Major Misunderstanding and the Voidability of Juristic Acts in Chinese Law: A Concretization of General Clause

PhD Thesis

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Abstract

So far, human beings have not obtained the divinity of being omniscient and omnipotent. A person manifesting his intent of creating certain legal effects may end up in a surprising juristic act because his vision of the reality was false or the signals he used to convey his idea was inaccurate. In order to provide proper relief for the person in mistake, §147 GP grants this person a possibility to avoid the unwanted juristic act, when his mistake constitutes a 'major misunderstanding'.

Traditional methodology of legal interpretation cannot provide us any concrete criteria for the judgement of major or non-major misunderstandings. Such open-ended legal concept and the general clause formed by it must first be concretized before being able to be applied to specific cases. The core method for the said concretization is the organization of case groups. Its ultimate goal is to form a set of 'case group norms' which could apply to subsequent cases with similar features. To accomplish this goal, the values stored in the internal system of law must be referred to every now and then as the compass for the organization of case groups and the source of legitimacy for the case group norms.

For concretizing the rule of major misunderstanding in Chinese law, a clear line must first be drawn between the 'error in expression' and the 'error in motive'. The necessity of this binary distinction emerges from the different states of principle collision behind the two types of mistake, which lead to distinct functions and regulative tasks of their remedies. The relief of error in expression aims to provide a fairness review on the normative interpretation of a manifestation of intent, thus the scope of mistake to be examined should not be narrowed; whilst the remedy for error in motive has to pre-determine the range of is protection because it is an exceptional mechanism for safeguarding the material freedom of self-decision on the part of the mistaken party. The two types of relief cannot be combined into one.

Based on the judicial practice in China, it is submitted in this paper that an error in expression can be excused when, a) so more was paid or so less was asked by the mistaken party because of the mistake, that the equilibrium of the contract was seriously impaired, or b) the typical contractual purpose of the mistaken party was frustrated by the mistake. Nonetheless, the above rule should not be applied to cases where, a) the juristic act involves no exchange of performances, b) the weight of transactional safety

surpasses the importance of commutative fairness, c) the manifesting party is required to pay more attention to avoid his mistake but failed to do so, or d) the mistaken party lacks the capacity to fully understand the nature of a document to which he appended his signature due to some special personal reasons.

Based on the judicial practice, referring to the experience of comparative law and tracing back to the internal system of Chinese civil law, it is submitted in this paper that an error in motive is excusable only when, a) Both parties were caught in the same factual misconception and based their manifestations of intent thereupon. However, if, according to the terms of the contract, transactional practice and usages, default rules concerning specific contracts, or the principle of fairness, the risk of mistake must be borne by one of the parties, that party will not be allowed to invoke avoidance against the other party. b) The false assumption of fact was caused by the opposite party's violation of the duty to disclose, which eventually resulted in the frustration of the transactional purpose of the party in error. c) The error in motive was induced by the misrepresentation of the opposite party, and the transactional purpose of the mistaken party was frustrated due to the influence of the misrepresentation. However, if the representee should have paid due attention to the correctness of the statement of the representor and would have discovered the mistake by himself, he will not be granted any relief. d) The offeree was informed by the offeror of the mistake in the offer but still made acceptance and insisted on performing the contract. Or e) the error in motive occurred to someone who was unilaterally granting benefits to the opposite party in gratuitous acts.

Keywords: major misunderstandings; error in expression; error in motive; concretization

Abbreviations

ABGB	Austrian Civil Code (*das Allgemeine Bürgerliche Gesetzbuch*)
BGB	German Civil Code (*das Bürgerliche Gesetzbuch*)
BGH	the Federal Court of Germany (*das Bundesgerichtshof*)
BGHZ	Decisions of the Federal Court on Civil Affairs
BPC	China's Basic People's Court
BW	Civil Code of the Netherlands (*Burgerlijk Wetboek*)
CCC	Chinese Civil Code
CL	Contract Law of the People's Republic of China (1999)
CROL	Commission for the Reform of Japanese Obligation Law
DCL	the Deliberation Council of Legislation of the Japanese Ministry of Justice
GCJ	the Grand Court of Japanese Empire (*Daishin-in*)
GCJC	Collected Civil Law Decisions of Grand Court (*Minroku*)
GP	General Provisions of Chinese Civil Law (2017)
GPCL	General Principles of Chinese Civil Law (1987)
HPC	China's High People's Court
IPC	China's Intermediate People's Court
JCC	Japanese Civil Code (*Minpo*)
MPC	China's Maritime People's Court
NPC	the National People's Congress of China
NPCSC	the Standing Committee of the Chinese National People's Congress
OGPCL	Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of Chinese Civil Law (1988)
OR	the Swiss Law of Obligation (*das Schweizerische Obligationenrecht*)
PL	the Property Law of the People's Republic of China (2007)
RG	the Imperial Court of Germany (*das Reichsgericht*)
RGZ	Decisions of the Imperial Court on Civil Affairs
SCJ	the Supreme Court of Japan (*Saikosai*)

SCJR	Supreme Court Reports on Civil Decisions (*Minshuu*)
SCJC	Collected Civil Decisions of Supreme Court (*Shuumin*)
SL	Securities Law of the People's Republic of China (2014)
SPC	the Supreme People's Court of China
SRCC	the Civil Code of Soviet Russia (1922)
TL	Tort Law of the People's Republic of China (2009)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
Modification Act	the Act for the Modification of a Part of Japanese Civil Code
Proposed Outline	the Proposed Outline for the Modification of Japanese Civil Law
CROL Materials	Materials for Meetings of CROL
CROL Records	Official Records for Meetings of CROL

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Chapter 1 Introduction

1.1 Concretization problem of the rule of major misunderstanding

It may sound disappointing, but so far (and in foreseeable future), human beings, even with our most advantaged technology, can still not acquire the divinity of being omniscient and omnipotent. Therefore, at a certain point of time, our vision of the empirical world may turn out to be false, and the various signals we use to communicate with each other may fail to convey our true intentions. Once the above situation occurs during the process where an intent that aims to create certain legal effects is manifested, the manifesting person will probably have to face a juristic act or contract which is of great surprise to him. In such cases, a crucial question posed to every legal system is that whether this surprising result should still be fully binding.

In China, the above question is answered mainly by §147 GP, which provides that

> *'a civil juristic act based on a major misunderstanding is voidable by a request of the acting person to a people's court or an arbitration institution.'*

If we try to apply §147 GP to an existing case, we will find that by no means of legal interpretation is it possible to draw any concrete indications as to the threshold of voidability from the above article. The source of problem lies in the use of the concept 'major misunderstanding'. Although this concept alone determines the scope of legally relevant mistakes, it contains within itself no substantive standards. As a result, the rule of major misunderstanding is like a seemingly well-equipped gold mine with a hollow interior, letting every passionate treasure hunter to return with empty hands, although they may often claim to have dug out something therefrom.

However, the uncertainty with §147 GP is not a loophole in law that goes against the legislator's plan.[1] Instead, it is a 'strategic ambiguity' spontaneously imported by the law makers. Here, the purpose of the legislator is not to set up a hollowed mine, it is to construct a 'warehouse', which will gradually become rich in the continuing process of 'storing in'. The judicial task involved in interpreting §147 GP, therefore, is

[1] See Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (Berlin: Duncker & Humblot, 1983), 28.

different from that in many other provisions: what needs to be done is not to read something **out** of the norm *per se*, but rather, to find concrete value criteria outside the norm and then incorporate them **into** it.[2] The methodological problem is the '**concretization**' of vague standards in private law.[3]

1.2 Methodological basis for the concretization of the rule of major misunderstanding

1.2.1 The difference between interpretation and concretization

The concretization of vague standards in private law is a methodological process quite different from the traditional norm interpretation. This is not to say that there is no room for any interpretative problems whatsoever under these vague standards, it only means that the traditional methodology of logical-semantic analysis can provide nothing more than a roughly determined range or orientation of these standards, and can by no means lead to result directly applicable to concrete cases.[4] In this context, interpretation is a preliminary step for the discovery of law. To finally enable these vague standards to deal with individual situations, it is necessary to carry out the second step of concretization.[5]

1.2.2 The object of concretization

Vague standards in private law can be divided into three types: general clauses, open-ended concepts and legal principles. There is no doubt that §147 GP does not constitute a legal principle; hence the remaining question is whether this article as a whole is a general clause or only the concept 'major misunderstanding' therein needs to be concretized. The answer lies in the relationship between the two types of vague standards.

Different opinions emerge among scholars regarding the boundary between general clauses and open-ended concepts. One view is that an open-ended concept involves only one of the constituent elements of a particular provision, whilst in the case of a general clause, the uncertainty in the legal language overshadows the entire

[2] See Su Chen, ed. *Commentary on General Principles of the Civil Code*, vol. 2 (Beijing: Law Press, 2017), 1052.
[3] Outside observers has pointed out this special problem in Chinese law, see for example Peter A Windel, "The Legal Treatment of Defects in Declarations of Intention," *China Review of Administration of Justice*, no. 1 (2019)
[4] See Sudabeh Kamanabrou, "Die Interpretation Zivilrechtlicher General Klauseln," *AcP* 202 (2002), 663.
[5] See Thomas M. J. Möllers, *Juristische Methodenlehre* (München: Verlag C. H. Beck, 2017), 306.

norm.[6] According to this criterion, §147 GP is not a general clause, but merely a specific clause containing an uncertain element. Another view among scholars is that the distinction of the above two types of vague standards should be made based on the degree of their uncertainty. An open-ended concept, despite its overall ambiguity, still contains a relatively clear 'conceptual kernel' that is able to cover certain paradigm examples of such concept; a general clause, on the other hand, does not have a kernel.[7] According to this criterion, §147 GP would be categorized as a general clause because there is no particular type of mistake that can directly be viewed as 'major misunderstandings' without referring to any other values of the law. There also exists a view that treats general clauses and open-ended concepts as not antagonistic. According to this view, open-ended concepts can be further classified into sub-types: those to be categorized as legal standards that need value infusion since their uncertainties come from their value openness, and those that do not need such infusion because their uncertainties come from the ambiguity of the language itself and the extension of the concept.[8] General clauses, on the other hand, are not in the same dimension with open-ended concepts. Rather, they are to be construed by the latter. A general clause is a norm that contains at least one open-ended concept which needs value infusion, regardless of whether the uncertainty of the concept overshadows the entire provision, or co-exists with a conceptual kernel.[9] Under this criterion, §147 GP should be understood as a general clause for it was formed mainly by the uncertain concept of major misunderstanding that needs the infusion of value.

In the opinion of this author, it is not so important from the perspective of legal practice whether we treat the entire §147 GP as a general clause or to discuss only the uncertain concept of major misunderstanding because such distinction will not change the methodological task we are facing here, namely, to import from outside concrete criteria to determine the legal relevancy of the misunderstandings. In this regard, the third approach cited above is more preferable as it has successfully accommodated situations in which the same methodological problem exists. Following this approach, in the present study, §147 GP will be viewed as a general clause, and the subject matter of the judicial task of concretization is the most uncertain part of that clause, i.e. the concept of major misunderstanding.

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[6] See J. W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: J.C.B. Mohr., 1933), 53 and below.
[7] See Möllers, *Juristische Methodenlehre*, 308.
[8] See Kamanabrou, "General Klauseln", 664.
[9] Ibid., 669.

1.2.3 Methodology for the concretization

The concretization process of general clauses can be carried out at different levels. First, the legislator himself may shed some light on the typical situations that can be attributed to a particular general clause by providing normative examples in law. For instance, the provisions of §§42 (1) (2), 43 CL can be seen as examples regulating pre-contractual faults. In addition to this, especially in the field of public law, general clauses can also be concretized by authorized administrative organs. In the field of private law, on the other hand, such task is mainly assumed by the judiciary.

In China, there are two ways in which the judicial authorities can concretize general clauses. One is for the SPC to issue judicial interpretations, the other is for the courts to make individual decisions on cases by following similar precedents. Judicial interpretations in China are quasi-legislations,[10] hence also the most effective way for the task of concretization to be carried out. For the rule of major misunderstanding in the old GPCL, the SPC had provided in §71 OGPCL a detailed interpretation. However, as will be discussed later, this judicial interpretation can no longer meet the needs of practice because the CL and GP had later revised the provision of GPCL. What needs to be noticed here is therefore the method of case comparison. By making a guiding decision, the court will be able to set a fixed point within the scope of a general clause. As the number of leading cases accumulates, the density of the fixed points also increases, until at some point several relatively clear cores are highlighted.[11] In this way, single guiding decisions will eventually develop into a number of 'case groups', providing basis for the generalization of certain 'case group norms' that could be applied to subsequent cases.[12]

Regarding the rule of major misunderstanding, the Chinese courts have already issued a large number of judgments, which seems to be sufficient to provide a basis for the formation of case group norms. However, there remains two obstacles to be overcome: Firstly, among the large number of court rulings, decisions made on the level of SPC and HPCs are relatively rare, most cases concerning major misunderstanding are judged by lower courts, thus have limited value for reference. As a result, it is difficult to derive any general binding standards therefrom. Secondly, even concerning

[10] The SPC in China has the authority of issuing abstract judicial interpretations to statutes when it feels necessary instead of expressing its understanding of law in specific cases. The judicial interpretations are binding for courts of all instances.

[11] See Karl Larenz, Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3 ed. (Berlin, Heidelberg: Springer-Verlag, 1995), 113.

[12] See Möllers, *Juristische Methodenlehre*, 341.

cases decided by SPC or HPCs, judges commonly lacked the consciousness to form case groups when making decisions, and tended to not fully disclose the specific reasons for the judgment on major or non-major misunderstandings. As to the lower courts, the practice of simply 'escaping to general clause' also abounds. Under this situation, it is impossible to extract those facts to which the courts actually attached importance from the complicated circumstances of individual cases, and the formation of binding abstract case group norms will also become an impracticable task. Against this background, legal doctrine must play a role where the judicial reasoning is insufficient. By analysing the case law materials accumulated in judicial practice and reinforcing them with legal justifications, scholars may come up with some theoretical suggestions for the formation of case group norms that may be referred to by the judiciary in the future concretization work. So will this be the task of this research.

The formation of case group norms is premised on the accumulation of cases and the construction of case groups. Nonetheless, in order to determine whether a group of cases with certain common factual elements can be included in the general clause, it is necessary to first introduce separate value criteria into the general clause. This process could be referred to as the 'value infusion'. The main source of such value infusion is the legal principles contained within the 'internal system' of the law. However, this does not mean that it is always necessary to determine the attribution of a case or a case group directly on the basis of various legal principles. In fact, legal principles themselves often need to be concretized with reference to conflicts of interest that have arisen or may later arise in real world in order to provide valid guidance. As subsequent cases continue to accumulate, the originally introduced value criteria deriving from certain legal principles may also need further concretization. Therefore, the work of infusing value into a general clause cannot be separated from individual cases or case groups. It is not done once for all, but stage by stage depending on the status of the cases. On the other hand, the construction of case groups is also inseparable from the process of value infusion. When determining the *tertium comparationis* (the third part of the comparison, i.e. the compared aspects) among multiple cases, one must always have in mind the potentially referable legal principle or principles, and prepare the case groups for the value infusion and the final value judgment. To borrow Kant's famous sentence pattern: value infusions without case groups are empty, and case groups without value infusion are blind. During the process of concretization, ideas and reality need to approach each other and clarify each other. We cannot draw a clear line between

the task of value infusion and that of the case group construction. In the following discussion, we must always 'go back and forth' between the two.[13]

1.3 Legislative and doctrinal history of the rule of major misunderstanding in China

Although the provision §147 GP is still young, the concept of 'major misunderstanding' have been adopted in Chinese legislations for more than 30 years. In light of this, it is necessary to clarify the legislative history of this article together with the arrival point of existing legal theories so as to provide a basis for our subsequent discussion.

1.3.1 §59 GPCL and its logical-semantic interpretation

The concept of major misunderstanding first appeared in §59 I GPCL which provides that

> *'(1) A party may request a people's court or an arbitration institution to adapt or avoid the following civil acts,*
>
> *a) those performed by an actor with major misunderstanding as to the contents of the acts; and*
>
> ...

Thus, the above provisions set up two elements for the relief for mistakes: firstly, the misunderstanding must be one concerning the 'content' of a juristic act; secondly, the misunderstanding itself must be significant enough to constitute a major mistake.

By semantic analysis, the so-called 'content' of a juristic act should refer to its normative meaning determined through interpretation. Such content can thus only be constituted by certain instructions on how the parties' legal relations should be altered by the juristic act.[14] It is perhaps for this reason that the above provision did not use the word 'mistake' as has been commonly adopted in most civil law systems. Instead, the expression 'misunderstanding' was chosen since in Chinese this word usually refers to incorrect understanding of the meaning of certain language. Following this way of

[13] See *infra* Section 1.4.
[14] Some early scholars were of this opinion, see for example Hejun Wang, "On Misunderstandings in Civil Law," *Legal Commentary*, no. 2 (1987), 20.

interpretation, it is obvious that the scope of §59 I GPCL cannot cover cases where the acting party (or parties) has correctly understood the content of the juristic act but was mistaken about particular facts that have led to his decision, i.e. the scenario of 'error in motive'.[15]

Moreover, the rule of major misunderstanding as to the content of the juristic act also does not apply to cases of communicational error where a person fails to convey his intention due to accidental misuse of symbols (e.g. input error, clerical error, transmission error, a slip of the tongue, etc.). According to some scholars, such cases are to be solved by an analogical reference of §59 I GPCL[16] or by the application of §55 GPCL which provides that the existence of an authentic manifestation of intent is an element of a juristic act with full validity.[17]

In a word, the requirement of 'content involvement' in §59 I GPCL has strictly and clearly specified the scope of mistakes that are of legal relevancy. In such context, the remaining task of concretization of the concept 'major misunderstanding' should focus on the severity of those mistakes to give further restrictions. Regarding this issue, some writers believed that the existence of a causal link between the error and the making of the juristic act should be the criterion for distinguishing major and non-major misunderstandings;[18] whilst other scholars opined that the significance of a mistake must be judged both subjectively and objectively,

> *'subjective criterion aims to decide whether it was the case that the manifesting person would not have participated in the juristic act had there been no misunderstanding, whereas the objective criterion is to objectively analyze whether the mistaken part was important in view of the nature, content and any other specific circumstances of each juristic act.'*[19]

There was no consensus among early scholars as to the significance requirement of legally relevant mistakes in §59 I GPCL.

1.3.2 The historical interpretation of §59 GPCL

[15] See Rou Tong, ed. *Chinese Civil Law: General Part* (Beijing: Publishing House of Chinese people's Public Security University, 1990), 246; Tian Yin, "On Civil Acts Based on Misunderstandings," *Political Science and Law*, no. 1 (1993), 17.
[16] See "On Civil Acts Based on Misunderstandings", 16.
[17] See Chun Zhang, "On Mistakes as Defect in Civil Acts," *Zhejiang Social Sciences*, no. 7 (2004), 87.
[18] See Wang, "Misunderstandings", 21.
[19] Yin, "On Civil Acts Based on Misunderstandings", 18.

It is inadequate for one to fully understand the rule of mistake stipulated in §59 I GPCL and to correctly grasp the subsequent developments made by judicial interpretation and legal practice if we solely rely on the text of this provision. What is also necessary is to analyse its historical background.

