

Civil
Infringement of a Computer Software Copyright
Burden of Proof
Infringement Comparison
Characteristics of Defects

裁判要点

在被告拒绝提供被控侵权软件的源程序或者目标程序，且由于技术上的限制，无法从被控侵权产品中直接读出目标程序的情形下，如果原、被告软件在设计缺陷方面基本相同，而被告又无正当理由拒绝提供其软件源程序或者目标程序以供直接比对，则考虑到原告的客观举证难度，可以判定原、被告计算机软件构成实质性相同，由被告承担侵权责任。

Main Points of the Adjudication

In a situation where a defendant refuses to provide the source program or the object program of the allegedly infringing software, and, due to technical limitations, the object program cannot be read directly from the allegedly infringing product, if the design defects of the plaintiff's software and [those of] the defendant's software are basically the same, and if the defendant has no proper reasons to refuse to provide the source program or the object program of his[1] software for direct comparison, [the court] may, in consideration of the plaintiff's objective difficulty in adducing evidence, determine that the plaintiff's computer software and that of the defendant are substantively the same and that the defendant bears liability for infringement.

相关法条

《计算机软件保护条例》第三条第一款[2]

Related Legal Rule(s)

Article 3 Paragraph 1 of the *Regulation on the Protection of Computer Software*[3]

基本案情

原告石鸿林诉称：被告泰州华仁电子资讯有限公司（以下简称华仁公司）未经许可，长期大量复制、发行、销售与石鸿林计算机软件“S型线切割机床单片机控制器系统软件V1.0”相同的软件，严重损害其合法权益。故诉请判令华仁公司停止侵权，

Basic Facts of the Case

Plaintiff SHI Honglin claimed: defendant Taizhou Huaren Electronic Information Co., Ltd.[4] (hereinafter referred to as "Huaren Company"), without authorization, copied, distributed, and sold for a long time a large quantity of software that was the same as SHI Honglin's computer software, [namely,] the "S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller System Software V1.0", seriously harming his[5]

公开赔礼道歉，并赔偿原告经济损失10万元、为制止侵权行为所支付的证据保全公证费、诉讼代理费9200元以及鉴定费用。

legal rights and interests. Therefore, [SHI Honglin] sued and requested that [the court] order Huaren Company to cease the infringement, publicly apologize, and pay the plaintiff RMB 100,000 as compensation for economic losses, RMB 9,200 [for covering] evidence preservation notary fees and litigation agent fees[6] paid for the purpose of stopping the infringing act, and [an amount for covering] the cost of appraisal.

被告华仁公司辩称：其公司HR-Z型线切割机床控制器所采用的系统软件系其独立开发完成，与石鸿林S型线切割机床单片机控制系统应无相同可能，且其公司产品与石鸿林生产的S型线切割机床单片机控制器的硬件及键盘布局也完全不同，请求驳回石鸿林的诉讼请求。

Defendant Huaren Company defended its position, claiming: the system software used in [Huaren] Company's HR-Z-Type Wire-Cut Electrical Discharge Machining Controller was independently developed [by Huaren Company]. There should not have been any possibility for [it] to be the same as SHI Honglin's S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller System. In addition, [Huaren] Company's products and the hardware and keyboard layout of the S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller produced by SHI Honglin were completely different. [Therefore, Huaren Company] requested that [the court] reject SHI Honglin's litigation requests.

法院经审理查明：2000年8月1日，石鸿林开发完成S型线切割机床单片机控制器系统软件。2005年4月18日获得国家版权局软著登字第035260号计算机软件著作权登记证书，证书载明软件名称为S型线切割机床单片机控制器系统软件V1.0（以下简称S系列软件），著作权人为石鸿林，权利取得方式为原始取得。2005年12月20日，泰州市海陵区公证处出具（2005）泰海证民内字第1146号公证书一份，对石鸿林以660元价格向华仁公司购买HR-Z线切割机床数控控制器（以下简称HR-Z型控制器）一台和取得销售发票（No：00550751）的购买过程，制作了保全公证工作记录、拍摄了所购控制器及其使用说明书、外包装的照片8张，并对该控制器进行了封存。

The court handled the case and ascertained:[7] on August 1, 2000, SHI Honglin completed the development of the S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller System Software. On April 18, 2005, [SHI Honglin] received from the National Copyright Administration[8] the Ruan Zhe Deng Zi No. 035260 Computer Software Copyright Registration Certificate. The certificate clearly stated ["]S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller System Software V1.0["] (hereinafter referred to as the "S-Series Software") as the name of the software, SHI Honglin as the copyright owner, and original acquisition[9] as the method by which the right was acquired.

On December 20, 2005, the Hailing District Notary Office of Taizhou Municipality issued the (2005) Tai Hai Zheng Min Nei Zi No. 1146 Notarial Certificate. With respect to the purchasing process [that showed that] SHI Honglin purchased from Huaren Company an HR-Z Wire-Cut Electrical Discharge Machining Numerically-Controlled Controller (hereinafter referred to as the "HR-Z-Type Controller") at a price of RMB 660 and obtained a sales invoice (No. 00550751), [the notary office] prepared a record of the notary preservation work, took eight photographs of the purchased controller, its operating manual, and its external packaging, and sealed the controller for storage.

一审中，法院委托江苏省科技咨询中心对下列事项进行比对鉴定：（1）石鸿林本案中提供的软件源程序与其在国家版权局版权登记备案的软件源程序的同一性；（2）公证保全的华仁公司HR-Z型控制器系统软件与石鸿林获得版权登记的软件源程序代码相似性或者相同性。后江苏省科技咨询中心出具鉴定工作报告，因被告的软件主要固化在美国ATMEL公司的AT89F51和菲利普公司的P89C58两块芯片上，而代号为"AT89F51"的芯片是一块带自加密的微控制器，必须首先破解它的加密系统，才能读取固化其中的软件代

During the first-instance adjudication, the court entrusted the Science and Technology Advisory Center of Jiangsu Province[10] to conduct a comparative appraisal of the following matters: (1) the identicalness of the source program of the software provided by SHI Honglin in this case and the source program of the software whose copyright he registered and put on record at the National Copyright Administration; [and] (2) the similarity or sameness between the source program code of Huaren Company's HR-Z-Type Controller system software as preserved by the notary [office] and [that of] SHI Honglin's software, whose copyright he obtained and registered.

Afterwards, the Science and Technology Advisory Center of Jiangsu Province issued an appraisal work report. [According to the report,]

码。而根据现有技术条件，无法解决芯片解密程序问题，因而根据现有鉴定材料难以作出客观、科学的鉴定结论。

because the defendant's software was primarily etched into[11] both the AT89F51 chip of Atmel Corporation[12] of the United States and the P89C58 chip of Philips Semiconductors,[13] and the chip code-named "AT89F51" was a self-encrypted microcontroller, it was necessary to first break its encryption system in order to read and retrieve the software code etched into it. However, given the existing technical conditions, the problem of the decryption process of the chip could not be resolved. Therefore, based on the existing appraisal materials, it was difficult to reach objective, scientific appraisal conclusions.

