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Discussing the Guiding Case System with Chinese Characteristics
By First Combining Guiding Case No. 1 with Adjudication Practices

CHINA GUIDING CASES PROJECT

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The publication of the *Provisions Concerning Work on Guiding Cases* on November 26, 2010 by the Supreme People’s Court symbolizes the preliminary establishment of a Guiding Case System with Chinese Characteristics. The Supreme People’s Court’s release of the first batch of guiding cases has led to heated discussions over the Guiding Case System with Chinese Characteristics in different sectors. I referred to the *Shanghai Centaline Property Consultants Limited v. TAO Dehua, An Intermediation Contract Dispute* (Guiding Case No.1) when I adjudicated two intermediation contract disputes. I have some thoughts on the Guiding Case System with Chinese Characteristics and would like to share them with you.

1. The Formats of Guiding Cases

Should a guiding case be presented in a form of combining the original judgment with the guiding spirit or should it be presented in a concise form? In common law countries, precedents are one of the sources of law. In adjudicating cases, judges need to follow precedents and should first compare [the pending case] with precedents. Judges make their own decisions only if the precedents are not applicable. In common law countries, precedents are required to be specific and available for search, and every detail in each case cannot be ignored. As judicial precedents are the source of case law, making the full-text of each precedent available enables the public to fully understand the case. China is a statutory law country, in which guiding cases are not a source of law. The purpose of [releasing] guiding cases is to unify judges’ adjudication standards. As a result, China’s guiding cases should give guidance on a specific issue regarding the application of the law, and the formats of guiding cases should be concise in order to highlight a certain specific issue. If a guiding case is simply presented in the form of the original judgment, due to people’s different understanding of the law, this will inevitably cause much controversy and thus weaken the authority of the guiding case.

2. Speculations on Reasons for the Selection of Guiding Case No. 1

Article 2 of the *Provisions of the Supreme People’s Court Concerning Work on Guiding Cases* clearly stipulates that the guiding cases should meet [at least] one of the following requirements: “are widely concerned by society”, “legal provisions are of relatively general nature”, “are of a typical nature”, “are difficult, complicated or are cases of new types”. Following the development of the economy, the real estate intermediary market in China has become very active. Clauses that prohibit breach of contract through "bypassing" are commonly

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found in real estate intermediary contracts and [these clauses] are of a typical nature. At the same time, [such cases] also meet the requirement of being “difficult, complicated, or are cases of new types” because different judges may have different views about how to handle these cases. Clauses that prohibit breaches of contract through "bypassing" cannot be invalidated as "Imparity Clauses”.  

According to the principle of *pacta sunt servanda*, if a clause that prohibits "bypassing" stipulates that [the party involved] cannot bypass the original intermediary company and sign a contract through another intermediary company, the party involved should adhere to the agreement; otherwise, [such acts] constitute a breach of contract. Taking into consideration fair competition between intermediary companies and the consumer’s right to choose, Guiding Case No. 1 makes breakthroughs in the above-mentioned principle of *pacta sunt servanda*. Guiding Case No. 1 has enriched the contents of such general principles as fair competition and that concerning consumers’ right to choose.

Nonetheless, with regards to such general principles as fair competition and consumers’ right to choose, Guiding Case No. 1 could have been better drafted. In the “Main Points of the Adjudication” section of Guiding Case No. 1, it is written that the buyer has a right to choose an

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3 Author’s note: The “Imparity Clause” originates from Article 40 of the *Contract Law of the People's Republic of China*. The legal term is "unequal standard clause". These clauses mainly refer to unequal standard contracts, notices, statements, and store announcements, or industrial practices unilaterally prepared by business operators in order to evade legal obligations or reduce their own responsibilities. Most unequal standard clauses are found in monopoly industries and place many restrictions on consumers. The term “Imparity Clause” is a common name for “unequal contract clauses”. The terms of a contract should be established on the basis of voluntariness, fairness, honesty and good faith. They should express the real intentions of both parties. So-called Imparity Clauses refer to business operators who are in favorable positions and use their positions to restrict the other party’s rights so as to deprive the other party of their rights. This demonstrates a form of unfair practice. One of the features of the Imparity Clause is the expansion of the rights of producers and business operators, and the limitations on the rights of consumers. The judgment of whether a particular clause is to be deemed an Imparity Clause is usually based on such considerations as whether the consumers signing the contract have the freedom and right to choose and whether the other party has the status as a monopoly.