It was argued by Zhao Yi that the adoption of the concept 'major misunderstanding' in Chinese law is very likely to have been influenced by the 1922 Civil Code of Soviet Russia.[20] According to different versions of Chinese translation, it was stipulated in §32 SRCC that a juristic act based on 'a misunderstanding of great significance'[21] or 'a gross mistake'[22] or 'a serious misunderstanding'[23] could be partially or wholly invalidated by the court. According to the interpretation in several influential treatises on soviet civil law that were translated into Chinese in the 1950s, a mistake (or misunderstanding) is legally relevant as a significant, gross or serious error only when it concerns the juristic act *per se* or an 'essential component'[24] or 'element'[25] thereof. In other words, the concept corresponding to 'major misunderstanding' in the SRCC only intended to include mistakes concerning the nature of the juristic act or its important parts.

If it can be ascertained that §59 I GPCL was intended to follow SRCC, then from the standpoint of subjective interpretation of law, we should also attach more importance to the criterion adopted by soviet civil law theories which distinguishes major and non-major mistakes according to the significance of their objects. But the problem is, whether or not §59 I GPCL itself and the mainstream legal theory at the time of the legislation were truly in concord with the soviet legal doctrine of mistake, seems to be quite doubtful.

First of all, if we look back to the long endeavour of civil law codification in China,[26] we will find that the NPCSC has once tried to partially accept the rule of

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[20] Yi Zhao, "Revisiting the Unsolved Case in the History of Privat Law: The Origin of 'Major Misunderstanding'," *Political Science and Law*, no. 5 (2015), 111.
[21] *Civil Code of Soviet Russia*, trans. Zengrun Wang (Beijing: Xinhua Bookstore, 1950), 15-16.
[22] *Civil Code of Soviet Russia*, trans. Yuyuan Wang (Shanghai: San Min Book Co., 1950), 10.
[23] *Civil Code of Soviet Russia*, trans. Hua Zheng (Beijing: Law Press, 1956), 10.
[24] See D. M. Genkin, ed. *Soviet Civil Law*, trans. Civil Law Department of Renmin University, vol. 1 (Beijing: Law Press, 1956), 289.
[25] See R. O. Halfina, *The Meaning and Essence of Contract in Soviet Socialism Civil Law*, trans. Li Shikai, Zheng Hua, Fang Airu (Beijing: Law Press, 1956), 227.
[26] Since the 1950s, China has initiated five waves of civil law codification. The first wave was from 1954 to 1956 during which the first draft of CCC was finished yet not adopted; the second wave began in 1962 and ended 2 years later with a Trial Proposal which was soon deserted due to another round of political movement; the third wave of civil law codification started in 1979 under the background of reform and opening up in China, by 1982, the Civil Code drafting group established by the Legislative Affairs Commission of the NPCSC had finished four Exposure Drafts of CCC, although these drafts were not adopted, they have played an important role in the legislation of

mistake in the SRCC. In §41 of the Draft General Part of CCC finished on 24 October 1955, it was proposed that

> *'if a juristic act was made on the basis of fraud, threat or a major misunderstanding as to <u>any elementary content of the contract</u>, the aggrieved party may request the court to confirm and declare partial or total invalidity of the act.'*[27] *(emphasis added)*

However, in the subsequent drafts, the above provision was either deleted or modified, and the requirement for the importance of the mistaken object was no longer seen in any other legislative proposals.

During the third wave of civil law codification in the 1980s which had a direct impact on the legislative process of GPCL, the soviet doctrine of mistake was also rejected by the drafters of CCC. §50 of the first Exposure Draft published on 15 August 1980 stipulated only that a person with major misunderstanding may request avoidance of the juristic act. It did not contain any further requirement as to the importance of the mistaken object itself. Later, in the Exposure Draft II, III, and IV, the rule of major misunderstanding was deleted without replacement.[28] This suggests that the drafters may have some concerns about letting the scope of relievable mistakes determined entirely by an open-ended concept. §59 I GPCL finally added the requirement regarding the object of the mistake probably for the purpose of gaining more explicitness. If in the mind of the Chinese legislators there was a preference for the mistake rule of SRCC, it would be hard to explain why they only required the object of mistake to be the content of the juristic act instead of further restricting it within the range of 'elementary content' as was proposed in the 1955 Draft of CCC. Therefore, the wording of §59 I GPCL *per se* is the evidence of rejecting the soviet legal doctrine of mistake.

Secondly, the approach of soviet civil law did not gain widely support among legal theories underlying the legislation of GPCL either. For instance, in the early textbook edited in 1958 by the Civil Law Department of the Chinese Central Political and Legal

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subsequent specific civil laws such as the GPCL and CL; the work of civil law codification was once again restarted in 1998, on 22 December 2002, a new draft of CCC was submitted to the NPCSC for first review but was later put on hold; the fifth wave of civil law codification was launched in 2015 and is currently in process, in 2017, the NPC has enacted the GP as a part of the future civil code, the rest of the draft CCC was scheduled to be submitted to the NPC for consideration in March 2020.

[27] Qinhua He, Xiuqing Li,Yi Chen, ed. *Drafts of Civil Code in the People's Republic of China*, 3 vols., vol. 1 (Beijing: Peking University Press, 2017), 15.

[28] For details, see *Drafts of Civil Code in the People's Republic of China*, 3 vols., vol. 2 (Beijing: Peking University Press, 2017), 1151-1342

Cadre School,[29] the concept of major misunderstanding was defined as

> *'an incorrect comprehension of major issues related to the juristic act, such as its nature, content, etc.'*[30]

Notably, it did not include any further restriction on the importance of the content. Also, in the commentary on GPCL written by relevant individuals who participated in the legislation, the same tendency could also be spotted. It was stated that

> *'the so-called major misunderstanding of an acting party exists when a) the acting party lacked proper understanding as to the content of the juristic act, such as its nature, type, participants, subject matter and the quantity or price of the subject matter, etc., and thereby fell into mistake; and b) such mistake had a significant impact on the decision making and the expression of intent of the acting person.'*[31]

In a word, although the concept of major misunderstanding in §59 I GPCL was influenced by §32 SRCC, there is no direct evidence indicating that the simultaneous adoption of the soviet civil law theories defining such concepts as mistakes concerning particular elementary content of the juristic act. Absent a basis for historical interpretation, the logical-semantic analysis on this provision as was proposed in the previous section should have greater weight. In the following part of this work, I will adhere to the above-mentioned understanding of §59 I GPCL.

1.3.3 Position of the SPC in §71 OGPCL

In 1988, shortly after the GPCL entered into force, the SPC promulgated a judicial interpretation (the OGPCL) to clarify the meaning of certain disputed provisions of the GPCL, among which was §59 I. §71 OGPCL contains an interpretation on this article, providing that

> *'it may be identified as a case of major misunderstanding when the*

[29] The Central Political and Legal Cadre School was founded in 1951, it was for long the highest academic institution for the training of legal cadres until the Cultural Revolution broke out.
[30] Civil Law Department of the Chinese Central Political and Legal Cadre School, ed. *Basic Problems of Chinese Civil Law* (Beijing: Law Press, 1958), 82-83.
[31] Shengqin Mu, ed. *Commentary on the General Principles of Chinese Civil Law* (Beijing: Law Press, 1987), 72.

consequences of the act are contrary to the intention of an acting party and result in considerable loss to him, due to the person's incorrect conception as to the nature of the act; the opposite party, the subject matter's categories, quality, specifications, quantity, /; etc.' (emphasis added)

If analysed literally, the second half of this provision, which lists the potential objects of mistake to be the nature of the act; the opposite party; the subject matter's categories, quality, specifications and quantity …, could be seen as embodying the concept of 'content of the juristic act' in §59 I GPCL, whilst the first half, requiring the consequences of the juristic act performed in mistake to be contrary to the intention of the mistaken party and to cause considerable loss, indicates the significance element of the major misunderstanding.

Although the above provision in the judicial interpretation seems to have covered and concretized all the elements regarding the legal relevancy of a misunderstanding, the criteria provided therein are still full of ambiguity. The problem stems mainly from the use of the word 'etc.'. In §71 OGPCL there are two levels of enumeration: the first level covers the nature of the act, the opposite party and certain aspects of the subject matter; whereas the second level specifies such aspects as its 'categories, quality, specifications and quantity'. The word 'etc.' appears at the end of the two levels of enumeration, thus making it hard to ascertain to which level this word is referring viewed from the Chinese grammar. Moreover, the word 'etc.' is also ambiguous in Chinese. It may either indicate that the enumeration is not exhaustive or be merely used as an auxiliary word at the end of an exclusive list. It is unclear which is the case in the present provision. In view of the above uncertainties, there are at least three possible understandings of §71 OGPCL: a) the major misunderstanding in the sense of §59 I GPCL includes, but is not limited to, incorrect conceptions as to the nature of the juristic act, the opposite party and certain facts concerning the subject matter. Such facts, however, must exclusively be the categories, quality, specifications and quantity of the subject matter; b) major misunderstanding are restricted within mistakes concerning the nature of the act, the opposite party, or the categories, quality, specifications and quantity of the subject matter; c) major misunderstandings are false conceptions as to the nature of the act, the opposite party and certain facts about the subject matter including, but are not limited to, its categories, quality, specifications and quantity.

Of the above three possible interpretations of §71 OGPCL, the first one is closest

to the semantic meaning of §59 I GPCL as it does not import any restrictions on the scope of the contents of the juristic act as the object of mistake. The other two understandings are closer to the aforementioned soviet legal theories which attempted to limit the object of mistake to certain elementary contents of the juristic act. The divergence of the two interpretations only lies in the concrete range of such contents.

The judicial practice in China tends to interpret §71 OGPCL through the third approach: on the one hand, the courts may refuse to relieve a mistake if it does not involve the nature of the juristic act, the opposite party or any aspects of the subject matter;[32] on the other hand, where the mistake concerns certain fact around the subject matter, the courts may still grant relief for the party in error even if the error is not one involving the categories, quality, specifications or quantity of the subject matter.[33] Nonetheless, as will be discussed in later chapters, although the judicial practice in China appears to have adopted a narrower understanding to §71 OGPCL which aims to limit the object of relevant errors to the those listed in this provision, once it comes to a mistake beyond the scope of §71 OGPCL that should be granted relief, many courts may choose to refrain from citing the judicial interpretation and instead allow avoidance or adaption of the juristic act relying directly on the rules of major misunderstanding in GPCL and CL.[34] As a result, the ultimate standing point of courts not be far away from the first possible understanding of §71 OGPCL which is also accepted by the majority of Chinese scholars. For example, Liang Huixing believes that mistakes as to the price, the place or time of performance may also be legally relevant 'to the extent that they are considered important in the transaction';[35] Cui Jianyuan is of similar opinion, who thinks that major misunderstandings may occur regarding the packaging of the goods, the way of performance, the place or time of performance, etc. as long as they would result in considerable loss of the person in mistake.[36] Han Shiyuan also pointed out that 'the enumeration in §71 OGPCL is an exemplary one, not exhaustive', hence this article may apply to other circumstances such as legal errors.[37]

This author also agrees with the above first understanding because it is in consistence with the semantic meaning of §59 I GPCL and therefore methodologically

[32] See for example IPC Heze, Shandong, 2017, CLI.C.9798994; IPC II Beijing, 2013, CLI.C.3806677. (If not otherwise indicated, all Chinese cases are cited by their citation codes in the 'PKULaw' database.)
[33] See for example BPC Gulou, Jiangsu, 2014, CLI.C.19219538; HPC Jilin, 2014, CLI.C.3985530; HPC Jilin, 2016, CLI.C.9880381.
[34] See *infra* Section 4.3.7-4.7.
[35] Huixing Liang, *General Introduction to Civil Law*, 3 ed. (Beijing: Law Press, 2007), 177.
[36] See Jianyuan Cui, *Contract Law* (Beijing: Law Press, 2012), 94.
[37] See Shiyuan Han, "On the Interpretation of Major Misunderstanding," *Peking University Law Journal* 29, no. 3 (2017), 675.

more justifiable.

Another important breakthrough made by the judicial interpretation on §59 I GPCL is that it defines misunderstandings as the incorrect conception that would result in the contradiction between the consequences of the juristic act and 'the intent' of the acting person. This definition may expand the scope of relevant mistakes established by §59 I GPCL. As was pointed out by some scholars, the concept of 'real intent' was used in a broad sense in GPCL, and can refer not only to the psychological will of the acting party but also the intention that should have been formed without certain abnormal obstacles.[38] Thus, §71 OGPCL will be able to cover both mistakes as to the meaning of the terms of a juristic act and those as to certain facts leading to the transaction decisions. However, in light of the original text of §59 I GPCL, only the former type of mistakes is legally relevant. In this respect, the judicial interpretation has, to some extent, further developed the law.

Last but not least, §71 OGPCL is also intended to provide more guidance on the judgment of the significance of a mistake. According to this article, the difference between a major and non-major misunderstanding lies in whether it has caused considerable loss to the person in mistake. Nevertheless, no unanimous legal opinion was formed in relation to the question about to what extent a loss could be deemed a 'considerable' one.

Most scholars understood the 'loss' in §71 OGPCL narrowly as economic disadvantages suffered by the mistaken party. They then criticized the judicial interpretation on this ground. For example, Zhu Qingyu argued that the economic consequence-oriented approach of the above provision 'has deviated from the correct track from the very beginning': if the significance of the loss is to be decided by its absolute amount, participants in small transactions would be deprived of any opportunity to correct their mistakes; if it is to be judged from its relative proportion, parties in large transactions are bound to be disadvantaged, whichever of the two cases is not fair.[39] Li Junqing also believed that whether the mistake is a major or non-major one does not necessarily depend on the economic loss it may lead to, and the courts should not block the channels through which parties in small transactions may seek relief for mistake simply for the purpose of saving judicial resources.[40] Wang Liming

[38] See Keping Ran, "Constructing the Law of Mistake in Manifestations of Intent against the Background of the General Part of Civil Code " *Law Science*, no. 2 (2016), 119.
[39] See Qingyu Zhu, *The General Theory of Civil Law*, 2 ed. (Beijing: Peking University Press, 2016), 276.
[40] See Junqing Li, "Determining the 'Severity' of a Mistake in Manifestation of Intent," *Journal of Liaoning Academy of Governance*, no. 3 (2016), 18.

took the same view, treating 'considerable loss' as server economic detriments. He further proposed that as long as the mistake has substantially affected the rights and obligations of the parties or has hindered the realization of the purpose of the contract, a major misunderstanding can still be found even if no economic loss was caused.[41]

On the other hand, there are also many scholars who explicitly opposed to the economic consequence-oriented interpretation of §71 OGPCL. For example, Han Shiyuan advocated that the 'considerable loss' test should be viewed as a supplementary factor to identify the significance of a mistake, thus must be judged flexibly according to concrete circumstances in individual cases;[42] Cui Jianyuan opined that the criterion for determining considerable loss is whether the consequences of the mistake frustrated the contractual purpose of the party in error.[43]

In judicial practice the test of considerable loss is understood quiet differently from that in legal theories. As can be seen in a number of court decisions, especially those concerning contractual errors, considerable loss is likely to be recognized when the mistake a) has led to gross disparity between the obligations of the two parties; or b) has rendered it impossible for the person in error to achieve his contractual purpose.[44] The above tendency of the courts deserves our attention.

In summary, although §71 OGPCL has greatly enriched the connotation of the rule of major misunderstanding in §59 I GPCL, it has hardly alleviated the difficulties in applying this article due to the new controversies arising from its ambiguous wording. The legitimacy of this judicial interpretation was further weakened after the CL and GP amended the provision of GPCL.

1.3.4 The legislation of CL and GP

The rule of major misunderstanding has undergone a series of changes during the legislative process of the CL. Initially, the Trial Draft of CL prepared by scholars in 1995 was intended to introduce the provision of the judicial interpretation into the statute. §49 of the Trial Draft provides that

> *'if one party misunderstood the nature of the contract, the opposite party, the identity of the subject matter or any other matters considered fundamental*

[41] See Limin Wang, *Studies in Contract Law*, 4 vols., vol. 1 (Beijing: China Renmin University Press, 2011), 694.
[42] See Han, "On the Interpretation of Major Misunderstanding", 678.
[43] See Cui, *Contract Law*, 94.
[44] See ICP Xuzhou, Jiangsu, 2017, CLI.C.11348013; 2016, CLI.C.9109934; IPC Qinhuangdao, Heibei, 2013, CLI.C.4243193; IPC II Shanghai, 2008, CLI.C.180417.

in transaction, so that the consequences of the act are contrary to his own intention and considerable loss is caused, the person in mistake may request avoidance of the contract. '[45]

However, the above proposal was later rejected by the 1997 Exposure Draft. In §35 I of the said Draft, it was submitted that

'a contract concluded because of a major misunderstanding is voidable, unless the mistaken party was guilty of gross negligent, or the opposite party has started performing the contract and was not at fault. '[46]

This proposal was clearly affected by the UNIDROIT Principles (1994), in fact, it was composed with almost the same language the drafters used to describe the rule of mistake in the model law.[47]

§3.5 of the UNIDROIT Principles (1994)[48] stipulates that

'(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party. (emphasis added)

[45] Shengming Wang et al., *Important Drafts of Chinese Contract Law* (Beijing: Law Press, 2000), 25.
[46] Ibid., 117.
[47] See Lihai Sun, ed. *Selected Materials on the Legislation of Contract Law* (Beijing: Law Press, 1999), 285.
[48] Later became §3.2.2 UNIDROIT Principles (2016).

§35 I of the Exposure Draft of CL has excluded the right to avoid the contract on the ground of mistake when the person in error was guilty of gross negligent; where the opposite party has begun to perform his obligation and was not at fault, these exceptions were respectively derived from §3.5 (2) (a), (1) (b) and (1) (a) of the UNIDROIT Principles.[49] It goes without saying that the Exposure Draft has significantly deviated from the old track of §59 I GPCL which is intended to formally limit the scope of legally relevant mistakes by restricting their objects, rather, it has relied on a comprehensive consideration of certain material factors from the perspective of both parties to decide the voidability of the contract. Regrettably, this proposal was not adopted by the 1998 Draft of CL. After the Exposure Draft was published for public comments, it was argued by some that the 'unless' part of §35 I 'may have overly restricted the right of avoidance and thereby harms the interest of the person in error'.[50] Perhaps influenced by these opinions, in §54 of the 1998 Draft (which later became §54 I CL), the above proviso was deleted. It was provided instead that

> *'one of the parties may request a people's court or an arbitration tribunal to adapt or avoid the following contracts,*
>
> *(a) those that were concluded due to major misunderstandings; and*
>
> *…'*[51]

Therefore, both the 1998 Draft and the final version of CL, despite their removal of the 'unless' part of §35 I of the Exposure Draft, have not returned to the old approach of §59 I GPCL. Such shift in attitude in the legislation process has fundamentally changed the orientation of the concretization task of the concept 'major misunderstanding'. Originally in §59 I GPCL, due to the existence of the requirement of 'content involvement', the purpose of the concretization was merely to further limit the scope of legally relevant mistakes in terms of their significance. Now, with this requirement removed, the function of providing initial restrictions on the relievable mistakes will be assumed by the concept of 'major misunderstanding'. Consequently, when concretizing this concept, we must consider the significance of the mistake together with other

[49] See Ying Tang, "On Mistakes in Manifestations of Intent: A Comparative Study of Chinese and German Law," *Journal of Comparative Law*, no. 1 (2004), 40.
[50] See Lihai Sun, ed. *Selected Materials on the Legislation of Contract Law*, 83.
[51] Shengming Wang et al., *Important Drafts of Chinese Contract Law*, 178.

elements.