二审中，法院根据原告石鸿林的申请，就以下事项组织技术鉴定：原告软件与被控侵权软件是否具有相同的软件缺陷及运行特征。经鉴定，中国版权保护中心版权鉴定委员会出具鉴定报告，结论为：通过运行原、被告软件，发现二者存在如下相同的缺陷情况：（1）二控制器连续加工程序段超过2048条后，均出现无法正常执行的情况；（2）在加工完整的一段程序后只让自动报警两声以下即按任意键关闭报警时，在下一次加工过程中加工回复线之前自动暂停后，二控制器均有偶然出现蜂鸣器响声2声的现象。

During the second-instance adjudication, the court, based on plaintiff SHI Honglin's application, organized a technical appraisal of the following matters: whether the plaintiff's software and the allegedly infringing software had the same software defects and operational characteristics. After the appraisal, the Copyright Authentication Committee of the Copyright Protection Center of China[14] issued an appraisal report, [in which] the conclusions were:

> Through running the plaintiff's software and the defendant's [software], it was discovered that the two [software products] had the same instances of defect, as [stated] below:
>
> (1) after continuously processing more than 2048 program segments, neither of the two controllers could execute [their programs] normally; [and]
>
> (2) when a key was pressed to turn off an alarm that had automatically rung once or twice after a complete program segment had been processed, and [then], after the processing of the next [program segment] automatically paused at a time before the recoil line was processed, both controllers occasionally exhibited two buzzer sounds.

二审法院另查明：原、被告软件的使用说明书基本相同。两者对控制器功能的描述及技术指标基本相同；两者对使用操作的说明基本相同；两者在段落编排方式和多数语句的使用上基本相同。经二审法院多次释明，华仁公司始终拒绝提供被控侵权软件的源程序以供比对。

The second-instance court also ascertained: the operating manuals of the plaintiff's software and the defendant's [software] were basically the same. Both were basically the same in [their] descriptions of the controller functions and technical specifications; both were basically the same in [their] explanations of the use and operation [of the software]; both were basically the same in how paragraphs were arranged and in many statements used. After the second-instance court's multiple explanations and clarifications, Huaren Company still refused to provide the source program of the allegedly infringing software for comparison.

裁判结果

Results of the Adjudication

江苏省泰州市中级人民法院于2006年12月8日作出（2006）泰民三初字第2号民事判决：[15]驳回原告石鸿林的诉讼请求。石鸿林提起上诉，江苏省高级人民法院于2007年12月17日作出（2007）苏民三终字第0018号民事判决：[16]一、撤销江苏省泰州市中级人民法院（2006）泰民三初字第2号民事判决；二、华仁公司立即停止生产、销售侵犯石鸿林S型线切割机床单片机控制器系统软件V1.0著作权的产品；

On December 8, 2006, the Intermediate People's Court of Taizhou Municipality, Jiangsu Province, rendered the (2006) Tai Min San Chu Zi No. 2 Civil Judgment:[17] [the court] rejects plaintiff SHI Honglin's litigation requests. SHI Honglin appealed. On December 17, 2007, the High People's Court of Jiangsu Province rendered the (2007) Su Min San Zhong Zi No. 0018 Civil Judgment:[18]

1. [The court] revokes the (2006) Tai Min San Chu Zi No. 2 Civil Judgment [rendered by] the Intermediate People's Court of Taizhou Municipality, Jiangsu Province.

三、华仁公司于本判决生效之日起10日内赔偿石鸿林经济损失79200元；四、驳回石鸿林的其他诉讼请求。

2. [The court orders] Huaren Company to immediately cease the production and sale of products that infringe on SHI Honglin's copyright to the S-Type Wire-Cut Electrical Discharge Machining Single-Chip Computer Controller System Software V1.0.

3. [The court orders] Huaren Company to pay, within 10 days of the judgment's coming into effect,[19] SHI Honglin RMB 79,200 as compensation for economic losses.

4. [The court] rejects SHI Honglin's other litigation requests.

裁判理由[20]

Reasons for the Adjudication[21]

法院生效裁判认为：根据现有证据，应当认定华仁公司侵犯了石鸿林S系列软件著作权。

In the effective judgment, the court opined: [22] based on the existing evidence, [the court] should determine that Huaren Company infringed on SHI Honglin's copyright to the S-Series Software.

一、本案的证明标准应根据当事人客观存在的举证难度合理确定

1. The standard of proof in this case should be reasonably determined in accordance with the [relevant] party's objective difficulty in adducing evidence.

根据法律规定，当事人对自己提出的诉讼请求所依据的事实有责任提供证据加以证明。本案中，石鸿林主张华仁公司侵犯其S系列软件著作权，其须举证证明双方计算机软件之间构成相同或实质性相同。一般而言，石鸿林就此须举证证明两计算机软件的源程序或目标程序之间构成相同或实质性相同。但本案中，由于存在客观上的困难，石鸿林实际上无法提供被控侵权的HR-Z软件的源程序或目标程序，并进而直接证明两者的源程序或目标程序构成相同或实质性相同。1.石鸿林无法直接获得被控侵权的计算机软件源程序或目标程序。由于被控侵权的HR-Z软件的源程序及目标程序处于华仁公司的实际掌握之中，因此在华仁公司拒绝提供的情况下，石鸿林实际无法提供HR-Z软件的源程序或目标程序以供直接对比。2.现有技术手段无法从被控侵权的HR-Z型控制器中获得HR-Z软件源程序或目标程序。根据一审鉴定情况，HR-Z软件的目标程序系加载于HR-Z型控制器中的内置芯片上，由于该芯片属于加密芯片，无法从芯片中读出HR-Z软件的目标程序，并进而反向编译出源程序。因此，依靠现有技术手段无法从HR-Z型控制器中获得HR-Z软件源程序或目标程序。

According to legal provisions, the party [making the litigation request] has the responsibility to provide evidence to prove the facts upon which the litigation request put forward by him is based. In this case, SHI Honglin asserted that Huaren Company had infringed on his copyright to the S-Series Software, and[, therefore,] he had to adduce evidence to prove that the computer software [products] of the two parties were the same or substantively the same. Generally speaking, on this [issue], SHI Honglin had to adduce evidence to prove that the source programs or the object programs of the two computer software [products] were the same or substantively the same.

In this case, however, because there were objective difficulties, SHI Honglin could not practically provide the source program or the object program of the allegedly infringing HR-Z Software to directly prove that the source programs or the object programs of the two [software products] were the same or substantively the same. [These difficulties were:]

1. SHI Honglin could not directly obtain the source program or the object program of the allegedly infringing computer software. Since the source program and the object program of the allegedly infringing HR-Z Software were actually controlled by Huaren Company, and under the circumstance that Huaren Company refused to provide [them], SHI Honglin could not practically provide the source program or the object program of the HR-Z Software for direct comparison.

2. Neither the source program nor the object program of the HR-Z Software could be obtained from the allegedly infringing HR-Z-Type Controller by using existing technical means. According to the facts appraised during the first-instance adjudication, the object program of the HR-Z Software was added to the internal chip of the HR-Z-Type Controller. Because that chip was an encrypted chip, the object program of the HR-Z Software could not be read from the chip to decompile the source program. Therefore, neither the source program

nor the object program of the HR-Z Software could be obtained from the HR-Z-Type Controller by relying on existing technical means.

综上，本案在华仁公司无正当理由拒绝提供软件源程序以供直接比对，石鸿林确因客观困难无法直接举证证明其诉讼主张的情形下，应从公平和诚实信用原则出发，合理把握证明标准的尺度，对石鸿林提供的现有证据能否形成高度盖然性优势进行综合判断。

In summary, in this case, given that Huaren Company had no proper reasons to refuse to provide the source program of the software for direct comparison, and that, SHI Honglin, due to objective difficulties, could not directly adduce evidence to prove his assertion in this lawsuit, [the court] should, based on the principles of fairness and good faith and reasonable application of the scale of the standard of proof, comprehensively determine whether the existing evidence provided by SHI Honglin could, constitute, with a high degree of probability, a preponderance [for him].[23]

二、石鸿林提供的现有证据能够证明被控侵权的HR-Z软件与石鸿林的S系列软件构成实质相同，华仁公司应就此承担提供相反证据的义务

2. The existing evidence provided by SHI Honglin could prove that the allegedly infringing HR-Z Software and SHI Honglin's S-Series Software were substantively the same, [therefore,] Huaren Company should bear the obligation of providing evidence to the contrary.