4 Author’s note: The legal proverb *pacta sunt servanda* (agreements must be kept) from ancient Rome has been regarded as an *a priori* proposition that cannot be further questioned in the field of law and ethics. This is also reflected in Article 8 of the *Contract Law of the People's Republic of China*. Some scholars also refer to it as “the principle of performing obligations in accordance with the contract” or “the principle of keeping agreements”. [Article 8] specifically provides that “A contract that is formed in accordance with law has binding legal effect on the parties. Each party should follow the terms of the contract to perform his own obligations, and is not allowed to unilaterally modify or terminate the contract. A contract that is formed in accordance with law is legally protected. .”

5 The “Main Points of the Adjudication” section of Guiding Case No. 1: “In a housing sale intermediation contract, terms that concern prohibiting a buyer from using housing information provided by an intermediary company to conclude a housing sale contract with the seller while bypassing the intermediary company are legal and valid. But when a seller lists the same house for sale through multiple intermediary companies and the buyer can obtain the same housing information by other legitimate means that are accessible by the public, the buyer has a right to choose an intermediary company with a lower quoted price and better service to facilitate formation of a housing sale contract. Such acts do not [entail the] use of housing information from the intermediary company with whom [the buyer] has previously contracted; therefore, they do not constitute a breach of contract.”
intermediary company with "a lower quoted price and better service" to facilitate the formation of a housing sale contract and that such an act does not constitute a "bypassing" breach of contract. This statement can easily lead to differences in the understanding of the [Main Points]. Is "a lower quoted price and better service" one of the conditions that allow a person to go through another intermediary company and "bypass" the original intermediary company without breaching the contract? If the choice is not an intermediary company with "a lower quoted price" but [one with] "a higher quoted price", would this still constitute a breach of contract? By what standards should "better service" be measured against? In the “Main Points of the Adjudication” section of Guiding Case No. 1, if "the buyer has a right to choose an intermediary company with a lower quoted price and better service to facilitate the formation of a housing sale contract" is replaced with "the buyer has a right to choose an intermediary company to facilitate the formation of a housing sale contract", then the aforementioned problems can be solved. It is necessary to state that, when there are value judgments like the statement "a lower quoted price and better service" in a guiding case, the names of the parties involved should not be cited directly in order to prevent unnecessary misunderstanding. For example, Guiding Case No. 1 includes such value judgments like this "a lower quoted price and better service" language, which may give people the impression that Shanghai Centaline Property Consultants Limited is not able to provide a "lower quoted price and better service" as compared with other intermediary companies.

3. My Opinions on Whether Guiding Cases Should be Identified in Adjudication Documents

After the Supreme People's Court released the first batch of guiding cases, I referred to Guiding Case No. 1 when I adjudicated two similar intermediation contract disputes. The case numbers are (2011) Dong Er Fa Min Er Chu Zì No. 1870 [（2011）东二法民二初字第1870号] and (2011) Dong Er Fa Min Er Chu Zì No. 1915 [（2011）东二法民二初字第1915号] respectively. In Case No. 1870, the defendant claimed that after the intermediation contract with the plaintiff had been signed, the defendant's friend also had the same housing information, so the defendant reached a leasing agreement with the lessor through the friend's introduction. As the trial judge, I decided that it constituted a breach of contract. In Case No. 1915, the defendant claimed that after the intermediation contract with the plaintiff had been signed, the defendant obtained the same housing information from another intermediary company and signed the leasing agreement with the lessor. The defendant also provided evidence to prove that the defendant had paid the other intermediary company the intermediation fee. I decided that there was no breach of contract.

During the proceedings of the aforementioned cases, neither the plaintiffs nor the defendants took the initiative to refer to Guiding Case No. 1 in their pleadings. As the trial judge,

I took the initiative to refer to Guiding Case No. 1 to make my decisions. In the reasoning parts of my judgments, I also referred to the “Main Points of the Adjudication” section of Guiding Case No. 1 when I explained my thoughts. But I did not include explicit expressions such as "with reference to Guiding Case No. 1" in the judgments. Nor did I compare and contrast the pending cases with Guiding Case No. 1 in the judgments. I made this choice based on the following considerations: first, the Notice of the Supreme People's Court Concerning the Release of the First Batch of Guiding Cases clearly calls for [judges’] accurate understanding of the guiding spirit of these cases and being more aware of applying guiding cases. The guiding cases are the Supreme People’s Court’s guidelines on adjudication. Judges should take the initiative to refer to the main points of the adjudication of guiding cases when they handle the same or similar cases. Second, guiding cases are not a source of law in China. Therefore, explicit expressions such as "with reference to Guiding Case No. 1" should not appear in judgments of a civil law country. Third, China is not a common law country, and the parties did not refer to guiding cases in their pleadings; so the judge did not need to identify the guiding cases in the judgments.