§147 GP had basically followed the idea of §54 I CL. In fact, during the review process of GP, a provision similar to §71 OGPCL was proposed (§105 II) but once again rejected by the legislator.[52] The reason is as follows,

> *'It is still questionable whether all scenarios of major misunderstanding could be covered by upgrading the provision in the current judicial interpretation into statute. With the continuous development of both theories on juristic act and the relevant legal practice, the application scope of the institution of major misunderstanding will change. This, however, is essentially a judicial issue, and the legislation may not specifically limit it.'*[53]

Therefore, by deleting the object limit of relevant mistakes in §59 I GPCL, CL and GP have both dramatically increased the uncertainty of the rule on major misunderstanding. The purpose underlying such arrangement is to authorize the judiciary to gradually develop certain concrete criteria by accumulating decisions with reference to the progress in legal theories.

1.3.5 Reception of the bifurcated approach in German and Japanese law

The above analysis has shown that the rule of major misunderstanding in Chinese law has gone through continuous development and evolution, it possesses its own inherent logic which should be the starting point of every doctrinal construction. Such inherent logic, however, was receiving less and less attention as the rule of mistake in the German BGB (and also in the Civil Code of Taiwan which belongs to the German legal family) and the mainstream legal theory in Japan gradually gains dominance in Chinese legal treaties since the 1990s.

The receipted German and Japanese model of the law of mistake was later called the bifurcated approach[54] and has the following two characteristics. First, it strictly distinguishes cases of 'error in expression' from that of 'error in motive'. The so-called error in expression refers to scenarios where the manifesting person either misunderstood the normative meaning of the signals used in the manifestation of intent (i.e. error

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[52] See *Legislative Background and Points on the General Provisions of Civil Law* (Beijing: Law Press, 2017), 258.
[53] Shishi Li, ed. *Commentary on the General Provisions of Civil Law* (Beijing: Law Press, 2017), 461.
[54] This terminology was borrowed from Japanese scholars, see Kazutoshi Kobayashi, *A Study in the Law of Mistake* (Saitama: Sakai Syoten, 1997), 1.

in content) or accidentally used unintended signals to convey his idea (i.e. error in communication),[55] whilst the error in motive refers to cases where the manifesting person's conception as to certain fact which has triggered his decision on making the manifested intent was inconsistent with the reality. Secondly, on the basis of the above distinction, the bifurcated approach also treats the two types of mistakes differently. Whereas it generally excuses errors in expression, it granted relief only exceptionally in cases of error in motive when some further requirements were met. In the German BGB, the motive error must be related to 'the nature of a person or thing considered fundamental in transaction', and under the Japanese traditional mainstream theory, the erroneous motive must be expressed and became an important part of the manifestation of intent.[56]

With the introduction of the German-Japanese bifurcated approach into China, a series of concepts and criteria such as 'errors in expression', 'errors in motive', 'mistakes as to the fundamental nature', 'the indication of motivational conception', etc., begun to emerge in Chinese civil law textbooks. For example, Liang Huixing has adopted the distinction between the error in expression and the error in motive, and submitted that motive errors shall not affect the validity of juristic acts unless expressed and become part of the manifestation.[57] This line of thinking was obviously influenced by the Japanese bifurcated theory. In comparison, Zhang Junhao has followed the German mode, and divided mistakes into error in content, error in communication and error in motive, suggesting that relief should be allowed only for the first two types of mistakes (i.e. error in expression) because an error in motive 'is not an adequate reason for the manifesting person to transfer his risk of misconceptions of fact and failure in speculation'.[58] Long Weiqiu was of a similar opinion. He adopted the approach of BGB and limited the scope of relevant mistakes to error in expression (§119 I BGB) and error as to the fundamental nature (§119 II BGB). The rule of major misunderstanding in Chinese law was roughly discussed under the title of error in expression although §71 OGPCL and §54 I CL have both expanded the application scope of this rule.[59] In his recent work, Zhu Qingyu noticed and accepted some subsequent developments in

[55] Some scholars use the terminology of 'error in expression' in a narrow sense, referring only to cases of communicational error, see for example Dieter Medicus, *Allgemeiner Teil des BGB*, 9 ed. (Heidelberg: C.F. Müller, 2006), para.746.
[56] For details see infra Section 5.1.1, 5.2.1.
[57] See Huixing Liang, *General Introduction to Civil Law*, 1 ed. (Beijing: Law Press, 1996), 167-169.
[58] See Junhao Zhang, ed. *Basic Theories of Civil Law* (Beijing: China University of Political Science and Law Press, 1997), 249-250.
[59] See Weiqiu Long, *The General Theory of Civil Law* (Beijing: China Legal Publishing House, 2001), 553-560; 572-581.

German law. He first limited the application scope of the rule of mistake to cases of unilateral error, and proposed that the problem of shared error in motive should be dealt with by the doctrine of disrupted transaction basis in the frame of obligation law (§313 BGB). In this way, he seems to have ignored the fact that §54 I CL (and also §147 GP) never excluded common mistake from its scope. In addition, Zhu also adopted the distinction between error in expression and error in motive, and only provided relief for the latter provided that it concerns a fundamental nature of a person or thing.[60]

There are also many scholars who, though have not attempted to interpret the rule of major misunderstanding in Chinese law according to the bifurcated approach, opined that this approach should be viewed as the *lex ferenda* that is to be achieved by the amendment of the *lex lata*.[61] In fact, in the legislation process of the GP, most drafts prepared by legal experts have chosen §119 BGB as the model of the law of mistake.[62]

The above situations have shown that the dogma of the irrelevancy of motive error and that of the relevancy of error in expression originating from the German and Japanese law have for long been the ingrained opinion in the Chinese legal academia. They encountered no challenge until Sun Peng published his research in 2005.[63]

1.3.6 The proposal of the unitary approach

In his paper, Sun criticized the bifurcated theory from the following aspects: a) it could be very difficult to distinguish error in motive from error in expression, especially when it involves a mistake concerning the identity of a person or thing; b) even if such distinction is possible, it is meaningless in law because both categories of mistake are identical to the extent that they both harmed the 'true intention' of the person in error; c) the bifurcated approach was based on the will theory, and failed to balance the protection of the manifesting person and the security of transaction; d) the bifurcated theory in Japanese law, which allows relief for error in motive when 'it was expressed and thus became the content of the manifestation', is not justifiable: whether the motivational conception is expressed or not, it could become the content of the juristic act through interpretation as long as it was knowable to the opponent, and the

[60] See Qingyu Zhu, *The General Theory of Civil Law*, 1 ed. (Beijing: Peking University Press, 2013), 260-266.
[61] See for example Chun Zhang, "Reconstruction of the Rule on Mistake in Chinese Civil Law," *Jianghai Academic Journal*, no. 6 (2003), 122-127; Jinhai Zhang, "The Bifurcated System of Mistake Law in Germany and Its Referential Significance," *Hebei Law Science*, no. 10 (2006), 180-181.
[62] See for example the Proposed Draft of the General Provisions of Civil Law prepared by the CASS Study Group of Civil Law Codification, §150; the Proposed Draft prepared by the CUPL Study Group of Chinese Civil Law, §§110, 111.
[63] See Peng Sun, "Motive Errors in Civil Law: From Typological Theory to Unitary Theory," *Modern Law Science*, no. 4 (2005), 105-111.

expression of motive is nothing more than a 'parameter' for judging the recognizability of the mistake that forms the uniform premise of legal relevancy of all types of errors. On this basis, Sun abandoned the traditional typological system and advocated for the first time a unitary theory of mistake.

Since Sun's research, opposite voices to the old bifurcated approach continue to be heard in the Chinese academia. For example, Ye Jinqiang pointed out that

> *'the distinction between error in motive and error in expression is not an adequate ground for different legal effects both in terms of logic and value. The argument of the mainstream theory that 'motive exists in one's heart and is unknown to others, so the manifesting party cannot be allowed to invoke avoidance [for motive errors] at the cost of transaction security' is invalid because the error in expression is also unknown to other people. The opinion that the risk of error in motive must be borne by the manifesting party…is also not persuasive, for it fails to explain why the risk of error in expression should not be assumed by that party as well. The viewpoint that in cases of error in expression there is an inconsistency between intent and manifestation whilst in cases of error in motive there isn't, has ignored the following major questions: why motives which constituted the basis of the intention are not as important as the latter? why the private autonomy of the manifesting person is not equally impaired by an error in motive which influenced the decision of the intent as an error in expression which harmed its accomplishment? '*[64]

Zhang Qing argued that the bifurcated approach has the following three shortcomings:

> *'firstly, the bifurcated theory has divided the process of manifestation of intent into different stages, but the subjective factors in a manifestation are by themselves vague and uncertain…whether such stage separation could work is doubtful in the first place; secondly, in practice, the distinction between error in expression and error in motive is often difficult…thirdly, the opposite party is also protected by the principle of private autonomy, and it*

[64] Jinqiang Ye, "The Flexibility of Civil Legal Effects", *Chinese Journal of Law*, no. 1 (2006), 108.

is therefore unreasonable to completely ignore his interests."[65]

Ran Keping reconsidered the mistake rules in German and Japan separately. He believed that while the German law failed to draw a clear line between mistake as to the identity of a person or thing and error in motive, and its scope of mistaken nature is difficult to delimit, the Japanese bifurcated theory, which emphasizes the expression of motive, cannot improve the transactional safety and efficiency, either, and would hinder the completion of transaction.[66] Long Jun postulated that the German-Japanese mode of mistake law was the result of the will theory which is no longer compatible with modern society, and both German and Japanese law have adopted various amendments to their bifurcated structure in order to alleviate its contradiction with social reality yet without curing the problem. Long proposed that there is no need to retake the detour in China.[67] Han Shiyuan opined that the structure of §147 GP is different from §119 BGB, providing neither separate provisions for the error in expression and the error in motive nor exceptional rules for the treatment of the latter, hence making the unitary approach more preferable for the interpretation of §147 GP.[68]

Although the binary dogma was harshly criticized, no consensus has been reached by Chinese scholars as to what uniform rule should be established in its place. Different proposals may be found in recent legal writings.

(1) The theory of contractual purpose. Tong Lei advocated in her dissertation that whether a misunderstanding is major or not should depends on 'the purpose of the contract' which constitutes its '*substantia*'. There are only two types of ultimate purposes in contractual relations: one is to lock in a particular performance (in cases where the subject matter or the opposite person is irreplaceable to the person in error); the other is to lock in a favourable price (when the subject matter or the opposite person is replaceable). If a mistake has hindered either of the above fundamental purposes, then the binding force of the contract would be affected. Whether it was an error in expression or an error in motive is insignificant.[69] But the problem is that parties to a contract normally have different purposes: while when one party may be trying to 'lock in a particular performance', the other party may be attempting to 'lock in a favourable

[65] Qing Zhang, "On Mistakes in Civil Law," *Jiangsu Social Sciences*, no. 2 (2008), 107.
[66] See Ran, "Constructing the Law of Mistake in Manifestations of Intent against the Background of the General Part of Civil Code ", 119-120.
[67] See Jun Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent," *Tsinghua University Law Journal*, no. 5 (2016), 131-132.
[68] See Han, "On the Interpretation of Major Misunderstanding", 671 and below.
[69] See Lei Tong, "A Study on Contractual Mistake" (Doctoral Thesis, Fudan University, 2011), 112 and below.

price'. It is thus hard to explain why in cases where one party's contractual purpose is frustrated by his own mistake, the law should sacrifice the other party's purpose for the benefit of such party in error.

(2) The theory of value reference. Han Shiyuan pointed out recently that under §149 GP, where the fraud is committed by a third party, the victim can avoid the juristic act only when the opponent knew or ought to have known the fraud. This approach takes the factors concerning the recipient of the manifestation into account before allowing avoidance. This value judgment should also be applied to cases of mistake where the autonomy of the manifesting party is even less significantly impacted than in cases of fraud. Therefore, the law may not grant relief to the person in error when the counterparty has not involved in the mistake: *a maiore ad minus*. Han then put forward three situations in which the opponent has been involved in the mistake: a) where he knew or ought to have known the error but failed to notice the party in error according to the principle of good faith; b) where he induced the mistake by misrepresentation; c) where he shared the mistake with the other party. Added to that, the right of avoidance should be excluded when the party in error is guilty of gross negligence or has assumed the risk of mistake.[70]

However, a closer look at the provision of §149 GP reveals that the article allows avoidance for third-party fraud only when it was detectable to the opponent on the ground that the counterparty should have informed the victim about the fraud instead of trying to take advantage of it. Such value judgment could be applied only to the above situation a), not the other two situations.

(3) The reliance theory. Most supporters of the unitary approach have chosen to strengthen its legitimacy from the perspective of protecting the reasonable reliance of the opposite party. For example, Long Jun was of the opinion that avoidance for mistake should not be allowed unless the mistake was recognizable to the opponent or has been shared or induced by the latter because in these circumstances he lacks reasonable reliance on the binding force of the manifested intent.[71] I will further discuss this theory in subsequent chapters.[72]

Although acquiring increasing support in China, the unitary approach has not yet gained dominance. There remain many scholars who are in favour of the dual structure of the mistake law. However, confronted with the challenge of the unitary theorists,

[70] See Han, "On the Interpretation of Major Misunderstanding", 679 and below.
[71] See Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 132 and below.
[72] See *infra* Section 6.2.1.

recent supporters of the bifurcated mode have introduced a number of amendments to accommodate more cases of error in motive into the scope of §147 GP.[73] As Wu Teng observed, the dogma of the irrelevancy of motive error has been abandoned by both sides.[74] Nonetheless, the dogma of the general relevancy of the error in expression is still upheld by new bifurcated theorists.

In a word, the problem as to whether the law should treat error in motive and error in expression differently remains unsolved in China. In the following chapters, I will revisit this issue.

1.4 Structure of this research

The research of this dissertation will be divided into five parts.

In Chapter 2, I will respond to the long-standing controversy between the bifurcated approach and unitary approach of mistake law. Although some scholars have pointed out that §147 GP does not literally distinguish error in expression and error in motive, which seems to be close to the position of the unitary theories, a review of the legislative history of this article has shown that the legislator of GP had no intention to decide on this issue. Therefore, if the result of value infusion shows that the value foundation for relieving errors in expression is different from that for errors in motive, we should not hesitate to treat them separately. By digging into the collided legal principles involved in the two types of mistake, we will find that the relief for errors in expression aims to provide a fairness review on the normative attribution of a manifestation of intent whilst the relief for errors in motive is a mechanism providing exceptional protection for the mistaken party's material freedom of self-determination: the two types of reliefs cannot be combined into one. This is the conclusion of the preliminary value infusion into the rule of major misunderstanding.

Based on the above binary distinction, Chapter 3 will focus on the relief for error in expression, which mainly involves the following three aspects. Firstly, from the perspective of comparative law, I will examine two different tendencies in foreign legal systems that are either friendly to or conservative about the relief for errors in

[73] See for example Wei Mei, *Studies in the Law of Mistake in Manifestations of Intent* (Beijing: Law Press, 2012), 317 and below; "The Structure of the Rule on Mistakes in Manifestation of Intent in Civil Law," *Global Law Review*, no. 3 (2015), 75; Yi Zhao, "Constructing the Rule on Mistake in the General Part of Civil Law," *Studies in Law and Business*, no. 4 (2016), 147; Junqing Li, "The Remedial Approach of Motive Errors under the Rule of Major Misunderstanding in the General Part of Civil Law," *Legal Forum*, no. 11 (2017), 119 and below.

[74] See Teng Wu, "Normative Construction of Material Mistake in the Context of Civil Codification," *Contemporary Law Review* 33, no. 1 (2019), 19.

expression. By analysing the different historical and theoretical traditions behind the two legislations, I will try to prove the rationality of the compromised approach proposed in the previous chapter at the level of legal policy. Secondly, I will give reflections on the problem of functional confusion between the law of mistake and the rules of interpreting manifestations among Chinese courts and unitary theorists to provide some important 'risk prompts' for the application of §147 GP. Thirdly, at the end of this chapter, I will turn to the existing case groups in China to generalize from them several concrete standards that must be met for expressional mistakes to invoke avoidance.

Following that, I will attempt to address the issue of error in motive in Chapters 4, 5, 6. Chapter 4 will organize several case groups in which the relief of motive error was granted by Chinese courts. These case groups are of descriptive nature, hence must be further justified by value infusion. Chapter 5 will try to provide some guidance on such value infusion from the perspective of legal comparison. In this chapter, I will mainly refer to the law of mistake in Germany and Japan to summarize the various arguments provided by their courts or scholars justifying the legal relevancy of certain types of motive errors. Chapter 6 will further examine the arguments obtained from the comparative study in the context of case groups and internal value order of Chinese law so as to provide final justifications. Methodologically, Chapters 5 and 6 are the second and more specific value infusion into the rule of major misunderstanding on the basis of the empirical materials organized in Chapter 4. By combining the two processes, I will finally come up with some suggestions for the concrete case group norms concerning the relief for motive errors.

Chapter 2 The Binary Distinction between Error in Expression and Error in Motive

The theory of major misunderstanding in Chinese law has aroused unsolved debate over the traditional bifurcated approach and the new unitary mode that has lasted for nearly fifteen years.[75] The dispute was not quelled by the recent inaction of GP, of which §147 inherits the style of general clause from the old legislation.[76] The same controversy seems to have been logically transferred to the interpretative work of the new article and may remain the mainstays of the discussion around the structure of the law of mistake.[77] However, if inspecting carefully, we may find that the above discussion actually is suffering from a major terminology confusion.

Literally, the distinction between 'bifurcated approach' and 'unitary approach' should only exist to the extent that different fact patterns of error in expression and error in motive are to be treated separately in the framework of mistake law: if such separation is recognized, the arrangement is bifurcated, otherwise unitary.[78] Nonetheless, when the terminology of 'bifurcated approach' was applied in the theoretical discussion, its original semantic scope was greatly restricted. This is not surprising because such concept was initially adopted by supporters of the unitary theory when referring to the target of their criticism, i.e., the bifurcated mode in German-Japanese law. As a result, in the mind of these scholars, the bifurcated theory is equal to the position which 'clearly distinguishes error in motive from error in expression and generally negates avoidance of the former while allowing that of the latter'.[79] Thus, the 'bifurcated approach' opposed by the unitary theorists is one in a narrower sense. To put it bluntly, it is only 'a' bifurcated mode, not 'the' binary structure as a whole.