本案中的现有证据能够证明以下事实：

The existing evidence of this case could prove the following facts:

1. 二审鉴定结论显示：通过运行安装HX-Z软件的HX-Z型控制器和安装HR-Z软件的HR-Z型控制器，发现二者存在前述[24]相同的系统软件缺陷情况。

1. The conclusions of the appraisal [conducted] during the second-instance adjudication showed: through running the HX-Z-Type Controller installed with the HX-Z Software [25] and the HR-Z-Type Controller installed with the HR-Z Software, it was discovered that the two [controllers] exhibited the same system software defects mentioned above.[26]

2. 二审鉴定结论显示：通过运行安装HX-Z软件的HX-Z型控制器和安装HR-Z软件的HR-Z型控制器，发现二者在加电运行时存在相同的特征性情况。

2. The conclusions of the appraisal [conducted] during the second-instance adjudication showed: through running the HX-Z-Type Controller installed with the HX-Z Software and the HR-Z-Type Controller installed with the HR-Z Software, it was discovered that the two [controllers] exhibited the same characteristics when running with increased power.

3. HX-Z和HR-Z型控制器的使用说明书基本相同。

3. The operating manuals of the HX-Z-Type [Controller] and the HR-Z-Type Controller were basically the same.

4. HX-Z和HR-Z型控制器的整体外观和布局基本相同，主要包括面板、键盘的总体布局基本相同等。

4. The overall appearance and the layout of the HX-Z-Type [Controller] and the HR-Z-Type Controller were basically the same, [as reflected] primarily [in the fact that their] panels and the overall layout of [their] keyboards were basically the same.

据此，鉴于HX-Z和HR-Z软件存在共同的系统软件缺陷，根据计算机软件设计的一般性原理，在独立完成设计的情况下，不同软件之间出现相同的软件缺陷机率极小，而如果软件之间存在共同的软件缺陷，则软件之间的源程序相同的概率较大。同时结合两者在加电运行时存在相同的特征性情况、HX-Z和HR-Z型控制器的使用说明书基本相同、HX-Z和HR-Z型控制器的整体外观和布局基本相同等相关事实，法院认为石鸿林提供的现有证据能够形成高度盖然性优势，足以使法院相信HX-Z和HR-Z软件构成实质相同。同时，由于HX-Z

Based on this, the HX-Z [Software] and the HR-Z Software had common system software defects. According to general principles of computer software design, the probability that different software [products] designed independently will show the same software defects is extremely low, and if [different] software [products] have common software defects, the probability of their having the same source program is relatively high.

Considering [the above factors], together with relevant facts, including [the facts] that both [controllers] exhibited the same characteristics when running with increased power, that the operating manuals of the HX-Z-Type [Controller] and the HR-Z-Type Controller were basically the same, and that the overall appearance and the layout of the HX-Z-Type [Controller] and the HR-Z-Type Controller

软件是石鸿林对其S系列软件的改版，且HX-Z软件与S系列软件实质相同。因此，被控侵权的HR-Z软件与石鸿林的S系列软件亦构成实质相同，即华仁公司侵犯了石鸿林享有的S系列软件著作权。

were basically the same, the court opined that the existing evidence provided by SHI Honglin could, constitute, with a high degree of probability, a preponderance [for him] and adequately convince the court into believing that the HX-Z [Software] and the HR-Z Software were substantively the same.

In addition, because the HX-Z Software was SHI Honglin's revision of his own S-Series Software and the HX-Z Software and the S-Series Software were substantively the same, the allegedly infringing HR-Z Software and SHI Honglin's S-Series Software were also substantively the same, meaning that Huaren Company had infringed on SHI Honglin's copyright to the S-Series Software.

三、华仁公司未能提供相反证据证明其诉讼主张，应当承担举证不能的不利后果

3. Huaren Company could not provide contrary evidence to prove its assertion in this lawsuit, and should [therefore] bear the unfavorable consequences of failing to adduce evidence

本案中，在石鸿林提供了上述证据证明其诉讼主张的情形下，华仁公司并未能提供相反证据予以反证，依法应当承担举证不能的不利后果。经本院反复释明，华仁公司最终仍未提供被控侵权的HR-Z软件源程序以供比对。华仁公司虽提供了DX-Z线切割控制器微处理器固件程序系统V3.0的计算机软件著作权登记证书，但其既未证明该软件与被控侵权的HR-Z软件属于同一软件，又未证明被控侵权的HR-Z软件的完成时间早于石鸿林的S系列软件，或系其独立开发完成。尽管华仁公司还称，其二审中提供的2004年5月19日商业销售发票，可以证明其于2004年就开发完成了被控侵权软件。对此法院认为，该份发票上虽注明货物名称为HR-Z线切割控制器，但并不能当然推断出该控制器所使用的软件即为被控侵权的HR-Z软件，华仁公司也未就此进一步提供其他证据予以证实。同时结合该份发票并非正规的增值税发票、也未注明购货单位名称等一系列瑕疵，法院认为，华仁公司2004年就开发完成了被控侵权软件的诉讼主张缺乏事实依据，不予采纳。

In this case, given that SHI Honglin provided the above-mentioned evidence to prove his assertion in this lawsuit and Huaren Company could not provide contrary evidence to rebut, [Huaren Company] should, in accordance with law, bear the unfavorable consequences of failing to adduce evidence. After the court repeatedly explained and clarified, Huaren Company was, in the end, still not able to provide the source program of the allegedly infringing HR-Z Software for comparison. Although Huaren Company provided the Computer Software Copyright Registration Certificate of the DX-Z Wire-Cut Controller Microprocessor Firmware Program System V3.0, it neither proved that the software and the allegedly infringing HR-Z Software were identical software, nor did it prove that the completion time of the allegedly infringing HR-Z Software was earlier than [that of] SHI Honglin's S-Series Software or that the development of [the HR-Z Software] was completed independently.

Huaren Company also claimed that the commercial sales invoice [dated] May 19, 2004, that it provided during the second-instance adjudication could prove that it had already completed the development of the allegedly infringing software in 2004. On this, the court opined that although the product name indicated on the invoice was HR-Z Wire-Cut Controller, it could not infer with certainty that the software used by that controller was the allegedly infringing HR-Z Software; and Huaren Company did not go further to provide any other evidence to prove this. This, together with a series of flaws, including [the fact that] the invoice was not a formal value-added tax invoice and that it did not indicate the name of the purchasing entity, the court opined that Huaren Company's assertion in this lawsuit that the development of the allegedly infringing software was completed in 2004 lacked factual basis and was [therefore] not accepted.