Scholars surely have the right to define their terms. However, utilizing the concept 'bifurcated theory' in a narrower sense has undeniably sown the seed of crisis for the

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75 See *supra* Section 1.3.5, 1.3.6.
76 See Shiyuan Han, *The Law of Contrat*, 4 ed. (Beijing: Law Press, 2018), 272.
77 For bifurcated approach, see Huixing Liang, *General Introduction to Civil Law*, 5 ed. (Beijing: Law Press, 2017), 183; Huabin Chen, "Mistakes in Manifestation of Intent and Their Regulation in Future Chinese Civil Code," *Law Science Magazine*, no. 9 (2017), 31 and below. For unitary approach, see Han, "On the Interpretation of Major Misunderstanding", 674 and below; Lei Wang, "Outline of the Value Infusion into the Concept of 'Major Misunderstanding'," *Journal of Gansu Political Science and Law Institute*, no. 6 (2016), 145 and below.
78 See Yi Zhao, "The Bifurcated Mode of Mistake Doctrine in Roman Law and Its Modern Reception," *Science of Law (Journal of Northwest University of Political Science and Law)*, no. 1 (2018), 64.
79 See Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 117 and below.

unitary theories. However persuasive their arguments against the German-Japanese mode of bifurcated approach may be, they are unable to rule out the possibility of other possible way of binary treatment, hence cannot perfectly justify the superiority of their own advocation. As we will see later, this seed of crisis has recently sprouted in Japan. With the rise of the consensus theory that has redesigned the binary treatment of error in expression and error in motive to make it more in line with the judicial practice in Japan, the 'Maginot Line' painstakingly built up by the unitary approach was quickly circumvented. The 2017 Modification Act of JCC has explicitly rejected the unitary proposal of mistake law and eventually established a bifurcated framework within the new article.[80] The above trend in Japanese law deserves our attention.

For the above reasons, if we want to have an effective discussion with the terms 'bifurcated' and 'unitary' approach, we must return to their original meanings. The primary question to be asked should then become whether the distinct treatment (in whatever form) of the two types of mistake is possible and necessary. The answer is affirmative in the opinion of this author.

2.1 Why is the binary structure possible

First, I will analyse the possibility of the distinction between error in expression and error in motive that is often doubted by unitary theorists. Two arguments have been continuously brought up by them, one pointing to the value foundation of the bifurcated approach, the other to its technical practicability.

2.1.1 The 'will dogma' as the foundation of the bifurcated approach?

It is often argued by the dissenters of the bifurcated approach that its value foundation, i.e., the 'will dogma', is incompatible with the internal value order of modern civil law. As a result, it is necessary to turn to the unitary approach based on the objective theory which attaches more importance to the reasonable reliance of the counterparty.[81] This argument is partially valid for the German scheme of bifurcated theory founded by Savigny in the 19th century,[82] it is however inadequate to eliminate the possibility of other types of binary structures. Consider the following counter-examples:

[80] See for details *infra* Section 5.2.
[81] See Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 119.
[82] See *infra* Section 3.1.1.

§871 of the Austrian ABGB literally does not distinguish error in expression and error in motive. Relief is generally allowed for '*Geschäftsirrtümer im weiteren Sinn*', i.e., mistakes as to matters concerning the content of the juristic act.[83] Whilst all errors in expression fall within the scope of *Geschäftsirrtümer*,[84] only some of errors in motive, namely, errors concerning relevant facts of the contract 'which were considered important and accepted by both parties', could be included in it.[85] The reason for such distinction is that

> *'[f]acts, which are relevant for both contracting parties because of their affiliation to the contract, fall into the risk sphere of both parties. Therefore, the counterparty here, as in cases of error in expression, must tolerate avoidance under the conditions of § 871. Whilst the error in motive that is not voidable under §871 relates to circumstances outside the contract which, in cases of paid transactions, are within the risk sphere of each party (§901 S 2), and only fraud could justify avoidance."*[86]

Thus, the binary treatment of error in expression and error in motive in ABGB is not based on the will dogma. Instead, it is shaped by the principle of self-responsibility and the consideration of distributive justice concerning the allocation of risks.

The bifurcated structure can also be founded on the basis of the objective theory. For example, §6:228 (Fundamental mistake) of the Dutch BW provides that

> *'(1) An agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he would have had a correct view of the situation, is voidable:*
>
> *a) if the mistake is caused by information given by the opposite party, unless this party could assume that the agreement would be concluded even without this information;*
>
> *b) if the opposite party, in view of what he knew or ought to have known*

[83] Franz Bydlinski, "Das Österreichische Irrtumsrecht als Ergebnis und Gegenstand Beweglichen Systemdenkens", in *Festschrift für Hans Stoll zum 75. Geburtstag* (Tübinger: Mohr Siebeck, 2001), 118.
[84] See Peter Bydlinski, *Bürgerliches Recht, Band I Allgemeiner Teil*, 3 ed. (Wien: Springer-Verlag, 2005), para. 8/9
[85] See F. Bydlinski, "Das Österreichische Irrtumsrecht", 119.
[86] Helmut Koziol, Peter Bydlinski,Raimund Bollenberger, ed. *Kurzkommentar zum ABGB*, 3 ed. (Wien: Springer-Verlag, 2010), §871 para.7 (Bollenberger).

about this mistake, should have informed the mistaken party about his error;

c) if the opposite party, at the moment on which the agreement was entered into, had the same incorrect assumption as the mistaken party, unless he could have believed that the mistaken party, if this party had known the mistake, still would have entered into the agreement.

(2) A nullification on the ground of a fundamental mistake cannot be based on a mistake which is exclusively related to a fact that, at the moment on which the agreement was entered into, still had to happen (fact in future) or that should remain for account of the mistaken party in view of the nature of the agreement, the general principles of society (common opinion) or the circumstances of the case.'[87] *(emphasis added)*

Whilst §3:33 BW stipulates that

A juridical act requires the will (intention) of the acting person to establish a specific legal effect, which will (intention) has to be expressed through a statement of the acting person.[88]

And §3:35 BW provides that

'[t]owards him who has interpreted another person's statement or behaviour, in accordance with the meaning that he reasonably could give to it in the circumstances, as a statement with a certain content of this other person addressed to him, cannot be appealed to the absence of a with that statement corresponding will (intention).'[89] *(emphasis added)*

Thus, in the BW, errors in expression are completely excluded from the scope of the law of mistake where they traditionally belong to, and are dealt with under even stricter rules in order to protect the opposite party's reasonable reliance on the objective meaning of a statement. The function of the mistake law is thus converted into granting relief only to certain erroneous motivational conceptions as to the reality, i.e., motive

[87] Translated at http://www.dutchcivillaw.com/civilcodebook066.htm.
[88] Translated at http://www.dutchcivillaw.com/civilcodebook033.htm.
[89] Translated at http://www.dutchcivillaw.com/civilcodebook033.htm.

errors.[90]

In a word, the binary structure of mistake law is not necessarily the result of the will dogma. Even if the will dogma is no longer sustained in modern civil laws, it is inadequate to deny the possibility of the bifurcated approach as long as other legal principles can provide justification for it, as is the case with the Austrian and Dutch law.

2.1.2 Distinguishability between error in expression and error in motive

Another argument against the bifurcated approach proposed by the unitary theorists is that the distinction between the error in expression and error in motive is technically impossible. This argument was usually seen in the following two forms.

The first form focuses on the composition of the manifestation of intent.

For example, Heinrich Titze was of the opinion that a person manifesting his will is pursuing through such manifestation not only certain legal purposes but also other economic and social goals. All these pursuits together constitute an indivisible entirety and form the 'content' of the manifestation.[91] In this context, all types of mistake, whether they are errors in expression or errors in motive, are nothing more than errors in the (expanded) 'content' of the manifestation of intent. There is no way to split the two.[92] Thus, in the case where someone bought a gift for a wedding, the content of his manifestation was to obtain a gift suitable for the wedding, and it makes no difference whether he failed to convey his idea or was unaware of the fact that the wedding has already been cancelled: in both cases the buyer was mistaken about the content of his manifestation as a whole, leaving no room for the distinction of the 'two types of mistakes'.

The above analysis of Titze was founded on the 'theory of final consequences' (*die Grundfolgentheorie*) concerning the content of the manifestation.[93] However, this theory itself is problematic. If we give binding force to a person's behaviour that merely reflects his economic or social intentions, the boundary between legal relations and other social contacts such as 'gentleman's agreements' or offering favours will become unrecognizable.[94] In fact, §133 GP has clearly defined the manifestation of intent as a

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[90] See Toshikazu Uchiyama, "Modernization of the Law of Juristic Act in Dutch Civil Code," *Waseda law journal* 58, no. 2 (2008), 119-123.
[91] See Heinrich Titze, "Vom Sogenannten Motivirrtum", in *Festschrift Für Ernst Heymann Zum 70. Geburtstag* (Weimar: 1940), 94.
[92] See Ibid., 95.
[93] See Erich Danz, *Die Auslegung der Rechtsgeschäfte: Zugleich ein Beitrag zur Rechts- und Tatfrage*, 3 ed. (Jena: Verlag von Gustav Fischer, 1911), 7 and below.
[94] See Franz Bydlinski, *Privatautonomie und Objektive Grundlagen des Verpflichtenden Rechtsgeschäftes* (Wien: Springer-Verlag, 1967), 7.

tool for establishing, modifying, and terminating 'civil legal relationships', hence rendering Titze's theory rootless in Chinese law.

Interestingly, Wagatsuma Sakae, who was also influenced by the theory of final consequences, ended up adopting a bifurcated structure in the context of Japanese law. Wagatsuma defined mistake as 'the inconsistency between what is derived from the expression and the intention of the addresser which is not determined purely by the effective intention but by **all economic and social goals pursued by the juristic act**'.[95] This position was similar to that of Titze's. However, Wagatsuma then correctly pointed out that, unlike the content of a manifestation reflecting the legal effects pursued by the manifesting person, his version of economic or social purposes (i.e., his motives) will not naturally appear in the manifestation and thus must be specially expressed in order to obtain legal relevancy.[96] Still taking the wedding gift case as an example, although the buyer ultimately intended to obtain a thing suitable as a wedding gift, when he made the offer to the seller, the legal effects he pursued will immediately become the content of his manifestation, yet his social purpose, i.e., the use of the thing as a wedding gift, will not automatically be included into the content if such motive was not expressed to the seller. As a result, in the theoretical framework of Wagatsuma, error in expression and error in motive are once again treated differently despite his shared starting point with Titze. Therefore, even if we can provide a unitary definition of mistake by extending the scope of the content of manifestation of intent, the binary distinction between two types of error is still possible or even inevitable.

The other objection to the technical possibility of the binary distinction focuses on its ambiguity in certain types of borderline cases.

One example is the famous 'Nixe case' widely discussed by German scholars.[97] In this hypothetical case, X sent a letter to Y offering to sell a racing horse named 'Nixe', Y mistakenly thought that Nixe was a horse that had won an award before, and thus made the acceptance. Later, Y found out that the winner was another horse of X and Nixe had never won any awards. At this point, it seems that Y has misunderstood both the meaning of the word 'Nixe' (error in expression) and the fact that he was purchasing a winning horse (error in motive). Regarding this problem, Larenz has proposed a

[95] See Sakae Wagatsuma, *Introduction to Civil Law II: General Provisions* (Tokyo: Nippo Hyoron Sha, 1960), 187.
[96] See *General Provisions of Civil Law* (Tokyo: Iwanami Shoten, Publishers, 1933), 318.
[97] See Titze, "Vom Sogenannten Motivirrtum", 81; Hans-Martin Pawlowski, *Allgemeiner Teil des BGB*, 4 ed. (Heidelberg: C. F. Müller Juristischer Verlag, 1993), para.551; Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Bd.2. Das Rechtsgeschäft* (Springer-Verlag Berlin Heidelberg GmbH, 1992), 459-460.

relatively valid solution. According to him, if Nixe was once shown to Y, Y has formed the image of the horse in his mind and was fully aware of the linguistic link between the image and the word 'Nixe'. When Y agreed to buy Nixe thinking it was a winning horse, he was mistaken about the fact that led to the contract. Conversely, if Y has never seen Nixe, thus erroneously linked the word 'Nixe' to an imagined image of a winning horse in his mind, he was mistaken about the meaning of his manifestation of intent.[98]

In a decision made by the 'Supreme Court' of Taiwan in 2000,[99] the agent of a land owner was unclear about the detailed location of the land tract, and hence told the buyer the wrong boundaries. The buyer decided to purchase the land tract based on the information given by the agent. Later, it turned out that the actual scope and shape of the land tract was quite different from what has been expected. In this case, the buyer has no image in his mind of the scope and shape of the land tract. When he offered to 'buy this land tract', he meant an imaginary target in his mind, though his manifestation is to be interpreted objectively as offering to buy the land tract belonging to the land owner. The buyer was, therefore, caught in an error in expression. In contrast, in a recent court decision in Chinese Mainland,[100] X contracted with a real estate company Y to purchase 'Apartment A' from the latter. Before the conclusion of the contract, X was shown by Y's employee a model apartment, and thus believed that the floor plan of the model apartment would be identical with that of Apartment A. Later, such assumption turned out to be incorrect. In this case, the subject matter of the contract had been specified by the name of the apartment, and X had not confused the meaning of the word 'Apartment A'. Rather, he was mistaken about the floor plan of the apartment which related to the motive of his manifestation.

Another type of borderline case is often called 'double mistakes' (*Doppelirrtümer*), which refers to situations where the manifesting person misunderstands the linguistic meaning of the quality specifications contained in the manifestation of intent.[101] For example, in a judgment of Zhuhai IPC in 2015,[102] a buyer offered to purchase 3010 'units' of paper cups from the seller, thinking that each 'unit' was a package containing a number of individual paper cups. In fact, the word 'unit' normally refers to a single paper cup in transactions. What he wanted was actually 3010 'bars' of paper cups. In

[98] See Karl Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts*, trans. Huaishi Xie et al., vol. 2 (Beijing: Law Press, 2003), 508.
[99] TSC no.465.
[100] See IPC Xi'an, Shaanxi, 2017, CLI.C.10158228.
[101] See Reinhard Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen* (München: Verlag C. H. Beck, 1995), 215.
[102] CLI.C.8081515.

this case, the buyer seems to have misunderstood both the meaning of the manifestation (error in expression) and the nature of the subject matter (error in motive). However, if we consider the fact that the buyer's motivation conception, i.e., 'each unit **is** a package containing several individual cups', has been transformed into part of the normative content of the manifestation, i.e., 'the seller **should** deliver the packages in exchange for the sales price', we will see that the only problem was that the buyer failed to convey his intention due to the misuse of the word 'unit' instead of the word 'bar'. He was therefore in an error in expression. The boundaries between the two types of mistake are still clear.

2.2 Why is the binary structure necessary

So far, I have reaffirmed the possibility of the binary distinction. The remaining question is now why such distinction is so important for the law of mistake. The answer lies in the different legal principles underlying the relief for different types errors.

2.2.1 Relief for error in expression as a mechanism of fairness review

(1) The binding force *ipso iure* of a pathologic manifestation. The Chinese civil law (and the civil law in most legal systems) treats the principle of private autonomy as one of its most important foundations. §5 GP legally established this principle,[103] providing that participants of civil activities shall act voluntarily, and establish, modify or terminate civil legal relationships according to their wills. The instrument for the realization of private autonomy is the institution of juristic act and manifestation of intent.[104] This is reflected in §133 GP which defines the juristic act as 'a party's conduct to establish, modify or terminate civil legal relationships through a manifestation of intent'. Provided that it is not inconsistent with peremptory regulations, public order and good customs, a juristic act based on a 'sound' manifestation of intent or a meeting of minds should be recognized by law, without the need of any additional justifications. §143 GP reaffirms this conclusion.

The problem is that the manifestation of intent does not always appear in its complete form in real life. Rather, it is often 'pathologic' and unable to precisely reflect the true intention of its author.[105] In these cases, attributing the legal effects recorded

[103] See Li, *Commentary on the General Provisions of Civil Law*, 17 and below.
[104] See *Staudinger Kommentar zum BGB*, vol. 1 (Berlin: Sellier De Gruyter, 2017), Vorbem. zu §§ 116–144, para.6 (Singer).
[105] See Claus-Wilhelm Canaris, *Die Vertrauenshaftung im Deutschen Privatrecht* (München: Beck, 1971), 412

in the manifestation to the manifesting party can no longer be justified by the principle of self-determination. On the contrary, it violates such principle since the result is not autonomy but heteronomy.[106] This, however, does not necessarily mean that all pathologic manifestations of intent should be invalid.[107] In fact, even if it results in complete heteronomy, a pathologic manifestation of intent may still be admitted so long as it can be supported by other legal principles of greater importance than the principle of private autonomy under certain conditions.[108] Here arises a situation where principles collide. According to the 'collision rule' proposed by Robert Alxey,[109] if the principle of private autonomy has less weight than other legal principles under certain conditions, and the latter principles require the maintenance of the binding force of a pathologic manifestation, the law must attribute the legal effects recorded in the manifestation to its author even though it is not wanted by him. In other words, in the above case, the manifestation is binding not because of the self-determination of the manifesting party, but *ipso iure*.[110]

The normative attribution of pathologic manifestations is the original form of errors in expression. Obviously, if only manifestations in concord with the internal intention of the authors are valid, there would be no need to seek their avoidance. The relief for mistake becomes a problem because a manifestation could be binding *ipso iure*, and the relief for mistake, as a mechanism to deny such normative attribution, could be allowed only when it is supported by other legal principles that overweigh the principles favouring the normative attribution.

In a word, there are two stages of principle collision concerning the problem of pathologic manifestations: one prior to the rule of mistake, the other within the scope of it. In the next part, I will discuss the two stages of collision separately.

(2) The principle collision prior to the mistake law. The error in expression is a defect that occurs during the communication phase of a manifestation of intent: the manifesting person has chosen imprecise signals to convey his intent because he was either mistaken about or completely unaware of their meaning in the language circle of the recipient. If we only consider the requirement of private autonomy, such pathologic manifestations should not be binding as they are inconsistent with the party's intention.

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[106] See Daixiong Yang, "Positive Reliance Protection in the Law of Juristic Acts," *Peking University Law Journal* 27, no. 5 (2015), 1160.
[107] See Li, *Commentary on the General Provisions of Civil Law*, 445 and below.
[108] See Franz Bydlinski, *System und Prinzipien des Privatrechts* (Wien: Springer-Verlag, 1996), 154 and below.
[109] See Robert Alexy, *Law: The Institutionalization of Reason*, trans. Lei Lei (Beijing: China Legal Publishing House, 2012), 134 and below.
[110] See *Münchener Kommentar zum BGB*, vol. 1 (München: Verlag C. H. Beck, 2018), Vor §116, para.3 (Ambrüster).

Nonetheless, the following legal principles intervene to justify its normative attribution. First of all, the manifestation of intent has dual functions. On the one hand, it is the instrument for realizing self-determination; on the other hand, it is a form of social communication.[111] Since human beings currently do not possess the capability of 'telepathy', any form of social communication will have to be carried out by external signals. In order to make such communication possible, the law must allow the recipient to reasonably assume the objective meaning of a symbol originating from the sphere of another person to be an expression of the latter's mind. This is required by the principle of reliance protection. However, the above principle alone does not suffice to explain why the objective meaning must be attributed to the manifesting person, given that theoretically there are other ways to protect the reliance interest. For example, the law could set a requirement for notarization as a precondition for manifestations to be valid, letting the state guarantee the correctness of the communication process. It could also try to divert the risk of using false symbols through social insurance. To justify the normative attribution of a pathologic manifestation, it is also necessary to introduce the ideas of self-responsibility, fairness and efficiency: the principle of self-responsibility, being the reverse side of the principle of self-determination, establishes the eligibility of the manifesting person to be responsible for the frustrated reliance of the recipient, for the reason that the imprecise expression originates from his voluntary and purposed conducts. The principles of fairness and efficiency then further turned the eligibility of responsibility into the finial attribution. Viewed from the fairness perspective, the manifesting party has overwhelming control over the meaning of his expression compared to the opposite party who passively receives the symbols.[112] At the same time, the manifesting party is the beneficiary of employing the instrument of manifestation of intent. It is therefore fair to let him assume the disadvantages of the defective communication process. This is also required by the principle of efficiency in that the manifesting person is normally the 'cheapest cost avoider' of the risk of imprecise communication. It is thus more efficient if such risk is attributed to him so that he will be motivated to establish more reliable transmission systems, and the social welfare would be thereby maximized at the lowest cost.

The combined roles played by the aforementioned principles of reliance protection,

[111] See Manfred Wolf, Jörg Neuner, Karl Larenz, *Allgemeiner Teil des Bürgerlichen Rechts*, 11 ed. (München: C.H.Beck, 2016), §30 para.7.
[112] See Hailong Ji, "'Will' Stepping Down the Alter: Manifestation of Intent and Risk Imputation," *Peking University Law Journal* 28, no. 3 (2016), 668 and below.

fairness and efficiency exceed the importance of private autonomy for the following two reasons. Firstly, the principle of self-responsibility is the reverse side of the principle of self-determination from which the idea of private autonomy was derived. In cases of imprecise communications, the manifesting person still possesses some autonomic elements since he is acting voluntarily and consciously pursuing certain legal effects.[113] Secondly, the principle of private autonomy is realized by the system of juristic act. If we completely ignore the reliance interests of the recipient, the overall credibility of the institution of juristic act will be seriously impaired, rendering the realization of private autonomy itself impossible. To conclude, the law must maintain the binding force of a pathologic manifestation of intent so long as the recipient has reasonably relied on it.

The above conclusion is reflected in the rule concerning the interpretation of manifestations of intent with recipients (§142 I GP). This provision requires the court to determine the meaning of a manifestation not according to the psychologic intention of its author but objectively in accordance with the requirement of good faith with comprehensive reference to the normal meaning of the words, the context, the nature and purpose of the act, and customary usages.

(3) The principle collision within the law of mistake. The problem of error in expression emerges after an unintended meaning was attributed to the manifestation during the interpretation. In order to justify the relief for mistake, there must be another principle that overweighs the principles of self-responsibility, fairness and efficiency under certain conditions.

In the mistake law of Germany and Japan, the value foundation for the relief of error in expression is the principle of private autonomy. Taking §§119 I, 122 BGB as an example, according to these provisions, the mistaken person is generally allowed to avoid the manifestation but must compensate the opposite party for his loss resulting from the reliance on the validity thereof. In this way, the German law has re-balanced the colliding principles that have once been considered during the interpretation process. By lessening the protection for the reliance interest of the recipient, the importance of the principle of private autonomy has been reiterated. The above scheme of German law, though recommended by many scholars, is not suitable for the Chinese law for the reasons that: a) as was mentioned above, the principle of reliance protection, combined with the principles of self-responsibility, fairness and efficiency, is adequate to

[113] See Canaris, *Die Vertrauenshaftung im Deutschen Privatrecht*, 422.

overweigh the principle of private autonomy, hence making it paradoxical if such principle was reintroduced into the law of mistake; b) §157 GP provides that if a juristic is voided, only the party in fault is liable for compensation. Unlike §122 BGB which still admits the binding force of the pathologic manifestation but replaces its content with the obligation to pay damages, §157 GP was designed as a special rule of pre-contractual liability. If the mistaken party was not in fault, the opposite party will have to assume all consequences of the error, which is not fair since the second party was completely innocent as to the occurrence of the mistake;[114] c) the judicial practise in China has never adopted the German (or the Japanese) approach, it is thus unnecessary to create a 'Procrustean bed'.

In fact, §71 OGPCL requires a major misunderstanding to have caused 'considerable loss' to the manifesting party. Many courts have interpreted such 'considerable loss' as the gross disparity between the obligations of the two parties, or the frustration of contractual purpose of the person in error.[115] This is a manifestation of the principle of fairness, or, more specifically, that of commutative fairness.[116]

Chinese civil law generally only provides formal protection for the commutative fairness in transaction. In other words, if the process through which the juristic act is manifested is flawless, the law will not require substantive examination of its content.[117] This is reflected in §151 GP, which suggests that even gross disparity between objective values of the parties' performances would not affect the validity of the juristic act so long as the favoured party has not taken advantage of the other party's distress, lack of judgment, etc., and thereby impaired the procedural justice of the transaction.

The priority of formal fairness is founded on the assumption that, compared with the court, parties of a juristic act know better about what is the 'right law' between themselves. Under the premise of free and undefective negotiation, parties with equal economic status and bargaining power will always reach an agreement that is considered by them to be justified. Therefore, the formal protection of commutative fairness already contains in itself the consideration of substantive justice:[118] *volenti non*

[114] See Guangxing Zhu, "The Avoidance for Mistakes in Manifestation of Intent and the Protection of the Conterparty's Reliance," *Science of Law (Journal of Northwest University of Political Science and Law)*, no. 4 (2006), 120.
[115] See *supra* Section 1.3.3, Fn.44.
[116] See Jun Yi, "Review and Reflection on the Theory of Fairness in Civil Law," *Zhejiang Social Sciences*, no. 10 (2012), 52 and below.
[117] See Han, *The Law of Contrat*, 52.
[118] See Walter Schmidt-Rimpler, "Grundfragen einer Erneuerung des Vertragsrechts," *AcP* 147 (1941), 152 and below.

fit iniutia;[119] *stat pro ratione voluntas.*[120]

However, in cases of error in expression, the above assumption can no longer be sustained. Since the meaning of the manifestation was attributed to the mistaken party *ipso iure*, he was unable to optimize his interests through negotiation or by simply walking away. In such cases, the formal protection of commutative fairness could be replaced with a substantive review as is established in §151 GP.[121]

The question then becomes whether under the above circumstances the principle of fairness is of greater importance than the principles justifying the normative attribution. The answer should be affirmative for the reasons that: a) fairness is the general pursuit of law. In all cases where certain contractual terms are imported in the contract *ipso iure* either by default rules or by gap-filling construction of the contract, the fairness of these terms is always an indispensable requirement;[122] b) the reliance principle focuses on the social effect of the institution of juristic act. If the application of such principle eventually leads to 'blatant plunders' of one person towards another, it will fall into self-contradiction.[123] As such, introducing a fairness review into the reliance principle to optimize its social effect is compatible with the purpose of this principle *per se*.

The task of fairness review of normative attribution of pathologic manifestations is to be undertaken by the rule of major misunderstanding. Hence, all types of error in expression, which are the result of the normative attribution, should be subject to this fairness review without having to meet any further requirements.

2.2.2 Relief for errors in motive as exceptional protection for material self-determination

The situation is quite different in cases of error in motive, where the manifestation is binding not *ipso iure* but because of the autonomy of the manifesting party.[124]

(1) The principle collision behind the rule of error in motive. The principle of private autonomy in civil law is not the end but a mean. The law recognizes it to serve a higher value, that is, the freedom of self-determination of human. The institution of

[119] See Claus-Wilhelm Canaris, "Wandlungen des Schuldvertragsrechts - Tendenzen zu Seiner Materialisierung," *AcP* 200 (2000), 284.
[120] See Flume, *Das Rechtsgeschäft*, 6.
[121] See F. Bydlinski, *Privatautonomie*, 154.
[122] See Canaris, "Wandlungen des Schuldvertragsrechts", 285.
[123] See F. Bydlinski, *Privatautonomie*, 144.
[124] See Hayashi Ryouhei, Yasunaga Masaaki, *Civil Law I General Provisions & Property Law* (Tokyo: Yushindo, 1987), 41.

juristic act is only one of the legal instruments for realizing such freedom. If we view the freedom of self-determination as a more general legal principle, the optimization of this principle would require the law of juristic act to not only recognize the authority of every individual in autonomically shaping his 'legal relations' with others, but also to protect the perfect exercise of such authority free from obstructions resulting from the acting person's lack of judgment, experiences, bargain power or information.[125] In other words, the law must consider both the formal and substantive aspects of self-determination of a manifesting person.

In cases of error in motive, the legal effect recorded in the manifestation is in concord with the psychological intention of the mistaken party, and a juristic act on such basis is thus still the formal outcome of his self-determination. The problem is that the seemingly autonomic manipulation of legal relations by the manifesting person may be decided on the basis of insufficient information. The rational judgment being obscured by his erroneous perception of the reality, the manifesting person lacks the substantive freedom of self-determination. Under such circumstances, the relief for error in motive is a way to restore such freedom, hence only permissible in cases where the principle of self-determination prevails.

If we comprehensively consider other internal values in civil law, however, we may find that there are other legal principles acting against the general consideration of substantive self-determination. The status of principle collision is as follows: a) as the manifesting persons are commonly more aware of their own needs for information than anyone else, and the information is normally only used to serve their interests, they usually have plenty of opportunities to obtain necessary information or to prepare for possible mistakes before making the decision of manifestation. When they fail to do so, they must bear the consequences instead of transferring the disadvantages to their opponents who generally have no control over the decision-making process of other people. This is required by the principle of fairness. Only in exceptional cases where the above assumptions are overturned will the principle of fairness step aside and allow consideration of substantive self-determination; b) if the law generally grant relief to motive errors, the validity of the manifestation and the juristic act will remain in a continuously uncertain state until all motivation conceptions are confirmed to be true. The opposite party is therefore unable to arrange for his future business on the basis of the manifestation, unless he seeks to verify the correctness of the manifesting party's

[125] See Canaris, "Wandlungen des Schuldvertragsrechts", 277.

motive at his own cost. The result is that all market participants would no longer need to invest in the intelligence capability for their own business but have to irregularly spend on obtaining information for the benefit of others in areas unfamiliar to them. Such an arrangement is obviously inefficient; c) the more serious consequence is that the social function of the institution of juristic act will be impaired by the uncertainty of its validity As R. A. Posner puts it, 'if the parties freely entered into a contract are allowed to modify its terms when they caused adverse consequences, no contract could ever be formed'.[126] We cannot let the law of mistake, which aims to protect the acting person's substantive self-determination, end up in becoming an obstacle for every possible legal transaction.

In a word, the general protection of substantive self-determination is prevented by the principles of fairness, efficiency and the purpose of such principle itself. this conclusion can also be seen in other legal institutions. For example, §151 GP does not allow a person to deny the binding force of a juristic act simply on the ground of his lack of rational judgment. He must additionally prove that the other party has taken advantage thereof, hence causing gross disparity between the obligations of the two parties. Here the law gives regard to the substantive self-determination of the disadvantaged party because there are other legal principles supporting the avoidance of the juristic act. The pure disruption of substantive self-determination is generally insufficient to invite legal relief.

Thus, the principle of self-determination in civil law is usually realized only to a formal extent. A juristic act could be seen as the result of the acting person's exercise of private autonomy so long as the manifestation of intent is in concord with his actual intention. This is the case when the juristic act contains error in motive. Only in certain exceptional circumstances is relief allowed for such type of mistake.

(2) The regulative task of the rule of error in motive. If we accept the above conclusion that the rule on the relief of motive errors functions to provide exceptional protection for the substantive self-determination of the party in mistake, we would see that the regulative task of such rule first lies in defining the scope of the above exceptions. The requirement does not exist in the cases of error in expression. As was pointed out earlier, the rule on the remedy for error in expression should be applicable to all cases of mistaken communication as a mechanism for restoring commutative

[126] Richard A. Posner, *Economic Analysis of Law*, trans. Zhaokang Jiang, vol. 1 (Beijing: Encyclopedia of China Publishing House, 1997), 8.

fairness in a defective juristic act. There is no need to further limit its scope. As a result, the binary treatment of error in motive and error in expression is inevitable.

2.3 Summary

The rule of major misunderstanding established in §147 GP should adhere to the binary distinction between error in expression and error in motive. Such bifurcated structure does not necessarily contradict the internal value order of Chinese civil law, and is also technically possible.

The necessity of such dichotomy emerges from the different states of principle collision behind the two types of mistake, which lead to distinct functions and regulative tasks of their remedies.

The relief for errors in expression aims to provide a fairness review on the normative interpretation of a manifestation of intent, hence the scope of mistake to be examined should not be narrowed, whilst the remedy for errors in motive has to predetermine the range of its application because it is a mechanism providing exceptional protection for the substantive freedom of self-determination on the part of the mistaken party. The two remedies cannot be combined into one.

Chapter 3 Construction of the Rule for the Relief of Error in Expression

In the previous chapter, it was submitted that §147 GP should be constructed as an equity review on the normative interpretation of a manifestation of intent. The main function of such mechanism is to restore equivalence between the performances of the two parties which may have been seriously impaired because the terms of the juristic act was interpreted objectively, against the will of the party in mistake. The purpose of excusing an error in expression is to strike a balance between the reliance interest of the opposite party and the law's pursuit of commutative fairness.

With this predetermined purpose in mind, in this chapter, I will first attempt to further examine this theory of equity review from the perspective of comparative law. Such observation will reveal the fact that to construct the relief of error in expression as a mechanism of fairness restoration is more compatible with the historical and social background of China, and therefore is a better choice even in the view of legal policy. Based on this conclusion, I will then try to clarify the systematic relationship between normative interpretation and the law of mistake, which is often confused by some Chinese judges and legal writers. Finally, at the end of this chapter, I will turn to the existing case groups in China in order to generalize from them several concrete criteria for the decision of the legal relevancy of errors in expression.

3.1 Different tendencies for the relief of error in expression from the perspective of comparative law

There is no universal model for the rule of error in expression, various tendencies may be seen in different legal systems.

3.1.1 The relief-friendly approach in German BGB

§119 I BGB has introduced a relatively lenient rule as to the relief of error in expression.[127] According to this provision, a person may avoid a manifestation of intent made by him if, at the time when the manifestation was made, he was mistaken

[127] See Wolf, *Allgemeiner Teil des Bürgerlichen Rechts*, §41 para.9.

about its contents or had no intention whatsoever to make a manifestation with such contents, as long as it is to be assumed that he would not have made the manifestation had he known and sensibly understood the truth.

Two types of error in expression are distinguished in this article: one is the mistake as to the contents of the manifestation (*Inhaltsirrtum*), which refers to the case where a person believed that the signals he used had precisely stated his mind while in fact they meant something else;[128] the other is the lack of intention to make the manifestation with its current contents (*Erklärungsirrtum*), which refers to the case where a person is completely unaware of the meaning of the signals he used to state his mind, he simply misspoke, miswrote or misclicked something by accident and had incorrectly believed that they had conveyed his will.[129] In addition, §120 BGB has recognised a third type of error in expression. Cases fallen under this provision are those where a third party engaged to transmit the intention of the manifesting party had incorrectly transmitted it (*Übermittlungsirrtum*). The above three types of error in expression were placed under the identical legal effect: the person in mistake may deny the binding force of the manifestation of intent without undue delay and by paying damages to the opposite party for his loss suffered as a result of relying on the validity of the manifestation (§§121, 122 BGB). The BGB contains no further limitation for the relief of all types of error in expression. They may all result in avoidance, as long as a causal link is established between the mistake and the making of the manifestation of intent.

The wording of §119 I BGB specified two aspects of the causal link: one is the subjective causation ('[the person in mistake] would not have made the manifestation had he known the factual position'), the other is the objective causation ('[he] would not have made the manifestation had he…sensibly understood the case').

The subjective causation is to be determined by a 'but-for' test. A causal link in this sense exists, if the manifestation of intent with its current contents would not have been made without the mistake of the party making it. In practice, the subjective causation can easily be proved in cases of error in expression, since it is empirical law that no reasonable person would leave his expression in mistake had he known its true meaning, he would have used other language which is in concord with his intention. The requirement of the 'but-for' test is therefore constantly fulfilled.[130]

The only factor left that could act as a restriction on the relief of mistake in §119

[128] See Flume, *Das Rechtsgeschäft*, 457.
[129] See *Münchener Kommentar zum BGB*, 1, §119 para.46 (Armbrüster).
[130] Ibid., §119 para.146.

I BGB is the requirement of objective causation. A causal link in this sense must be determined from the perspective of a reasonable third party in the same position as the person in mistake.[131] It is established, if such third party with the knowledge of the truth would not make the manifestation with its current contents as well. A glimpse to the legislative history of BGB reveals that the drafters of §119 I only intended to exclude the influences of the mistaken party's 'personal emotions' by introducing the requirement of objective causation because they believed that to excuse a person from his performance on the ground of his unusual subjective feelings would often result in immoral detriment to the opposite party.[132] A paradigm situation for the lack of objective causation is when the person in mistake insists to avoid the contract because some of his stubborn and even foolish opinions have made the deal unacceptable for him.[133] For example, the relief of error in expression should be denied in the case where a guest mistakenly booked Room no.13 in a hotel instead of a similar Room no.14, and he later seeks cancellation merely on the ground that the number '13' will bring him bad luck.[134] The objective causal link should also be denied if the mistake causes no mentionable economic disadvantages,[135] e.g. several cents from a transaction concerning hundreds of Euros.[136]

In a word, the requirement of objective causation in German law can only exclude the legal relevancy of mistakes of minor or no economic account to the person making the manifestation of intent. As a result, it has less significance in legal practice.[137] The purpose of §119 I BGB is to restore the function of contracts and other juristic acts as transactional instruments for a free market, and it will do no more. It will provide no protection for someone's subjective beliefs that are without commercial relevancy at the cost of the reasonable reliance of his opponent.

Although §119 I BGB didn't go so far as attempting to re-establish full and definite private autonomy for the person in mistake (for that it must allow avoidance for any mistake with a subjective causation), it still put more weight on the interest of the mistaken side in comparison to other legal systems as we will see later. The drafters of

131 See Helmut Köhler, *BGB Allgemeiner Teil*, 41 ed. (München: Verlag C. H. Beck, 2017), §7 para.29.
132 See *Protokolle zum Entwurf des BGB*, vol. 1 (1897), 231.
133 See Wolf, *Allgemeiner Teil des Bürgerlichen Rechts*, §41 para.33.
134 See Hans Brox, Wolf-Dietrich Walker, *Allgemeiner Teil des BGB*, 38 ed. (München: Verlag C. H. Beck, 2014), para.431.
135 See *Staudinger Kommentar zum BGB*, 1, §119 para.101 (Singer).
136 See RGZ 128, 117.
137 See *Historisch-Kritischer Kommentar zum BGB*, vol. 1 (Tübingen: Mohr Siebeck, 2003), §§116-124 para.54 (Schermaier).

BGB were quite aware of this situation, as compromises they then introduced a very short time limit for the mistaken party to invoke avoidance (§121 BGB),[138] and the declaration of avoidance was further required to be accompanied by a strict liability to pay damages for the loss suffered by the opposite party as a result of his reasonable reliance (§122 BGB).[139] All these compromises, however, do not change the fact that the binding force of contract and the expectation of the opposite party could be easily turned down in cases of error in expression under the provisions of BGB.