综上，根据现有证据，同时在华仁公司持有被控侵权的HR-Z软件源程序且无正当理由拒不提供的情形下，应当认定被控侵权的HR-Z软件与石鸿林的S系列软件构成实质相同，华仁公司侵犯了石鸿林S系列软件著作权。[27]

In summary, based on the existing evidence and given that Huaren Company had the source program of the allegedly infringing HR-Z Software but had no proper reasons to refuse to provide it [for comparison], [the court] should determine that the allegedly infringing HR-Z Software and SHI Honglin's S-Series Software were substantively the same, and that Huaren Company infringed on SHI Honglin's copyright to the S-Series Software.[28]

CGCP 备注

CGCP Notes

《计算机软件保护条例》

Regulation on the Protection of Computer Software

第三条

Article 3

本条例下列用语的含义：

The meanings of the following terms used in this Regulation:

（一）计算机程序，是指为了得到某种结果而可以由计算机等具有信息处理能力的装置执行的代码化指令序列，或者可以被自动转换成代码化指令序列的符号化指令序列或者符号化语句序列。同一计算机程序的源程序和目标程序为同一作品。

(1) "computer program" refers to a sequence of coded instructions that can be executed by devices with information processing capabilities, including computers, to obtain certain results; or to a sequence of symbolized instructions or a sequence of symbolized statements that can be automatically converted into a sequence of coded instructions. The source program and the object program of the same computer program are [considered] to be the same work.

（二）文档，是指用来描述程序的内容、组成、设计、功能规格、开发情况、测试结果及使用方法的文字资料和图表等，如程序设计说明书、流程图、用户手册等。

(2) "document" refers to textual information, a chart, etc. used to describe the content, composition, design, functional specifications, state of development, test results, and methods of use of programs. Examples include program design instructions, flowcharts, and user manuals.

（三）软件开发者，是指实际组织开发、直接进行开发，并对开发完成的软件承担责任的法人或者其他组织；或者依靠自己具有的条件独立完成软件开发，并对软件承担责任的自然人。

(3) "software developer" refers to a legal person or other organization that actually organizes, or directly carries out, the development [of a piece of software] and bears responsibility for the developed software; or to a natural person who, relying on his own qualifications, independently completes the development of a piece of software and bears responsibility for the software.

（四）软件著作权人，是指依照本条例的规定，对软件享有著作权的自然人、法人或者其他组织。■

(4) "software copyright owner" refers to a natural person, legal person, or other organization that, in accordance with the provisions of this Regulation, has the copyright to the software. ■

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* 此案例的中文引用是：《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》，《中国法律连接》，第7期，第61页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC49），2019年12月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-49。

案例原文载于：《中国法院网》，http://www.chinacourt.org/article/detail/2015/04/id/1602391.shtml。*亦见*《最高人民法院关于发布第十批指导性案例的通知》，2015年4月15日公布，同日起施行，http://www.chinacourt.org/law/detail/2015/04/id/148149.shtml。除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案》(*SHI Honglin v. Taizhou Huaren Electronic Information Co., Ltd., A Dispute over Infringement of a Computer Software Copyright*), 7 China Law Connect 61 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC49), Dec. 2019, http://cgc.law.stanford.edu/guiding-cases/guiding-case-49.

The original, Chinese version of this case is available at 《中国法院网》 (www.chinacourt.org), http://www.chinacourt.org/article/detail/2015/04/id/1602391.shtml. *See also* 《最高人民法院关于发布第十批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Tenth Batch of Guiding Cases*), issued on and effective as of Apr. 15, 2015, http://www.chinacourt.org/law/detail/2015/04/id/148149.shtml.

This document was prepared by Sean Webb, Dimitri Phillips, and Dr. Mei Gechlik. Minor editing, such as splitting long paragraphs, adding a few words included in square brackets, and boldfacing the headings, was done to make the piece more comprehensible to readers. All footnotes and "CGCP Notes", unless otherwise noted, have been added by the China Guiding Cases Project. The following text is otherwise a direct translation of the original text released by the Supreme People's Court. The China Guiding Cases Project thanks Jordan Corrente Beck, Oma Lee, Thomas Rimmer, Jeff Yau, Haibin Zhang, and Minmin Zhang for preparing an earlier translation of this Guiding Case.

[1] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it" and "its".

[2] 《计算机软件保护条例》，2001年12月20日由国务院通过和公布，2002年1月1日起施行，经两次修订，最新修订于2013年1月30日，2013年3月1日起施行，http://www.gov.cn/zwgk/2013-02/08/content_2330130.htm。

[3] 《计算机软件保护条例》(*Regulation on the Protection of Computer Software*), passed and issued by the State Council on Dec. 20, 2001, effective as of Jan. 1, 2002, revised two times, most recently on Jan. 30, 2013, effective as of Mar. 1, 2013, http://www.gov.cn/zwgk/2013-02/08/content_2330130.htm.

[4] The name "泰州华仁电子资讯有限公司" is translated herein literally as "Taizhou Huaren Electronic Information Co., Ltd." The company does not appear to have an official English name.

[5] Masculine pronouns are used to refer to this plaintiff because the name "鸿林" ("Honglin") is more commonly found among males.

[6] The text reads "诉讼代理费" ("litigation agent fees"). According to Article 58 of the *Civil Procedure Law of the People's Republic of China*, a party or a statutory agent ("法定代理人") may retain one or two persons as litigation agents ("诉讼代理人"). A litigation agent may be (1) a lawyer or legal service worker at the basic level ("基层法律服务工作者"); (2) a close relative or staff member of a party ("当事人的近亲属或者工作人员"); or (3) a citizen recommended by the community [where the party resides], the entity [where the party works], or a relevant social group ("当事人所在社区、单位以及有关社会团体推荐的公民"). *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm.

[7] The original text does not specify which court is referred to here. It is likely meant to be the High People's Court of Jiangsu Province, which, as shown below, rendered the final judgment of this case.

[8] The name "国家版权局" is translated here as "the National Copyright Administration" in accordance with the English name appearing on the administration's website, http://www.ncac.gov.cn.

[9] The text reads "原始取得" ("original acquisition"), which refers to an acquisition of a property that has never been the property of another. Acquiring the copyright to a piece of work that is newly created is, for example, a type of original acquisition. For more information about this topic, see Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 INDIANA L.J. 73 (Summer 2011).

[10] The name "江苏省科技咨询中心" is translated here literally as "the Science and Technology Advisory Center of Jiangsu Province". The center does not appear to have an official English name.

[11] The text reads "软件主要固化在" ("software was primarily etched into"). Any software that is permanently etched into a chip is called firmware ("固件"). For the definition of firmware, see, e.g., *Computer Designers are Firm about Software*, NEW SCIENTIST, at 816 (June 7, 1979); *Definition: What Does Firmware Mean?*, TECHOPEDIA, https://www.techopedia.com/definition/2137/firmware.

[12] The name "ATMEL公司" is translated here as "Atmel Corporation", which was acquired by Microchip Technology in 2016. *See, e.g.*, Leslie Picker, *Microchip Technology to Buy Atmel for Nearly $3.6 Billion*, NEW YORK TIMES, Jan. 19, 2016, https://www.nytimes.com/2016/01/20/business/dealbook/microchip-technology-to-buy-atmel-for-nearly-3-6-billion.html.

[13] The name "菲利普公司" is translated here as "Philips Semiconductors", which is currently named NXP. For details about this change, see e.g., Junko Yoshida, *Philips Semiconductors To Become NXP*, EE TIMES, Aug. 31, 2006, https://www.eetimes.com/document.asp?doc_id=1163319.

[14] The name "中国版权保护中心版权鉴定委员会" is translated here as "the Copyright Authentication Committee of the Copyright Protection Center of China" in accordance with the English name appearing on the center's website, at http://www.ccopyright.com/en/index.php?optionid=995.

[15] 一审判决书尚未找到，有可能已被排除在公布之外。

[16] (2007) 苏民三终字第0018号民事判决，2007年12月17日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2007-su-min-san-zhong-zi-0018-civil-judgment（以下简称"《二审判决》"）。

[17] The first-instance judgment has not been found and may have been excluded from publication.

[18] (2007) 苏民三终字第0018号民事判决 ((2007) Su Min San Zhong Zi No. 0018 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Dec. 17, 2007, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2007-su-min-san-zhong-zi-0018-civil-judgment (hereinafter "*Second-Instance Judgment*").

[19] The original text reads "判决生效" ("the judgment's coming into effect"). According to Article 155 of the *Civil Procedure Law of the People's Republic of China*, judgments and rulings that have come into effect are judgments and rulings of the Supreme People's Court as well as judgments and rulings which, according to law, may not be appealed or which have not been appealed within the prescribed time limit. *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), *supra* note 6.

[20] 本部分的黄色亮点由中国指导性案例项目添加，以展示该项目对本指导性案例和其所依据的最终判决（即：《二审判决》，注释16）的比较。以黄色突出显示的表述/信息并不用于最终判决的"本院认为"部分。最高人民法院将这些表述/信息用于指导性案例中，可能是为了改进该案例的推理部分，继而再归纳成"裁判要点"。

[21] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the final judgment upon which this Guiding Case is based (i.e., *Second-Instance Judgment*, *supra* note 18). Expressions/details highlighted in yellow were not used in the "This Court Opines" section of the final judgment. The Supreme People's Court likely included these expressions/details in the Guiding Case for the purpose of improving the Guiding Case's reasoning section, from which the "Main Points of the Adjudication" section was derived.

[22] The Chinese text does not specify which court opined. Given the context, this should be the High People's Court of Jiangsu Province.

[23] The text reads "形成高度盖然性优势", with "高度盖然性" meaning "a high degree of probability" and "形成优势" meaning "constitute a preponderance". For a discussion of issues arising from deficiencies in definitions of these terms, see 于健楠 (YU Jiannan), 民事证明标准研究 (*Research on Civil Standard of Proof*), WWW.CNKI.NET, 2010, http://cn.oversea.cnki.net/law/detail/detail.aspx?filename=2010147587.nh&dbcode=CLKM&dbname=clkm2010.

[24] 指导案例49号在"基本案情"部分中列出了软件缺陷（故在此处使用"前述"一词），而《二审判决》在"本院认为"部分中列出了这些缺陷。除此微小差异外，本指导案例的"裁判理由"部分完全基于《二审判决》。

[25] As explained below, SHI Honglin revised the S-Series Software to produce the HX-Z Software.

[26] Guiding Case No. 49 lists the software defects in the "Basic Facts of the Case" section (and thus, uses the phrase "mentioned above" here), whereas the *Second-Instance Judgment* listed the defects in the "This Court Opines" section. Except this minor difference, the "Reasons for the Adjudication" section of the Guiding Case is exactly based on the *Second-Instance Judgment*.

[27] 本指导性案例没有提供此信息："生效裁判审判人员：宋健、顾韬、吕娜"。见《二审判决》，注释16。

[28] This Guiding Case does not provide this information: "Adjudication personnel of the effective judgment: SONG Jian, GU Tao, and LÜ Na". *See Second-Instance Judgment*, *supra* note 18.

News and Events*

October 2019 | Training Event for Approximately 40 Attorneys from Different Parts of China

On October 10, 2019, the China Guiding Cases Project (the "CGCP") hosted a training session at Stanford Law School for a delegation of nearly 40 lawyers from different parts of China, who spent two weeks in the United States to gain familiarization with the U.S. legal system and institutions. A significant number of the delegates were lawyers from the Xi'an-based HR Law Firm (海普睿诚律师事务所), which generously sponsored their lawyers' trips to the United States, showing the firm's commitment to improving Chinese lawyers' skills.

Judge William A. Fletcher, Dr. Mei Gechlik, and approximately 40 Chinese lawyers

The session at Stanford was conducted by Dr. Mei Gechlik and the Hon. Judge William A. Fletcher, who sits on the U.S. Court of Appeals for the Ninth Circuit. Dr. Gechlik focused her talk on the Guiding Cases ("GCs") and their use in subsequent cases. After briefly introducing the research that the CGCP has conducted on the subsequent citation of GCs in China, Dr. Gechlik discussed some of the trends that have been observed. While the total number of GCs remains small when considered against the huge number of cases that are decided every day across China, Dr. Gechlik pointed out that there has been a rapid increase in the number of cases that have cited GCs.

Dr. Gechlik also shared her view on the importance of GCs in the development of the Belt and Road Initiative and the Guangdong–Hong Kong–Macao Greater Bay Area. As China's *de facto* binding precedents, GCs provide a means for the

judiciary in China to quickly and efficiently issue statements of legal principles regarding pressing legal issues involved in cross-border disputes.

Judge Fletcher then gave a presentation introducing the case-based legal system in the United States, in order to help illustrate how a legal system based on case law works in practice. In his talk, Judge Fletcher introduced the basic structure of the U.S. judicial system, including the distinctions between the federal courts and the state courts.

Two topics that particularly attracted the interest of the attending Chinese lawyers were Judge Fletcher's discussion of the life-long appointment of federal judges to ensure independent adjudication, as well as his discussion of the difference between binding authority and persuasive authority in U.S. cases and how they are distinguished. For a more detailed discussion of these and other related topics, interested readers can refer to Judge Fletcher's piece published in this issue of *China Law Connect*.[1]

During the Q&A section, the Chinese lawyers asked a number of thoughtful questions. For example, an attendee asked Dr. Gechlik to discuss the distinction between GCs and representative cases that are regularly published in the Supreme People's Court Gazette. Dr. Gechlik explained that while cases published in the Gazette are important and have referential value, they are not GCs, which are the only types of cases that can be cited by judges handling similar subsequent cases.

Another attendee asked Judge Fletcher for his thoughts on what traits are most important for a successful lawyer to possess. In response, Judge Fletcher emphasized that a good attorney needs to be intelligent (but not necessarily a genius), honest, and diligent. Of these three qualities however, Judge Fletcher stated that diligence was probably the most important. In Judge Fletcher's experience, when an attorney before his court fails to competently represent a client, it is usually not because the lawyer lacks intelligence or is dishonest; instead, it is usually due to the fact that the attorney has failed to work hard enough on the client's case.

The talks delivered by Dr. Gechlik and Judge Fletcher were well-received by the attendees, and several of the attorneys shared their impressions in a subsequent post on the WeChat page of the HR Law Firm (https://mp.weixin.qq.com/s/XmRfyFtzKLp0tS1qgIibMg). Below are the English versions of their original, Chinese-language comments. ■

We had the pleasure to visit three major law schools in the United States (Harvard, Yale, and Stanford). At Stanford Law School in particular, we were able to attend a talk by Dr. Mei Gechlik […] on the topic "China's Guiding Cases: Judicial Practice and Outlook". We were impressed by Dr. Gechlik's rigorous scholarship. She used statistics and large amounts of data to explain the current state of Guiding Cases cited in judgments of Chinese courts at all levels, providing an overseas perspective about the development and current state of China's Guiding Cases System. What is interesting is that we are observing "the landscape", and people from "this landscape" are observing us.