The pro-avoidance position in German civil law has its roots in Savigny's theory of mistake. In his *System of Modern Rome Law*, Savigny identified three particular elements from the concept of manifestation of intent: the will itself; the manifestation of the will; and the concordance between the will and the manifestation.[140] He then postulated that among those elements 'the only thing important and valid' was the will itself, and merely because the will was an internal, invisible event was its manifestation required to make it recognizable for other persons.[141] The manifestation, therefore, was merely the appearance of will. Thus, in cases where it failed to stay in concord with the true intention, no binding force would come into being, and the juristic act laboured under this kind of 'unreal mistake' (*unechter Irrtum*)[142] was then void.[143]

The counterpart of such 'unreal mistake' is the mistake that is 'real' (*echter Irrtum*), i.e. error in motive, which, according to Savigny, would not impair the validity of a juristic act because the will of the person in mistake was not determined by the mistake but by the person himself, his freedom of choice remained intact. He wrote,

> '*If we say that the erroneous assumption has determined the will, this statement is acceptable only in a very improper sense. It was always the acting person himself who gave the error this determining force. The freedom of his choice between competing decisions was unrestricted; whatever*

[138] §121 BGB provides, '*(1) Avoidance must be effected, in the cases set out in §§119, 120, without culpable delay (without undue delay) after the person entitled to avoid obtains knowledge of the ground for avoidance. Avoidance made to an absent person is regarded as effected in good time if the declaration of avoidance is forwarded without undue delay. (2) Avoidance is excluded if ten years have passed since the manifestation of intent was made.*'

[139] §122 BGB provides, '*(1) If a manifestation of intent is void under §118, or avoided under §§119, 120, the manifesting person must, if the manifestation was to be made to another person, pay damages to this person, or failing this to any third party, for the damage that the other or the third party suffers as a result of his relying on the validity of the manifestation; but not in excess of the total amount of the interest which the other or the third party has in the validity of the manifestation. (2) A duty to pay damages does not arise if the injured person knew the reason for the invalidity or the voidability, or did not know it as a result of his negligence (ought to have known it).*'

[140] See Friedrich Carl von Savigny, *System des Heutigen Römischen Rechts*, vol. 3 (1840), 99.

[141] See Ibid., 258.

[142] Ibid., 112.

[143] See Ibid., 263 and below.

advantage the error might present to him, he could reject it, and hence the existence of a free manifestation of the will is by no means destroyed by the influence of the erroneous assumption.'[144]

Savigny's standpoint, later known as the will theory, was a milestone in German doctrinal history. In so developing this theory, Savigny reorganized the traditional Roman legal materials and imputed new ways of thinking to them.[145] By integrating the whole matter of civil mistake into the theoretical frame of manifestation of intent and juristic act, he provided his further generation with a brand-new basis of discussion.[146] Later, at the end of 19th century when the BGB was drafted, Savigny's theory eventually became the intellectual foundation for the BGB's rule of mistake.

§98 of the first Draft of BGB in 1887 was a restatement of Savigny's concept of unreal mistake. It stipulated that a manifestation of intent shall be void, if, as a result of the author's mistake, his actual will and the manifested will failed to stay in concord with each other. Despite their obvious preference for Savigny's will theory, the writers of the first Draft were still unable to stay away from the influence of the traditional way of thinking inherited from scholars of natural law and European common law. They then significantly modified Savigny's proposition by introducing an exception for the voidance of an erroneous manifestation of intent: its binding force could no longer be denied, if the author had gross negligence as to the making of the mistake, unless the opposite party knew or ought to have known the fact that the author was mistaken (§99 of the first Draft).[147]

It was not until the 1895 second Draft of BGB was the historical residual of natural law and European common law theory, which connected the relief of mistake with the fault of the person making it, completed abandoned. The requirement of objective causation was at this point imported in its place as a milder restriction to the avoidance for mistakes. A more Savigny-styled rule on errors in expression was so established, which eventually became the law.

Savigny's will theory was constructed under the influence of the philosophy of liberalism, which had already fallen behind the development of social reality even before the BGB came into effect in 1900. The civil code, with its obvious tendency

144 Ibid., 113
145 See Catharine MacMillan, *Mistakes in Contract Law* (North America: Hart Publishing, 2010), 141.
146 See Flume, *Das Rechtsgeschäft*, 445.
147 See Martin Josef Schermaier, *Die Bestimmung des Wesentliehen Irrtums von den Glossatoren bis zum BGB* (Wien; Köln; Weimar: Böhlau, 2000), 633 and below.

towards liberalism, was like 'an unevenly forged bell, unable to ring for the coming of the new century'.[148] Under the background of a massive market economy, the strong preference of the will theory for the subjective intention of the manifesting person, would seriously jeopardize the safety and efficiency of legal transactions. Now, the will doctrine in Germany has stepped down from its altar. More and more scholars have come to realize that some objective factors, together or alongside with the will, may also be reasons for the law to award binding force to a human act.[149] For any external observers of German law, this modern trend must be kept in mind when evaluating the rule of mistake in the BGB.

3.1.2 The relief-conservative approach in English law

If compared with the attitude of German legislators, English courts are more reluctant to excuse an error in expression.

In English law, the problem of mistake is discussed in a quite different manner. Here the law recognises no general concept of juristic act or manifestation of intent, mistakes are mainly seen as an incident that may influence the validity of contracts. A contractual mistake is operative when it either negatives or nullifies the consent underlying the contract.[150] Two types of mistake with legal relevancy are distinguished by some English writers: one is the mistake as to the terms or identity, which prevents there being an effective agreement or at least means that there is no agreement on the terms apparently stated;[151] the other is the mistake as to the facts or law, which renders the agreement ineffective as a contract.[152]

Generally speaking, the doctrine of mistake as to the terms or identity aims to deal with misunderstandings occurred in contractual communication, thus functionally it is rule for the relief of error in expression; the doctrine of mistake as to facts and law, on the other hand, concerns with the problem of erroneous assumptions resulting in the contract, thus is rule for the relief of error in motive. For the purpose of the comparative study, this part will mainly focus on the first type of mistake doctrine.

Before moving to the details of this doctrine, it is necessary to first bear in mind that errors in expression (i.e. mistakes as to terms or identity) are easier to occur in

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[148] See Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter Besonderer Berücksichtigung der Deutschen Entwicklung*, trans. Jiann-huei Hwang, Ai-er Chen, vol. 2 (Shanghai: Joint Publishing Company, 2006), 463.
[149] See for example Reinhard Singer, "Geltungsgrund und Rechtsfolgen der Fehlerhaften Willenserklärung," *JZ* 44, no. 22 (1989), 1030.
[150] See *Bell v Lever Brothers Ltd.* [1932] A.C. 161, 217.
[151] See Hugh Beale, ed. *Chitty on Contracts*, 32 ed., vol. 1 (London: Sweet & Maxwell, 2015), 3-001.
[152] Ibid., 3-009.

English law than in German or Chinese law because English courts interpret a contract in a pure objective manner. Precedents have stated that '[c]ommunications, whether oral or written, are to be understood in the way that a reasonable person in the position of the recipient would have understood them'[153], and the author's '[s]ubjective intention or understanding, unaccompanied by some overt objectively ascertainable expression of that intention or understanding, is not relevant'[154]. The judicial task, therefore, 'is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other'[155]. Under this background, errors in expression are more likely to occur because contracts will never be interpreted according to the subjective understanding of the parties.

English law generally provides relief for the following situations of mistake as to terms:

(1) Mutual Misunderstanding. In the case of a mutual misunderstanding, two parties have understood the contractual terms differently, and neither of them was able to prove that a reasonable third party in the position of the opposite party would have understood the terms in the way he was understanding them, i.e. the agreement was objectively ambiguous. In such occasions, the contract is void since there was no ascertainable consent between the parties.[156]

In the famous *Raffles v Wichelhaus*,[157] a sales contract for cotton on board a cargo '*peerless*' sailing from Bombay to England was formed between the parties. Unexpectedly, there were two ships of the same name with the same course, one left Bombay in October and the other in December. The description of the goods failed to specify the cargo. Later, when the buyer refused to accept goods from the December shipment, asserting that the contract referred to the other one, the seller sued. The court gave judgment for the buyer, allowing him to adduce parol evidence as to which ship was meant. Although final result of this case was not recorded, the court did not express any disagreement with counsel's proposition that, if the two parties meant different *Peerless*, there would be no contract.

(2) Mistake actually known to the other party. In cases where the opposite party is contracting with knowledge of the mistake as to terms, the objective meaning of the

153 *Destiny 1 Ltd v Lloyds TSB Bank Plc* [2011] EWCA Civ 831.
154 *Ove Arup v Mirant Asia Pacific Construction* [2003] EWCA Civ 1729.
155 *McCutcheon v David MacBrayne Ltd* [1964] 1 W.L.R. 125, at 128, citing Gloag on Contract, 2nd ed., p.7.
156 See Beale, *Chitty on Contracts*, 3-019.
157 [1864] 2 Hurl. & C. 906, 159 E.R. 375.

agreement must be set aside in favour of the subjective intention of the party in mistake, for the law will allow no one to 'snatch a bargain' known not to have been intended for him.[158]

In *Hartog v Colin & Shields*,[159] a seller, prepared to sell 3,000 Argentine hare skins at a fixed price 'per piece' to the buyer, mistakenly expressed in his offer as to sell them 'per pound', and the total price he asked for turned out to be only one-third of the sum intended. After the seller refused to deliver at the lower price, the buyer sued for damages. The court ruled for the seller on the ground that the buyer, in the context of the custom of trade and the negotiation between the parties, 'must have realised, and did in fact know, that a mistake had occurred' in the seller's offer, hence there was no sale.

(3) Mistake ought to have been known to the opponent. Even when the mistake is not actually known to the other party, if it has been shown that any reasonable person in the same position ought to have been aware of the mistake, the mistaken party will not be held to the objective meaning of the contract.[160]

In *OT Africa Line Ltd v Vickers plc*,[161] the defendants, who was liable for damages to the plaintiffs, made an offer in a meeting out of court to settle the dispute by paying $155,000 to the latter. After this offer was refused, the defendants' solicitor sent a fax to the plaintiffs' solicitor on the following day offering a new sum of £150,000. The plaintiffs' solicitor accepted the offer which later turned out to have been made in error. The defendants' solicitor was in fact instructed only to confirm the earlier offer of $155,000. The defendants then issued a summons, claiming that the agreement was not binding for the reason, *inter alia*, that the plaintiffs' solicitor, as a competent and reasonable professional, ought to have realised the mistake.

The application of the defendants was dismissed by the court. In the judgment, Mance J agreed that the defendants would not be bound if they could show that the plaintiffs, or those acting for them, either knew or ought reasonably to have known the mistake, but they failed to do so in the present case.

(4) *non est factum*. Another variant of mistake as to terms is the case where a person executes a document under serious misapprehension as to its nature. Although the general rule is that a person of full age and understanding is normally bound by his

[158] See Mindy Chen-Wishart, *Contract Law*, 4 ed. (Oxford: Oxford University Press, 2012), 48.
[159] [1939] 3 All E.R. 566.
[160] See Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford: Oxford University Press, 2016), 181.
[161] [1996] C.L.C. 722.

own signature, there is a body of cases admitting an exception. The mistaken signer, under certain circumstances, will be allowed to plead *non est factum* ('it is not [my] deed') in an action against him.

English courts have placed strict limits on the doctrine of *non est factum* so as to preserve the regular binding force of the signature. In order to successfully invoke this defence, all of the following conditions will have be met: firstly, the signer must have made a fundamental mistake as to the character or effect of the document,[162] or as to the capacity in which he was acting,[163] or was completely unaware of the contents because the document was signed in blank and another person inserted erroneous details essentially deviated from the instruction of the signer;[164] secondly, the signer must not have been guilty of negligence in appending his signature;[165] thirdly, the signer must lacked the ability to obtain real understanding as to the purport of the document due to certain permanent or temporary impediments such as defective education, illness, innate incapacity, etc., or was tricked into signing the document.[166]

If the signer successfully pleads *non est factum*, the document to which his name is appended must be deemed as had never been signed, and the deed of the writing is completely void for there is no consent upon its binding force, the subjective intention of the signer once again triumphs.

(5) Mistake caused by the other party. It is still not clear whether a mistake as to terms induced by the non-mistaken party is operative in English law.

In *Scriven Brothers v Hindley*,[167] the plaintiffs instructed an auctioneer to sell by auction a large quantity of Russian hemp and tow from the same ship. In the catalogue prepared by the auctioneer, the goods were described as so many bales in different lots with the same shipping marks and without disclosing the difference in the nature of the commodity. The defendants' manager, after examined the samples of the hemp, mistakenly believed that all lots with this shipping mark were bales of hemp, as it was very unusual for hemp and tow to be landed from the same ship under the same shipping marks. Later, when the lots representing the tow were put up for sale during the auction, the defendants' manager made a bid at an extravagant price intended for the hemp, and the auctioneer, unaware of the manager' mistake with good reason, knocked down the

[162] See *Saunders v Anglia Building Society* [1971] A.C. 1004, 1017, 1022, 1026.
[163] See *Trustees of Beardsley Theobalds Retirement Benefit Scheme v Joshua Yardley* [2011] EWHC 1380 (QB).
[164] See *United Dominions Trust Ltd. v Western* [1976] Q.B. 513.
[165] See *Carlisle and Cumberland Banking Company v Bragg* [1911] 1 K.B. 489.
[166] See *Saunders v Anglia Building Society* [1971] A.C. 1004.
[167] [1913] 3 K.B. 564.

lots to him. The defendants, upon discovering the truth, refused to pay the price, and the plaintiffs sued. The court entered judgement for the defendants. Lawrence J was of the opinion that a person, whose own negligence or that of those for whom he was responsible, caused or contributed to cause the mistake, may not be allowed to insist upon the contract as a result of estoppel.[168]

However, in the recent *Deutsche Bank (Suisse) SA v. Gulzar Ahmed Khan*,[169] whether there is such a principle in English law was doubted by the court. This case involved a supplemental agreement to a facility contract, which was argued to be void by the defendants on the ground, *inter alia*, of a mistake alleged to have been induced by the other party if it was not known or ought to have been known to them. To support their proposition the defendants relied on *Scriven Brothers* and other cases. Hamblen J, however, found it insufficient to say that there was a general principle of mistake as argued for by the defendants from the cases they cited. Most of these cases were thought to be old and contrary to the 'modern tendency to cut down defences of unilateral mistake', and they failed to clearly set out and explain any such principle which ought to be well established given its potentially very wide application. The question, whether or not an induced mistake as to terms could affect the validity of contract, was left open by Hamblen J since it was unnecessary to decide the point in this case because no inducement was proven as a matter of fact.

Despite some uncertainties remained, the underlying basis for the law to excuse certain mistakes as to terms is without dispute. They are legally relevant because there is no longer a correspondence between offer and acceptance as it appears to be after the mistaken party is allowed to insist upon his subjective intention behind the words of the terms. The parallel issue raised from cases concerning mistaken identity is to be dealt with under the same principle, as Lord Phillips pointed out in *Shogun Finance Ltd v Hudson*,

> *'Just as the parties must be shown to have agreed on the terms of the contract, so they must also be shown to have agreed the one with the other. If A makes an offer to B, but C purports to accept it, there will be no contract. Equally, if A makes an offer to B and B addresses his acceptance to C there will be no contract. Where there is an issue as to whether two persons have*

[168] See also Edwin Peel, *Treitel on the Law of Contract*, 14 ed. (London: Sweet & Maxwell, 2015), 8-052.
[169] [2013] EWHC 482 (Comm).

reached an agreement, the one with the other, the courts have tended to adopt the same approach to resolving that issue as they adopt when considering whether there has been agreement as to the terms of the contract. The court asks the question whether each ***intended****, or must be deemed to have* ***intended****, to contract with the other.'*[170]

Therefore, in cases concerning mistaken identity, what important is to determine by interpretation whether the offer or the acceptance was made to the person intended for, or to any actual recipient to whom it was addressed or sent. The mistake is operative only if the former was the case as the mistaken party did not intend, and may not be deemed to have intended, to contract with the other party.[171]

If we compare the position in English law with the one in the German BGB, it would be clear that the English doctrine of mistake as to terms or identity is developed to eliminate the improper results originated from the strict rule of contract interpretation, or is merely the consequence of applying that rule (as in cases of mistaken identity). Unlike §119 I BGB which emphasises more on the freedom of choice of the acting party even at the cost of the other party's interest, English law allows the acting party to rely on his subjective intention only where there is no need to protect the other party's reasonable reliance on the objective meaning of the contractual communications, e.g. when the mistake is actually known or ought to have been apparent to him. In German law (and also in Chinese law as will be discussed later), the same task is assumed not by the provision of mistake, but by the rule of interpretation itself. §157 BGB requires contracts, and extendedly all manifestations of intent with recipient,[172] to be interpreted in observance of good faith and with consideration of transactional practices (*Verkehrs-sitte*). In cases where the recipient knew or ought to have known the true intention of the author, the requirement of good faith is to understand the manifestation according to the author's intention, thus there will be no error in expression;[173] if, on the other hand, the recipient knew or ought to have known only the fact that the author meant something else as what his words appeared to mean, but was unaware of his true intention, the objective meaning of the commination must also not be held to the author as the requirement of good faith, nor will the recipient be bound by the subjective

[170] [2004] 1 A.C. 919, at 964-965.
[171] See Beale, *Chitty on Contracts*, 3-039.
[172] See Medicus, *Allgemeiner Teil des BGB*, para.321.
[173] See *Münchener Kommentar zum BGB*, 1, § 119 para.61, 63 (Armbrüster).

intention of the author, the manifestation of intent will be void for its ambiguity, and the validity of the contract is then to be determined under the rule of hidden dissensus (§155 BGB[174]) instead of that concerning error in expression. Similarly, in cases of a mutual misunderstanding where certain term of the contract is objectively ambiguous, the principle of good faith will not hold either party to the understanding of the other, and there should be no consent upon that term, therefore the rule of hidden dissensus again applies.[175] In a word, German law interprets a contract in a way that combines subjective and objective standards, as a result, most cases where the mistake as to terms is legally relevant in English law, there will be no error in expression whatsoever under the application of BGB.

The same tendency has emerged also among English scholars. Some writers has begun to contemplate the doctrine of mistake as to terms or identity as no more than an application of general rules of contract formation and interpretation.[176] These writers saw no separate doctrine of unilateral mistake in English law on the ground that all legal effects of such mistake could be explained as resting on some exceptions of the normal rule of objective interpretation,[177] or that the normal rule of objective interpretation contains in itself indications to consider subjective factors, since any reasonable man in the same position of the recipient would not have believed that the person in mistake was agreeing to the objective meaning of the term when he knew or ought to have known that the term did not reflect the true intention of that person.[178] If these theories are acceptable, the general rule of interpretation of contract in English law will have little differences with its counterpart in German law. With the doctrine of mistake as to terms or identity completely absorbed by the general rules of offer and acceptance and their interpretation, English courts will provide no further relief for cases of error in expression.