——Lawyer ZHOU Xiaolong

Mei Gechlik, J.S.D., Stanford Law School, founded the China Guiding Cases Project (the "CGCP") in 2011. She is committed to promoting the uniform application of law in China's judiciary. At the beginning of her lecture, Dr. Gechlik outlined the 112 Guiding Cases released to date by the Supreme People's Court and their application in related subsequent cases. Through her analysis of specific cases, Dr. Gechlik pointed out the importance of Guiding Cases to the strategic development of China's Belt and Road Initiative. She also made some suggestions for related reform tasks led by the Supreme People's Court.

This lecture was held in a regular classroom at Stanford Law School, with round tables and sofas, coffee and refreshments. Unlike the serious teaching atmosphere in Chinese universities, the atmosphere of lectures in an American university is free, relaxed, active, and friendly. Professor Gechlik constantly asked questions, stimulating our thinking. Thus, throughout the lecture, everyone listened with concentration and interacted and exchanged their thoughts enthusiastically. I could not help but respect Dr. Gechlik's dedicated research of more than 20 years on Chinese law. I was also touched by her sense of responsibility as a Chinese for China's judicial reform. At the same time, we were deeply immersed in the free and relaxing teaching style and campus culture of American universities.

The use of Guiding Cases, which are model cases showing equitable application of law, to supplement reasons for adjudication is conducive to the equitable adjudication of cases and persuasion of parties to accept the adjudication results. As lawyers, who are to apply the law and carry out justice, we should keep our faith, never forget our original intentions, apply the law correctly in handling each case, and help build the cornerstone of fairness and justice through individual cases.

——Lawyer DU Juan

At Stanford University, we had the pleasure to listen to a wonderful lecture by Professor Mei Gechlik about her analysis of the Guiding Cases of China's Supreme People's Court. Through the talk, we could feel the pure sentiments and aspirations of Dr. Gechlik, who came to Stanford Law School all the way from Hong Kong to study in depth China's Guiding Cases. She regards these cases as a favorable platform for promoting [China's] judicial reform. Her spirit and perseverance deeply touched us and gave us the confidence and strength to advance the development of a "rule-of-law China".

——Lawyer LIU Zhonglei

We were fortunate to have the chance to listen to a lecture by Dr. Mei Gechlik on the "China Guiding Cases Project". I admire her hard work to promote China's judicial reform in the United States despite facing so many difficulties. I also respect her modest, prudent, sincere, and friendly personality and her character to think about others. With the unremitting efforts of Dr. Gechlik and her team, Issue 6 of China Law Connect *was published. China's legal development and reform, as well as the importance of Guiding Cases, have also attracted more and more attention.*

After Dr. Gechlik's lecture, [Judge William Fletcher,] a judge who has served in the [Ninth] Circuit for more than 20 years, systematically introduced the U.S. court system and the practical application of U.S. precedents. When asked by one of our peers about what makes an excellent lawyer in a judge's mind, Judge Fletcher replied that excellent lawyers should have intelligence, integrity, and, most importantly, diligence.

——Lawyer TONG Ying

October 2019 | Dr. Mei Gechlik Speaks to Stanford University's Undergraduate Students on U.S.–China Relations

Students who participate in the Forum for American–Chinese Exchange at Stanford (FACES)

On October 22, 2019, Dr. Gechlik gave a presentation to 15 Stanford students participating in a course organized by the Forum for American–Chinese Exchange at Stanford ("FACES"; https://faces.stanford.edu) to educate these students on the past and present states of U.S.–China relations. In her presentation, Dr. Gechlik highlighted certain areas of misunderstanding between the two countries today and how judicial cases can help bridge the U.S.–China gaps.

During her presentation, Dr. Gechlik discussed, among other topics, the history of GCs in China, their role as *de facto* binding precedents, and several challenges that the wider use of GCs in China has faced, such as a lack of familiarity with the use of GCs. Dr. Gechlik noted that to help resolve such problems, the CGCP provides legal training to Chinese judges, educates the Chinese public on the Guiding Cases System, and remains committed to advancing a deeper mutual understanding between the legal systems of China and the United States. ■

October 2019 | Dr. Mei Gechlik Speaks to Stanford Law School Students Enrolled in the Global Quarter Program

On October 23, 2019, Dr. Gechlik presented a lecture to students enrolled in the inaugural semester of Stanford Law School's Global Quarter (https://law.stanford.edu/education/international-and-global-opportunities/global-law-program). The Global Quarter is a 10-week immersive course in international business law and finance. During the quarter, students take short intensive courses on various topics related to international business transactions, regulation, and litigation. Following these courses, the students travel to a selected region of the globe to meet and work with overseas practitioners in the academic, corporate, and government sector whose work focuses on international business transactions and regulation.

The regional focus of the current Global Quarter is East Asia, and students enrolled in the program will have the opportunity to travel to Japan, China, and Singapore. Dr. Gechlik's lecture introduced these students to the basics of Chinese law as part of the students' preparations for this pioneering program. ■

October 2019 | Dr. Mei Gechlik Joins the "International and Global Law: From Education to Practice" Panel During Stanford's Alumni Weekend

Dr. Gechlik Joins the "International and Global Law: From Education to Practice" Panel

Left to right: Dr. Gechlik, Mr. Carl Ruggiero, Mr. Robert Townsend, and Professor Robert M. Daines

On October 25, 2019, Dr. Gechlik participated in a panel titled "International and Global Law: From Education to Practice", which was offered as part of the Alumni Weekend program. Moderated by Professor Robert M. Daines (Pritzker Professor of Law and Business, Associate Dean, and Senior Faculty for the Rock Center on Corporate Governance), the panel also included Carl Ruggiero, Partner at the law firm of Curtis, Mallet-Prevost, Colt & Mosle, and Robert Townsend, Senior Vice President and Chief Legal Officer of SoftBank Group Corp., and focused in particular on changes in the transnational business environment, evolving international judicial practice, and the challenges of realizing global justice. ■

November 2019 | Results of the Student Writing Contest Announced

In early November 2019, the CGCP team announced the winning pieces for the Stanford CGCP Student Writing Contest (formerly known as the "Stanford CGCP Student Editorial Contest"). Hundreds of submissions were received and more than 50 colleges and high schools are represented. It was an absolute pleasure to see that contestants are from not only major international cities, such as Beijing, Hong Kong, and London, but also more remote areas in China, such as Tibet and Inner Mongolia.

Contestants' submissions showcased a wide range of interests, including artificial intelligence, U.S.–China relations, online education, climate change, and other important topics. After careful discussion and consideration, the CGCP team selected two Silver Award winners and eight Honorable Mentions (see the list below, with names arranged in alphabetical order of family names).

All of the submissions demonstrated great efforts on the part of the authors. Although no contestants reached the high standards to receive Golden Awards, the CGCP team believes that submissions will continue to improve. To read the full-text submissions written by the two Silver Award winners and/or to learn more about the next writing contest, please visit https://cgc.law.stanford.edu/student-writing-contest. ■

Silver Awards

Hanxu Wu, Xiamen University, Malaysia
Bubble Milk Tea Global Boom: Representative of Millennials' Lifestyle

Ximan Zhang, Jeju Halla University, South Korea
China's NPO Needs to Retain Talent

Honorable Mentions

Yihan Fu, Beijing Foreign Studies University, China
Labor Analgesia: What Stops Its Popularization in China?