This relief-conservative approach in English law could be better understood in its historical context. English common law, at its early stage, has a strong character of strict

[174] It provides, '*If the parties to a contract which they consider to have been formed have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is valid if it is to be assumed that the contract would have been entered into even without a provision concerning this point.*'
[175] See Bernd Rüthers, Astrid Stadler, *Allgemeiner Teil des BGB*, 18 ed. (München: Verlag C. H. Beck, 2014), §19 para.42.
[176] See Beale, *Chitty on Contracts*, 3-013.
[177] See P. S. Atiyah, *Introduction to the Law of Contract*, 5 ed. (Oxford: Clarendon Press, 1995), 84.
[178] See John Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3 ed. (London: Sweet & Maxwell, 2012), 616-617.

law rooted in its Germanic legal tradition.[179] The spiritual foundation of strict law is individualism, which requires every man at mature age to take responsibility for their own deed. No one could expect the law to provide him guardianship like a *bonus pater familias*. As R. Pound put it:

> *'If he made a foolish bargain, it conceived he must perform his side like a man, for he had but himself to blame. When he acted, he was held to have acted at his own risk with his eyes open, and he must abide the appointed consequences. He must be a good sport and bear his losses smiling'.*[180]

Under this background, early English common law allowed no pleas on the basis of mistake except for certain cases of *non est factum*.[181]

Unlike the situation in continental Europe where the Germanic legal tradition was gradually abandoned as a result of the revival of Rome law, English common law, although also profoundly influenced by the same stream, did not completely loss its old character. In the field of the law of mistake, English theorist from the 19th century, when receipting many ideas from Roman law writers in the continent such as Pothier and Savigny, did not receipt them blindly without any reflection. They absorbed the civil law way of thinking which sees the contract as the meeting of mind, and begun to contemplate the effect of mistake as consequences of the lack or defect of consent. However, instead of falling completely into the arms of the will dogma, these scholars chose to stick to the objective approach already adopted by English courts.[182] They therefore imputed new contents to the concept of contractual consent: it is agreement not in the psychologic sense but in the normative sense. As Sir WR Anson, one of the prominent scholars from 19th century England, put it:

> *'The cases in which Mistake affects Contract are exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed.'*[183] *(emphasis added)*

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[179] See Roscoe Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Co., 1921), 18.
[180] Ibid., 19.
[181] See Tsuyoshi Kinoshita, "Mistakes in Private Law (England)," *Studies in Comparative Law* 41 (1979), 65.
[182] See MacMillan, *Mistakes in Contract Law*, 133, 295.
[183] Cited from MacMillan, *Mistakes in Contract Law*, 117.

This objective tendency among English cases und legal theories stayed in step with the social development of their time. Under the background of thriving capitalism, the objective theory provided people with stable expectations of their market behaviours, and significantly promoted transactional safety and efficiency.

In the 20th century, the legal policy concerning the relief of mistakes became even more conservative. Many have witnessed a 'modern tendency to cut down defences of unilateral mistake' by the courts. It was so because the courts had begun to realise that many contracts coming before them where mistake was alleged were for the most part commercial contracts between business men at arm's length. These people, in the contemplation of the law, ought to pay more attention to the drafting of their contract, and be held to the bargain they voluntarily entered into.[184]

In a word, the tradition of strict law, the selected reception of Roman law theories and the social and economic reality had all contributed to the relief-conservative attitude of English law towards contractual mistakes. This cultural background must not be overlooked when observing the English law from the perspective of legal comparison.

3.1.3 The compromised approach

Unlike the situation in England, China has neither cultural tradition nor social atmosphere of individualism, quite to the contrary, as many scholars had pointed out, there are tremendous transactions in China that are between parties with significant unequal bargain power. This is so not only because of the great economic disparity between consumers and producers like in many other countries, but also due to the regional imbalance of development which is a serious problem in China. It would be unfair if the law requires consumers and the vast low-income population to always act as an imagined 'reasonable man' with adequate experience and capacity to fully understand the situation and make the optimal choice without any influence from their personal emotions.[185] Under this back ground, certain degree of legal paternalism is still in need, therefore the relief-conservative approach in English law as to the error in expression is not the optimal legal policy in the social context of China.

On the other hand, Chinese law has also never adopted any kind of will theory as

[184] See Paul Richards, *Law of Contract*, 13 ed. (New York: Pearson, 2017), 351.
[185] See Zhao, "Constructing the Rule on Mistake in the General Part of Civil Law", 152.

that in the German BGB. The will factor, once thought to be the sole source of the validity of juristic acts by Savigny, has lost its appeal to Chinese scholars[186] and legislator (e.g. §142 GP). The purpose of the law of mistake is thought by many as not only to protect the mistaken party's authority of self-determination, but also to restore fairness by taking the interest of the opposite party into account. In a word, the relief-friendly approach of German law is also not compatible with the legal status in China.

In contrast to the solutions in German or English law, the proposition in the previous chapter which aims to construct the rule for the relief of error in express in §147 GP as an equity review on the normative interpretation of manifestation of intent, can not only stay in accord with the law's tendency to protect transactional safety, but also avoid the complete ignorance of the interest of the manifesting party, therefore is a better choice for Chinese law even from the perspective of legal policy.

There are also foreign legislations that have adopted this compromised approach on the basis of the theory of equity review. For example, §23 of the Swiss OR provides that a mistake occurred at the time of contract formation is only operative when it is a fundamental one (*wesentlicher Irrtum*). §24 OR specified several paradigm examples where a mistake in expression must be deemed to be fundamental: a) when the mistaken party intended to enter a different type of contract as the one to which he had declared consent; b) when the mistaken party's intention pointed to another thing or, where the contract is entered into in consideration of a particular person, to another person as he had expressed; c) when the mistaken party had promised a performance of substantially larger scale or had let to be promised to him a performance of substantially smaller scale, as he intended to. The list is not an exclusive one, but is sufficient to show the general character of a fundamental mistake: it is so serious that no one could reasonably expect the mistaken party to be bound by the contract against his will.[187] Here, the law allows excuse of performance because it has become excessively burdensome due to the mistake, so that it would be unfair to hold the mistaken party to the contract.

3.2 The systematic relationship between normative interpretation and the relief of error in expression

[186] See Ji, "'Will' Stepping Down the Alter: Manifestation of Intent and Risk Imputation", 662 and below; Daixiong Yang, "Will and Meaning in Manifestations of Intent," *Peking University Law Journal* 29, no. 1 (2017), 121 and below.

[187] See Eugen Bucher, *Schweizerisches Obligationenrecht: Allgemeiner Teil ohne Deliktsrecht*, 2 ed. (Zürich: Schulthess Polygraphischer Verlag, 1988), 197.

If we accept the proposition that the rule for the relief of error in expression should be constructed as a mechanism to restore fairness of a transaction which may have been impaired by interpretation of the manifestation of intent, the systematic relationship of the two sets of rules would be clear. When applying the law, one must first ascertain through interpretation the normative meaning of the manifestation of intent and then, if and to the extent that it diverges from the true intention of the manifesting person, implement the equity review in §147 GP at the request of that person. This process could be adequately described by the formula that '**interpretation comes before avoidance for mistake**'.[188]

Nonetheless, in the Chinese juridical practice, there are still many courts that have confused the functional distinction between normative interpretation and the law of mistake, resulting in a number of wrongful cancellation of contracts which substantially harmed the interest of the parties.[189]

The unitary theories, which stand for a uniform treatment of all types of mistakes, have also failed to pay adequate attention to the systematic relationship between the two set of rules. The unitary preconditions they proposed for the relief of mistakes could in fact never be fulfilled in cases of error in expression. As a result, the uniform treatment pursued by these theories has eventually ended up to be 'hidden bifurcated theories' since the two types of mistake were still handled in a different manner.

In this part, I will devote some reflections into the up mentioned problems of functional confusion among Chinese courts and unitary theorists. This work serves mainly two purposes: on the one hand, it may provide the future application of §147 GP with some important 'risk prompts'; on the other hand, it could serve as another evidence of the necessity of the bifurcated approach.

However, before we process to this topic, it is necessary to first shed some light on the new rule of interpretation in the GP. §142 GP includes two sets of interpretive criterions applicable separately for the manifestation with or without recipient. If the latter is the case, para.2 of this article instructs the court to understand the manifestation not rigidly adhere to its words but according to the true intention of the author. Under this subjective criterion, there would be no room for any errors in expression to occur. The manifestation with recipient, on the contrary, is to be interpreted in a largely

[188] See Zhu, *The General Theory of Civil Law*, 268.
[189] See Tianfan Wang, "The Rule on the Interpretation of Manifestations of Intent in the General Part of Chinese Civil Law," *Academic Journal of Zhongzhou*, no. 1 (2018), 57.

objective way as is provided in §142 I GP. What is crucial is no longer the author's psychologic will; the court must determine the normative meaning of the manifestation with a comprehensive reference to a group of objective standards, such as the normal meaning of the words, other relevant articles i.e. the context and usages. The application of these objective standards will inevitably result in some cases where the author is held to a manifestation that is against his true intention, and the problem of error in expression will arise therefrom.

Despite this clear objective tendency in §142 I GP, it is still incorrect to say that this article has adopted a purely objective criterion for the objective understanding of the manifestation is subject to the further limit of good faith.[190] Therefore the judicial task is to ascertain not the objective meaning of the manifestation, but the way an honest person in the same position of the recipient would have understood it. If alleging objective interpretation by the recipient is against the requirement of good faith, the author will not be held to its result.

Two concrete interpretive maxims widely acknowledged among Chinese scholars can be derived from the principle of good faith.

First is the doctrine ***falsa demonstratio non nocet*** (a false description does not vitiate). Under this doctrine, if the author and the recipient had common understanding as to the meaning of certain communicational signals, the manifestation must be interpreted in accord with that common understanding despite whatever objective meaning they may possess because the recipient is prevented by good faith to contradict his own previous act by insisting upon objective interpretation: *venire contra factum proprium*.

The other doctrine could be described by the formula that '**knowledge of the true intention excludes objective meaning**' which means that if the recipient knew or could reasonably be expected to have known the true intention of the author, the manifestation must be interpreted subjectively according to that intention.[191] Two sub-criterion could be distinguished from this doctrine: one asks for exclusion of objective interpretation when the author's true intention was actually known to the recipient; the other requests for the same result in cases where the recipient ought to have known it. The value judgements for these two criteria are not identical. The consideration behind the first sub-criterion is that an honest recipient would and should have informed the author

[190] Han, *The Law of Contrat*, 876.
[191] See Jinhai Zhang, "The Rule 'Know or Could Be Expected to Know' for the Interpretation of Manifestations of Intent," *Political Science and Law*, no. 4 (2016), 86.

about the mistake instead of attempting to take advantage of it, if he has noticed the inaccuracy of the author's expression, thus it is against good faith to allow the recipient to insist on objective interpretation of the manifestation.[192] The consideration behind the second sub-criterion, on the other hand, is that the recipient, who is in a closer social relation with the author during the process of legal negotiation, must take reasonable efforts to correctly understand the author's expression, if he failed to do so, he must bear the disadvantages result from the bad communication instead of trying to shift the risk to the author who has performed his part by expressing his intention in a way comprehensible for any honest person in the position of the recipient.[193]

Similar with the case where the author's true intention was open to the recipient, if the recipient knew or ought to have known only the fact that the author has made a mistake in expression, without awareness of the true intention of the latter, the objective interpretation of the manifestation should also be excluded. What is different under this circumstance is that the recipient may not be held to the subjective understanding of the manifestation, either, and the manifestation will become void for ambiguity. The reason behind this conclusion is that the author has not expressed his intention with adequate explicitness so that any honest person in the recipient's position could understand, thus cannot be treated as an author who has fulfilled such requirement.

Until now, we have observed the issue of normative interpretation only from the aspect of a single manifestation of intent. The situation will be more complicated if it involves the interpretation of a contract. Here the court must further determine whether there is a 'normative consent' on the basis of the two parties' individual manifestations i.e. the offer and the acceptance. If, after interpretation, the offer and the acceptance fail to meet at every indispensable point, the contract will not be formed; if, however, the lack of consensus involves points that are dispensable, the contract will come into being, although with certain gaps to be filled by the court or by the law.[194]

3.2.1 The functional confusion in Chinese judicial practice

Despite the widely acknowledged principle that 'interpretation comes before avoidance for mistake', there are still a number of cases in China where the systematic relationship between the two sets of rules was confused by the courts. The latent danger,

[192] See IPC II Shanghai, 2003, CLI.C.151466.
[193] See Zhang, "The Rule 'Know or Could Be Expected to Know'", 90.
[194] See Jianyuan Cui, "Loopholes in Contract and How to Fill Them," *Peking University Law Journal* 30, no. 6 (2018), 1461 and below.

that the rule for the relief of errors in expression may be incorrectly applied as an excuse to evade the burden of contractual interpretation, must not be underestimated. In this part, I will provide some alerts for several typical situations where the avoidance or adaption of contract (in cases where §54 CL was applied before the GP came into force) for mistake tends to be misused.

(1) Invoke avoidance or adaption where there is no mistake by objective interpretation. In Case 3-1,[195] a construction contract was entered into by X, the developer and Y, the contractor. In the contract, there was a term for a penal sum to be pay by Y if the project failed to reach the quality standard 'as is reported by the contractor'. During the performance of the contract, dispute occurred between X and Y as to the meaning of the 'reported' quality standard. X argued that it referred to the quality standard Y had offered to reach in his biding documents; Y, however, insisted that it should be interpreted as the quality level stated by himself in the table of Comprehensive Quality Assessment after the construction work was finished. Both understandings were literally possible in Chinese, but Y's interpretation was closer to the normal meaning of the word 'reported'.

The court of first instance gave judgment for the developer. The judge found that the term for the penal sum would be meaningless if the quality level of the work was to be determined according to the statement of the contractor himself, thus no reasonable person would allow such a term to be written into the contract. The court held that the word 'reported' must be interpreted in its context. The forepart of this term stipulated that the project must meet the quality of 'excellent', the penal sum was agreed as a security for this obligation and therefore cannot be understood as only referred to the contractor's own quality statement. The analysis of the court of first instance stayed in concord with §125 CL, which requires contract terms to be interpreted in consideration of not only the normal meaning of the words but also the teleology and context of the terms.

The court of the second instance, however, overruled the judgment of the first instance and retreated to the pure literal meaning of the contractual language. It held that if X did not agree with the understanding alleged by the counterparty, he can only invoke avoidance for the error in expression instead of attempting to 'modify the meaning of the words' by resorting to interpretation. This conclusion, however, is questionable since it violated the interpretive instruction clearly set out in §125 CL and

[195] See IPC II, Shanghai, 2003, CLI.C.151466.

deprived the developer of a contractual term which was in his favour.

In Case 3-2,[196] the defendant was hired by the plaintiff to decorate his house. The contract contained a document titled Detailed Quotation of the Work which specified concrete items of the decorating work with their prices. The defendant argued that the content of his obligation should be determined according to this document. The plaintiff, however, based his claim on another document appended to the contract with the title Detailed Quotation of the Materials which included more items of the work with the prices of their materials. The court ruled for the plaintiff on the ground that the additional items in the second document concerned premised works that must be completed so that the performance of the remaining works in the first document was possible. Thus, the content of the defendant's obligation must include the additional items in the second document. At this point, the court could have decided the case relying on the teleological interpretation of the contract, but it incorrectly applied the rule of mistake and 'modified' the contract to the understanding of the plaintiff where there was no such need whatsoever.

(2) Invoke avoidance or adaption where there is no mistake as the result of *falsa demonstratio non nocet*. In Case 3-3,[197] X, a member of a farmer's collective, entered a compensation agreement with Y, the villagers' committee of the said farmer's collective, because X was not attributed enough farm land as he was entitled to. The agreement provided that X should be compensated a sum calculated 'according to the assessment of the local government's agricultural committee', namely '¥153 per square meter'. In fact, the assessment referred to in the contract was not ¥153 per square meter but ¥153 per *mu* (1 *mu* ≈ 666.67 m^2), there was a typo when the contract was prepared by Y. Y therefore refused to perform the contract according to its literal meaning, X sued.

In this case, the two parties had reached explicit agreement on the formula for the calculation of the sum of compensation, therefore the contract should be interpreted in accord with their common understanding, i.e. ¥153 per *mu*. The court, however, decided the contrary. The contract was interpreted objectively to mean ¥153 per square meter, and the typo made by Y was held to be an irrelevant error in expression. Nonetheless, since X had already accepted performance on the basis of the correct price, the court stated that he must be deemed to have agreed the adaption of the contract to that price.

[196] See BPC Lanshan, Shandong, 2016, CLI.C.37458406.
[197] See HPC Heilongjiang, 2017, CLI.C.10040123.

As a result, X's claim for further payment according to the mistaken price in the contract was eventually denied by the court.

In Case 3-4,[198] the plaintiff contracted to lease to the defendant several shops with a total area of 545.88 m^2 for a monthly rent of ¥70 per square meter. When the parties were determining the total rent, a calculation error occurred. Instead of the correct number of ¥38211.6, a sum of ¥31842 was written into the contract. This mistake was not discovered until the wrong and lower rent was paid for 14 months. After the defendant refused to cover the difference between the two sums, the plaintiff brought an action against him.

The court of first instance ruled in favour of the plaintiff on the ground of *falsa demonstratio non nocet*. The judge held that the rent must be determined according to the unit price laid down in the contract; the result of the miscalculation by the parties was irrelevant. The court of second instance, however, disagreed with the judgment of the lower court. The judge, ruling that the rent must be paid in the sum that was written in the contract, applied the rule of major misunderstanding for the plaintiff. His claim for the higher rent was constructed by the court as a request to invoke adaption for mistake under §54 CL, which was admissible in this case. Nonetheless, since leasing contracts involve continuous performance of an obligation, their avoidance or adaption should not be given the retroactive effect, in other words, the contract with mistake is not void or adapted *ab initio* but from the moment the mistaken party so requested. Therefore, in the present case, the defendant was not liable to pay extra rent for the past 14 months, he needed to pay it only from the date when the legal action was brought up by the plaintiff.

The analysis of the court of second instance was misleading. Here, the first question to be asked was not whether the contract was labouring under a mistake, but whether the parties had reached normative consent as to the calculation formula of the monthly rent. If the answer was yes, the number calculated according to the formula will be decisive, because the number written in the contract was no more than an irrelevant *falsa demonstratio*. If, however, the parties had agreed not on the formula but on the final number, and the formula was added only for the purpose of explanation, the contract must be deemed to have been formed with the total amount of rent written therein. Things will again be different, if the court was unable to decide whether the parties had consent to the formula or to the number. In this occasion, the term of rent

[198] See IPC Xiaogan, Hubei, 2017, CLI.C.10702056.

must be excluded from the contract for its ambiguity, and the rent was then to be supplemented by the court as a gap in the contract according to §§61, 62 CL. Whichever was the case, there would be no error in expression whatsoever.