Yining Gong, Shenzhen College of International Education, China
The World Order in the Near Future

Bingqing Hao, 山西医科大学，中国
无限延长人类寿命的科学不该被限制

Qing Lin, Shandong Normal University, China
Whether Scientific Research Should Be Limited to Extending Human Life Indefinitely

Wei Shang, King's School Ely, United Kingdom
Despite the Increase of the Online Classroom, Traditional Education Will Never Be Replaced

Hangyi Shi, Beijing Normal University, China
Demonstration Classes: Formalization Is Poisoning Teaching

Yihan Wang, Shihezi University, China
Intellectual Property Rights of Works Created Independently by Artificial Intelligence

Jiayu Zhang, Shanghai Jiao Tong University, China
Technology is Reshaping the Global Balance of Power

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* The China Guiding Cases Project, *News and Events*, 7 China Law Connect 69 (Dec. 2019), http://cgc.law.stanford.edu/clc-7-201912. The original, English version of this piece was prepared by Nathan Harpainter, James Young Jin Noh, Straton Papagianneas, Liyi Ye, Nancy Zhang, and Wanqian Zhang; it was edited by Nathan Harpainter and Dr. Mei Gechlik.

[1] Judge William A. Fletcher, *Deciding Cases in the American Case-Based System*, 7 China Law Connect 1 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Dec. 2019, http://cgc.law.stanford.edu/commentaries/clc-7-201912-connect-9-william-fletcher.

新闻和活动*

2019年10月 | 为来自中国各地约40名律师所提供的培训活动

2019年10月10日，中国指导性案例项目（China Guiding Cases Project；“CGCP”）在斯坦福法学院，为一个来自中国不同地区的近四十位律师的代表团举办了一次培训。该团在美国用了两周时间来熟悉美国的法律制度和机构。很大一部分的团队成员来自西安海普睿诚律师事务所。该事务所慷慨赞助了其律师的美国之行，表明了它对提高中国律师技能的支持。

William A. Fletcher法官、熊美英博士和约40名中国律师

在斯坦福的这次活动由熊美英博士和美国联邦第九巡回上诉法院William A. Fletcher法官主持。熊博士演讲的重点是指导性案列及其在后续案件中的使用。她先简要介绍了CGCP对指导性案例在中国的后续引用的研究，然后讨论了所观察到的一些趋势。尽管指导性案例的总数相对于中国每天大量的裁决而言仍然很少，但熊博士指出，引用指导性案例的案件数量已迅速增加。

熊博士还分享了她对指导性案例在“一带一路”倡议和粤港澳大湾区发展中的重要性的看法。作为中国的事实上有约束力的先例，指导性案例提供了一个途径，让中国司法机关迅速有效地发布关于跨境争端涉及的紧迫法律问题的法律原则声明。

之后，Fletcher法官发言，介绍了美国基于案例的法律制度，以说明基于判例法的法律制度在实践中是如何运作的。Fletcher法官在讲话中介绍了美国司法制度的基本结构，包括联邦法院与州法院之间的区别。

两个话题特别引起与会中国律师的兴趣：Fletcher法官对终身任命联邦法官以确保独立审判的看法，以及他对美国案件中约束性权威和说服性权威之间的区别和如何区分二者的讨论。有关这些及其他相关话题的更详细讨论，有兴趣的读者可参考Fletcher法官发表于本期《中国法律连接》的文章。[1]

在问答环节，中国律师提出了一些令人深思的问题。例如，一位与会者请熊博士讨论指导性案例与定期在《最高人民法院公报》公布的有代表性的案例之间的区别。熊博士解释说，虽然公报所公布的案例重要且有参考价值，但它们不是指导性案例。指导性案例是法官处理类似后续案件时唯一能被引用的案例。

另一位与会者请Fletcher法官指出成功律师所应具备的最重要特质。在回答中，Fletcher法官强调，一位好的律师要聪慧（但不一定是天才）、诚实及勤奋。在这三种素质中，Fletcher法官认为勤奋可能是最重要的。根据Fletcher法官的经验，当一名律师在他的法庭上不能胜任代理委托人时，通常不是因为其缺乏智慧或不诚实。相反，这通常是由于该律师未有付出努力处理委托人的案件。

熊博士和Fletcher法官的演讲受到与会者的欢迎。随后，一些律师在海普睿诚律师事务所微信页面上分享了他们的感受（https://mp.weixin.qq.com/s/XmRfyFtzKLp0tS1qgIibMg）。■

有幸走访全美三大法学院（哈佛、耶鲁、斯坦福），尤其是在斯坦福法学院聆听了熊美英博士[...]关于“中国指导性案例：司法实践与展望”的演讲，教授治学严谨，统计出大量数据说明指导性案例在中国各级法院判决中被引用的现状，从海外视角看中国指导性案例制度发展和现状。有趣的是我们在看风景，风景里的人也在看我们。

——周小龙律师

熊美英，斯坦福法学院博士，2011年创办了中国指导性案例项（CGCP），致力推动中国司法适用的统一性难题。课程开始，熊博士概述了迄今为止最高法所公布的112个指导性案例及相关后续案件的适用情况，并通过分析特别案例引申指导案例对于中国一带一路战略发展的重要性，同时就最高法的改革任务提出建议。课程在斯坦福法学院的普通教室进行，圆桌沙发，咖啡茶点，与国内高校严肃的课堂教学氛围不同，美国大学课堂教学气氛显得自由、宽松、活跃和亲切，熊教授不断提问，引导和启发思考，整堂讲座大家听的非常精神，频频互动，热烈交流。我不禁对熊博士研究中国法律20余年的坚守而感叹，更为她身为华裔对中国司法制度改革推动的责任而感动，同时，也对美国高校自由轻松的教学模式和校园文化所深深陶染。

指导性案例，公正适用法律的模范案例，用它来补充裁判说理有利于论证裁判的公正，说服当事人接受裁判。身为律师，法律的应用者，正义的实践者，我们应坚定信念、不忘初心，在处理每个案件中正确适用法律，通过个案筑牢公平正义的基石。

——杜娟律师

在斯坦福大学有幸聆听熊美英教授关于中国最高法院指导性案例分析的精彩授课，让我们感受到熊教授朴素的家国情怀，一位来自于香港的博士，不远万里来到斯坦福大学，深入研究中国最高法院指导案例，并将其视为推动司法改革的有利平台，她的这份精神与执着，让我们深受触动的同时更给予我们推进“法治中国”的信心与力量。

——刘忠磊律师

我们有幸聆听了熊美英博士关于《中国指导性案例项目》的讲座，对其身在美国，在重重困难下仍不忘努力推动中国司法改革的作为感到十分的钦佩，也对其谦虚谨慎、真诚友好、为他人着想的个人修养感到佩服。在熊博士和团队的不懈努力下，《中国法律链接》杂志第六期已经发表，中国法律发展改革与指导性案例的重要性也获得越来越多人的关注。随后，任职联邦巡回法院二十余年的法官向我们系统介绍美国法院体系与判例实际应用，在他回答同行者关于法官心中优秀律师标准这一问题时，他答到优秀的律师应该具备智商、真诚与努力，且努力最为重要。

——童颖律师

2019年10月 | 熊美英博士就美国与中国关系向斯坦福大学的本科生致辞

2019年10月22日，熊博士向15名参与斯坦福中美学生论坛（FACES；https://faces.stanford.edu）所举办的课程的斯坦福学生作出演讲，教导他们美中关系的过去与现在。在演讲中，熊博士强调了目前两国之间存在误解的一些领域，以及司法案例如何能帮助弥合中美之间的隔阂。

除其它话题外，熊博士在演讲中还讨论了中国指导性案例的历史、它们作为事实上具有约束力的先例的作用，以及中国广泛使用指导性案例所面临的一些挑战，比如，对指导性案例的使用不够熟悉。熊博士指出，为帮助解决这些问题，CGCP向中国法官提供法律培训，向中国公众提供指导性案例制度方面的教育，并继续致力于促进中美两国相互了解其法律制度。■

参与斯坦福中美学生论坛（FACES）的学生

2019年10月 | 熊美英博士与参加“全球季度项目”的斯坦福法学院学生进行交流

2019年10月23日，熊博士向参加斯坦福法学院“全球季度项目”第一学期的学生发表演讲（https://law.stanford.edu/education/international-and-global-opportunities/global-law-program）。“全球季度项目”是一门为期10周的沉浸式国际商法和金融的课程。在本学期，学生参加与国际商业交易、监管和诉讼相关的各种主题的短期密集式课程。学习这些课程后，学生将前往全球指定地区，与在学术、企业和政府部门从事国际商业交易和监管工作的海外从业人员会面并合作。

目前“全球季度项目”的区域重点是东亚，参加项目的学生将有机会前往日本、中国和新加坡。熊博士的演讲向这些学生介绍了中国法律的基础知识，作为学生为这一开拓性项目所做准备的一部分。●

2019年10月 | 熊美英博士于斯坦福校友周末期间参加“国际和全球法律：从教育到实践”的讨论小组

2019年10月25日，熊博士参加了名为“国际和全球法律：从教育到实践”的讨论小组。这是“校友周末”活动的一部分。小组讨论由Robert M. Daines教授（Pritzker法律与商务教授、副院长、Rock公司治理中心高级教员）主持，成员还包括柯特思律师事务所（Curtis, Mallet-Prevost, Colt & Mosle）合伙人Carl Ruggiero先生，以及软银集团公司高级副总裁兼首席法律官Robert Townsend先生。小组讨论重点关注了跨国商业环境的变化，国际司法实践的演变，以及实现全球正义的挑战。■

熊博士参与名为“国际和全球法律：从教育到实践”的讨论小组

左到右：熊博士、Carl Ruggiero先生、Robert Townsend先生和Robert M. Daines教授

2019年11月 | 学生写作竞赛结果公布

2019年11月初，CGCP团队宣布了斯坦福CGCP学生写作竞赛（之前名为“斯坦福CGCP学生社论挑战赛”）的获奖作品。收到的数百份参赛作品，代表了50多所大学和高中。参赛者不仅来自北京、香港和伦敦等国际大城市，也来自西藏、内蒙古等中国偏远地区，这是令人欣慰的。

参赛者的作品展示了他们广泛的兴趣，包括人工智能、美中关系、线上教育、气候变化，以及其它重要话题。经过认真的讨论和思考，CGCP团队评选出了2名银奖得主和8名得到荣誉提名的参赛者（见下表，名字按姓氏首字母顺序排列）。

所有参赛作品都展现了作者们付出的努力。尽管没有参赛者达到金奖的标准，但CGCP团队相信参赛作品会越来越优秀。欲阅读两位银奖得主的作品全文及/或了解更多关于下一届的写作竞赛，请访问：https://cgc.law.stanford.edu/student-writing-contest。■

银奖

Hanxu Wu, Xiamen University, Malaysia
Bubble Milk Tea Global Boom: Representative of Millennials' Lifestyle

Ximan Zhang, Jeju Halla University, South Korea
China's NPO Needs to Retain Talent

荣誉提名

Yihan Fu, Beijing Foreign Studies University, China
Labor Analgesia: What Stops Its Popularization in China?

Yining Gong, Shenzhen College of International Education, China
The World Order in the Near Future

Bingqing Hao, 山西医科大学，中国
无限延长人类寿命的科学不该被限制

Qing Lin, Shandong Normal University, China
Whether Scientific Research Should Be Limited to Extending Human Life Indefinitely

Wei Shang, King's School Ely, United Kingdom
Despite the Increase of the Online Classroom, Traditional Education Will Never Be Replaced

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Demonstration Classes: Formalization Is Poisoning Teaching

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Intellectual Property Rights of Works Created Independently by Artificial Intelligence

Jiayu Zhang, Shanghai Jiao Tong University, China
Technology is Reshaping the Global Balance of Power

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* 中国指导性案例项目，新闻和活动，《中国法律连接》，第7期，第75页（2019年12月），http://cgc.law.stanford.edu/zh-hans/clc-7-201912。英文原文由Nathan Harpainter、James Young Jin Noh、Straton Papagianneas、Liyi Ye、Nancy Zhang和Wanqian Zhang撰写，并由Nathan Harpainter和Mei Gechlik博士编辑。本中文版本由卢映真、秦正、叶里依、张婉倩翻译，并由赵炜和熊美英博士最后审阅。

[1] William A. Fletcher法官，在美国基于案例的制度中判决案件，《中国法律连接》，第7期，第7页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2019年12月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-7-201912-connect-9-william-fletcher。

The Delights of Winter
《冬趣》

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. He was awarded the honorary title of "Young and Middle-aged Ceramic Artists Influencing China's Media in 2012" by the Chinese Business and Media Leaders Annual Conference. His different works have won numerous provincial and national awards, including "Gold Award in the 2012 China Collection of Top Ten Artistic Ceramics", "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Strongest Performance Category)", and "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Competition Category)".

Mr. Chen's works have been exhibited at various art exhibitions, festivals, and cultural exchange activities at home and abroad, including the 26th Asian Art Exhibition held in Korea, ST.ART International Exhibition of Chinese Contemporary Ceramic Art held at the Today Art Museum in Beijing, the Chinese and American Ceramic Art Exhibition held at the University Art Museum of Guangzhou Academy of Fine Arts, and the 2017 Chinese New Year Arts and Culture Festival held at the Carreau du Temple in Paris. Mr. Chen's works have been collected by famous art galleries in China, including the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, and the Jiangxi Arts and Crafts Museum, as well as by many private organizations in mainland China, Hong Kong, and Japan. Mr. Chen has organized many individual exhibitions and has been conducting academic research on ceramic culture. He has published more than ten collections of his works, including *CHEN Xuncheng's Ink* and *Zen of Life*.

Mr. Chen is a member of the China Arts and Crafts Association and the China Ceramics Industry Association. He plays important leadership roles, serving as the deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, the director of the Guangdong Ceramics Association, the director of the Chinese Painting Institute of Guangdong Province, and the director of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Union. At the same time, Mr. Chen is also a distinguished research fellow at the Guangzhou Painting Academy, an expert for the "National Cultivation Program for Young Painters in Guangzhou", and an adjunct professor at Guangdong Polytechnic Normal University.

陈训成

陈训成是中国广东省陶瓷艺术大师，曾获得由中国企业领袖与媒体领袖年会颁发的“影响中国2012年度媒体关注的中青年陶艺家”荣誉称号。他的不同作品获得广东省省级和中国国家级奖项，包括“中国收藏2012年十大艺术陶瓷名品金奖”、“第十五届中国当代陶瓷艺术展实力派类别金奖”、“第十五届中国当代陶瓷艺术展竞赛类别金奖”等。

陈训成的作品曾在海内外多项艺术展、艺术节和文化交流活动中展出，包括韩国举行的第26届亚洲艺术展、北京今日美术馆“就地出发”中国当代陶瓷艺术国际大展、广州美术学院大学城美术馆“中美陶艺家作品展”和法国巴黎三区圣殿礼堂2017巴黎新春中法文化艺术节等。他的作品被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆等国内著名艺术馆，以及日本、香港及国内多家私人机构所收藏。陈训成多次举办个人展览并不断探索陶瓷文化学术高度，并出版了《陈训成水墨》、《生活的禅》等十来册作品集。

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