In Case 3-5,[199] the plaintiff contracted to sell and leaseback one of his shops with the defendant. The total price for the sale was agreed to be ¥92820, the monthly rent was ¥774, calculated by the formula '92820 (the sales price) × 10% ÷ 12 (months)', and the term for the lease was 5 years. After expiration of the first lease term, the two parties agreed to renew the lease for another 5 years. This time, they set the monthly rent to be ¥1285, which, although not noticed by the two parties, contradicted the formula stipulated in the contract ('rent = the sales price × 10% ÷ 12 months'). The plaintiff made a clerical error as to the number of the sales price. Instead of ¥92820, he wrote ¥192820, resulting in a rent significantly higher than expected. In the legal action brought up by the plaintiff to adapt the rent, the court gave judgment for him on the ground of a major misunderstanding. This, however, was another misuse of §54 CL since it was obvious that the parties had agreed on the formula for the calculation of the rent, the contract should have been interpreted according to the correct result of that formula. No adaption was in need.

In Case 3-6,[200] the plaintiff offered to buy a shop inside a mall developed by the defendant. During the negotiation, a digitalized blueprint of the mall was brought to the plaintiff by one of the defendant's employee. The employee, pointing his finger to a shop X, introduced it to the plaintiff as shop Y. The plaintiff, who was unable to recognize the real name of the shop due to the low dpi of the digital screen, relied on the statement of the employee and eventually contracted to buy shop Y. After finding out that shop Y was in fact another shop located in a completely different position, the plaintiff sued to avoid the contract for mistake. The court held for the plaintiff, thus completely overlooked the fact that the parties had no difference about the shop to be sold, it was the one they discussed during the negotiation. The name of the shop was not important; there was no mistake.[201]

(3) Invoke avoidance or adaption where there is no mistake as the objective interpretation is excluded by the recipient's knowledge of the author's true intention. In Case 3-7,[202] an old lady of 76 appended her signature to a series of

[199] See IPC Changji, Xinjiang, 2014, CLI.C.6333907.
[200] See BPC Yunyan, Guizhou, 2017, CLI.C.48443482.
[201] See also BPC Shangcheng, Zhejiang, 2016, CLI.C.42327224; BPC Hightech Zone Changchun, Jilin, 2015, CLI.C.42075727.
[202] See IPC Urumchi, Xinjiang, 2015, CLI.C.8269108.

contracts transferring all of her real estates to her widowed daughter in law. Later, in an action brought by the daughter for the performance of the contracts, the old lady plead that she never intended to sell her estates, she signed the contracts because she was told by the plaintiff that those were documents applying construction permit of new houses. This allegation of fact was proved by the telephone communication between the parties after the contracts were signed. They discussed repeatedly only the issue concerning the building of the new houses, not a single word was said about the transaction of the old ones. The court gave judgment for the defendant, holding that the sales contracts were voidable due to her error in expression when appending her signature.

However, it was unnecessary to invoke avoidance for mistake in this case. At the time when the contracts were signed, the plaintiff knew exactly the true intention of the defendant, she should not be allowed to hold the defendant to the objective meaning of her signature, there had never been any contracts between the parties.[203]

(4) Invoke avoidance or adaption where there is no mistake as the contract is objectively ambiguous. In Case 3-8,[204] the plaintiff entered a contract to become a distributor of the defendant's products. In the agreement it was stipulated that the distributorship of the plaintiff was valid 'within the territory of Nanchang City, Jiangxi Province'. The plaintiff accepted this term with the understanding that the territory of Nanchang City included not only the urban area of Nanchang, but also all districts and counties that were subordinate to the municipal government of Nanchang. The defendant, on the other hand, insisted upon the interpretation that the distributorship was authorized only within the urban area of Nanchang City. Both understandings were semantically possible, therefore, the contractual term in dispute should not bind the parties due to its ambiguity. The court, however, incorrectly invoked avoidance for mistake although there was no agreement whatsoever to be avoided.

One possible reason for many Chinese courts to confuse the functional distinction between normative interpretation and the relief of errors in expression is that the two set of rules often seemed to have led to the same results. For example, in Case 3-4 and 3-5, applying the doctrine *falsa demonstratio non nocet* or invoking adaption for mistake will both end up in terms that are in concord with the subjective intention of the parties; in Case 3-7 and 3-8, the binding force of the contract will both be negated

[203] See also IPC Fuzhou, Fujian, 2015, CLI.C.7826038.
[204] See IPC II, Beijing, 2017, CLI.C.10632668.

whether on the ground of normative interpretation or the law of mistake. This statement is not true if we take the following facts into account: first, according to §152 GP, the avoidance for mistake must be invoked within 3 months after the mistaken party knew or ought to have known the error, or within 5 years since the making of the juristic act, whilst the normative interpretation, as a judicial task to ascertain the contents of the contract, does not subject to any time limits; second, §147 GP has already deleted the mistaken party's right to adapte the contract, if the future CCC does not revive such right (which is very likely to be the case), a situation of *falsa demonstratio*, when treated as a case of mistake, will only result in the contract being improperly avoided; third, even if the right to adapt the contract is re-introduced into the CCC, in cases where the contract involves continuous performance of an obligation, e.g. Case 3-4, the adaption will not be granted a retrospective effect, whilst the result of normative interpretation is valid *ab initio*.

In a word, we shall not underestimate the impact of the judicial confusion of the systematic relationship between normative interpretation and the law of mistake to the interests of the parties. The doctrine 'interpretation comes before avoidance for mistake' must always be kept in mind when dealing with cases concerning defected contractual communication.

3.2.2 The functional confusion in unitary theories

The systematic distinction between the interpretation of manifestation of intent and the law of mistake received no adequate attention also among Chinese unitary theorists. These scholars proposed several possible rules for the relief of all types of mistake, none of which, however, has the chance to be applied to cases of error in expression.

(1) Mistake knowable to the opposite party. Many supporters of the unitary theory are of the opinion that the relief of all type of mistake must not infringe the law's protection for transactional safety. As a result, avoidance should only be allowed when the opposite party of the manifestation knew or ought to have known the mistake of the author, thus has no interest of reliance.[205] This way of thinking was adopted from Japanese unitary theorists among whom Kawajima Takeyoshi was the representative.[206] However, it is notable that during the latest civil law reform in Japan, Kawajima's

[205] See Sun, "Motive Errors in Civil Law", 109 and below; Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 132.
[206] See Takeyoshi Kawajima, *General Provisions of Civil Law* (Tokyo: Yuhikaku Publishing, 1965), 289.

theory of reliance was explicitly refused by the CROL.[207] One of the most important reason why the CROL did not accept this theory was that it has confused the functional distinction between normative interpretation and the law of mistake. As Yamamoto Keizo, a member of the CROL pointed out during the 31st commission meeting,

> *'It has long been argued against this way of thinking [namely the reliance theory] that although it may somehow successfully explain the issue of error in motive, in cases of error in expression, when the mistake was recognizable to the opposite party, there was in fact no need to treat the mistake as a problem. Since the opposite party has no reasonable reliance on the objective meaning of the expression, the manifestation of intent will become void at the level of interpretation for it was impossible to ascertain its meaning.'*[208]

Yamamoto's argument works well for the Chinese reliance theory as well. If the law would only provide excuse for mistakes that were recognizable to the opposite party, all errors in expression will lose their legal relevancy, and the unified treatment of mistake promised by this theory will eventually end up to be another form of binary distinction between error in expression and error in motive.

In fact, in the original system of Kawajima's theory, such functional confusion did not exist. Kawajima had adopted a strict objective doctrine for the interpretation of manifestations of intent, he opined that the purpose of interpretation was to 'ascertain the social meaning of the signals used in juristic acts'.[209] As a result, even in cases where the true intention of the manifesting party was known to the recipient, the rule of interpretation would provide no protection for the author, the only choice left for him to escape from the binding force of his manifestation was to plead mistake. Nonetheless, after the mainstream theory of contractual interpretation in Japan has abandoned the pure objective position, the rule for interpretation assumed, at the stage prior to the law of mistake, partly the task of restoring the manifesting party's private autonomy where there was no need to consider the opposite party's reliance, and the function of the rule of mistake under the reliance theory of Kawajima was then overlapped with that of the

[207] See CROL, "Supplementary Elucidations on the Intermediate Organization of Argumentations for the Modification of Civil Law", http://www.moj.go.jp/content/000074988.pdf., 224 and below.
[208] See CROL Records no.31, 28.
[209] Kawajima, *General Provisions of Civil Law*, 188.

new doctrine of interpretation. As was mentioned earlier, on the issue of interpretation of juristic acts, Chinese law has never introduced any strict objective standards, it is therefore unwise to directly receipt Kawajima's mistake theory without making any adjustments.

(2) The opposite party knew or ought to have known the mistake but has left the mistaken party in error when it was contrary to good faith for him to do so. It was the opinion of some other unitary theorists that even if the mistake was recognizable to the opposite party, if under the principle of good faith, he has no such duty to inform the mistaken party about the error, the binding force of the manifestation of intent will not be affected.[210]

The additional requirement of a breach of the duty to disclose aims to put on more limits for the relief of mistake. However, in regard to cases of error in expression, if the opposite party knew or ought to have known that the objective meaning of the words differed from the true intention of the author, the manifestation of intent will no longer be interpreted objectively, and there will be no mistake.

(3) Common mistake. In the context of unitary theories, common mistake refers to shared misconception of **certain fact** which formed the ground of the juristic act.[211] The parties' common misunderstanding as to the semantic meaning of a contractual term is clearly not included, therefore no cases of error in expression will fall into the scope of this rule. In order to maintain the uniform treatment for all types of mistake, some unitary theorists redefined the concept 'common mistake' as the parties' shared erroneous assumption of an identical 'issue'.[212] This new definition appears to have covered also the situation of error in expression, it has not if we take the doctrine *falsa demonstratio non nocet* into account. According to this doctrine, when both parties had common understanding as to a term, even if such understanding diverged from the objective meaning of its language, the contract must still be interpreted in accord with that understanding, there is still no room for the application of the rule of common mistake proposed by these schalors.

(4) Mistake induced by the misrepresentation of the opposite party. It was proposed by many unitary theorists that if the manifesting party's error was caused by the conduct of the opposite party, the contract is voidable.[213] Paradigm examples for

[210] See Han, "On the Interpretation of Major Misunderstanding", 680.
[211] See Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 133.
[212] See Keping Ran, *Defects in Manifestations of Intent: Theories and Norms* (Beijing: Law Press, 2018), 216.
[213] See Han, "On the Interpretation of Major Misunderstanding", 680; Long, "The Theoretical Structure of the Law of Mistake in Manifestation of Intent", 133; Ran, *Defects in Manifestations of Intent: Theories and Norms*, 214.

the application of this rule are cases where the mistaken party's false assumption as to certain decisive fact (i.e. an error in motive) was the result of the opposite party's negligent or even innocent misrepresentation. It is doubtful whether cases of error in expression could ever fall into the scope of this rule. See the following two examples.

In Case 3-9,[214] the plaintiff, intending to buy apartment X from the defendant, was accidentally shown by the defendant's daughter another apartment Y. Thinking apartment X was the one in front of him, the plaintiff sent out an offer to buy 'apartment X'. When he later discovered that apartment X was at other location, he sued to avoid the contract.

In this case, the misuse of communicational signals by the plaintiff was caused by the incorrect instruction from the side of the defendant. However, instead of applying the law of mistake, it is arguable that since the defendant knew exactly that the true intention of the plaintiff was to buy the apartment shown to him, when the apartment shown to him was not the one his words objectively referred to, he cannot be held to the objective interpretation of his offer, thus there was no contract to be avoided.

In Case 3-10,[215] the defendant, a company for real estate development, was obliged to provide resettlement housing for the plaintiff, whose apartment was demolished in a construction project. For the purpose of resettlement, the defendant sent the plaintiff a pamphlet which contained the predetermined serial number and floor plan of all available settlement apartments. The plaintiff chose from the pamphlet an 'apartment X' and signed the contract based on this decision. Later, when 'apartment X' was handed over to him, the plaintiff found that it was not at the location stated in the pamphlet. The apartment the plaintiff intended to choose was in fact 'apartment Y', there was a misprint in the pamphlet.

Here, the misunderstanding of the manifesting party as to the objective meaning of certain contractual term was also caused by the conduct of the opposite party, but again there would be no need to resort to the law of mistake if the manifestation was properly interpreted. The defendant, when entering the contract, was completely aware that the plaintiff was naming the subject matter according to the statement of the pamphlet, he therefore should not be allowed to insist upon the objective meaning of the term, and the contract was not formed since the parties reached no agreement on the subject matter of the transaction.

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[214] See IPC Luoyang, Henan, 2013, CLI.C.2020335.
[215] See IPC III, Shanghai, 2017, CLI.C.10602515.

In a word, in cases where the manifesting party's misuse of language was caused by the misrepresentation of the opposite party, the proposed uniform rule for the relief of mistake will still have no chance to be applied, because in this situation the opposite party is normally in a position where he knew or ought to have known the subjective intention of the manifesting party, the defected communication will not bind the latter as a result of interpretation.

The above analysis of the unitary theories has made it clear that despite their advocation of a uniform treatment, these theories eventually failed to treat all types of mistake alike. Avoidance for mistake was *de facto* limited to cases of error in motive, as for all circumstances where the mistake is said to be legally relevant, the rule for contractual interpretation will take effect at an early stage and prevent any error in expression from coming into being. On the basis of this formally constructed unitary structure, a relief-conservative approach similar to that in English law which allows no excuse for errors in expression was established. It was nothing else but another form of bifurcated theory. Nonetheless, by hiding their position behind the appearance of a unitary approach, these theories have evaded their duty of argumentation.

3.3 Detailed structure of the rule of fairness review

Now, I will turn to the construction of the concrete requirements which must be met in order to invoke the avoidance for errors in expression.

Judicial practice in China has allowed the consideration of the following two arguments: one is the gross disparity between the parties' obligations resulted from the mistake; the other is the frustration of contractual purpose of the mistaken party.

3.3.1 Gross disparity

In cases of error in expression, the mistaken party has incorrectly manifested his intention, if his manifestation was to be interpreted objectively, he may find that he had promised a performance of substantially larger scale or had let to be promised to him a performance of substantially smaller scale, the equilibrium of the contract was seriously impaired by the inaccurate communication. Under this typical situation of defected commutative fairness, Chinese courts are more willing to provide relief for the party in mistake. It remained unclear, however, whether the gross disparity should be determined with reference to the mistaken party's intended scale of performance and anti-

performance (the subjective standard) or to the market value of the two obligations (the objective standard). The result could vary when different standards is applied. For instance, if X wanted to sell his house for 30 million yuan but accidentally wrote 10 million yuan in the offer, the equivalence between the parties' performances could be deemed to have been destroyed according to the subjective standard. However, if the market price of X's house was approximately 10 million yuan, there would be no gross disparity from the objective perspective. It is submitted here that the equity review of the law of mistake should be based on an objective standard for the purpose of the relief of errors in expression is not to restore the private autonomy of the mistaken party, but to pursuit commutative fairness of the transaction when the mistaken party was unable to protect his own interest through the process of contractual negotiation due to his mistake.[216] As a result, it is unnecessary to resort to the subjective standard when determine the legal relevancy of an error in expression.

Chinese courts have long been vacillating between the subjective and objective standard. See the following cases.

In Case 3-11,[217] X bought a large amount of US dollars from Y (a bank) with RMB, due to the malfunction of Y's computer system, X was offered an exchange rate that was only half of the lowest offer of the day. Y's request for avoidance was upheld by the court on the ground of the principle of fair dealing.

In Case 3-12,[218] X submitted a bid for the lease of Y's property, in the biding documents, X mistakenly offered a monthly rent of ¥61 per square meter when he meant ¥6.1 per square meter, he then refused to sign the lease contract and brought up an action for the refund of his bid bond. The court gave judgement for X finding that the contract can no longer be formed due to the mistake of X and it would be unfair for Y to keep the bid bond. If we see the bidding process as an independent pre-contract which obliged the parties to sign a formal lease contract, the decision of the court has in fact avoided this pre-contract on the basis of X's mistake.

Similarly, in Case 3-13,[219] X mistakenly offered in his bid to rent Y's property for 82 million yuan a year when he meant 8.2 million. The court upheld X's request to avoid the contract on the ground, *inter alia*, that the rent offered in the erroneous bid of X was substantially higher than **the average level in the local market**.

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[216] See *supra* Section 2.2.1.
[217] See BPC Pudong, Shanghai, 2002, CLI.C.225975.
[218] See IPC Shantou, Guangdong, 2016, CLI.C.8469084.
[219] See BPC Zhuji, Zhejiang, 2013, CLI.C.2859149.

In Case 3-14,[220] the plaintiff, descendant of a victim killed in a traffic accident, reached a compromise with the defendants, the injurer and the insurance company. In the contract it was stated that the defendants were obliged to compensate the plaintiff a total sum of 1.1 million yuan and 'all liabilities resulted from the accident shall cease to exist' upon the payment of the compensation. The plaintiff sued for avoidance of the contract after he found that the word 'all liabilities' meant not only the contractual liability of the insurance company, but also the tortious liability of the injurer, and he did not intend to release the injurer of such liability. The court ruled for the plaintiff, stating that it would result in '**obvious unjust**' if the contract were enforced in accord with the understanding of the defendants.

In Case 3-15,[221] E-commerce company X and hotel Y entered a contract involving internet sales service. According to the contract, X was obliged to sell on its website virtual accommodation vouchers of Y at a price predetermined by the latter. After the vouchers were sold and used, X shall pay Y a sum lower than the predetermined price and keep the difference as remuneration. The transaction went on well until a time X's employee accidentally inputted a wrong number into the computer system and the sales price of the vouchers displayed on X's website ended up to be only ¥18 instead of ¥110. Before this mistake was discovered and corrected, Z, the defendant, bought in 2500 units of the vouchers. X sued for avoidance.

The court of first instance gave judgment for the plaintiff on the basis of the objective standard, it found that a room for which the vouchers could be used never costed less than ¥100 in Y's own system and on other websites hired by Y, and the cheapest hotel room in the city would cost at least ¥29 per night, therefore the mistake of X had caused gross disparity between the performances of the two parties. The court of second instance, although agreed with the conclusion of the lower court, switched to a subjective approach. It emphasised the fact that the mistaken price of the voucher was 80% lower than its actual price, as a result, X suffered significate loss after Z bought in 2500 units of them.

In Case 3-16,[222] an employee of a jewellery store mistakenly labelled the price of a bracelet as ¥18,000 when its real price was ¥180,000 and sold it to the defendant with a further 35% discount. The court avoided the contract on the ground that the error 'has in fact caused significate loss to the owner'. In this case, the court did not consider the

[220] See IPC Tacheng, Xinjiang, 2017, CLI.C.10864633.
[221] See IPC I, Beijing, 2016, CLI.C.9530343.
[222] See IPC Jiayu, Gansu, 2015, CLI.C.7826294.

market price of the bracelet, it adopted a subjective standard and laid more weight on the plaintiff's personal valuation of the subject matter.

Nonetheless, in another similar case (Case 3-17)[223] where the price of an air-conditioner was mistakenly labelled as 0, the court allowed avoidance holding that the contract was obviously unfair to the seller as he was getting nothing for a subject matter that worth ¥8299 on the market. Here, the court obviously adopted an objective standard for the judgment of gross disparity.

Several conclusions could be derived from the above group of cases. First of all, most of the cases involved erroneous expression of price where the party in error offered to pay more or let himself to be paid less than intended. If such mistaken pricing occurs in the scenario of internet consumer contract, Chinese courts are more inclined to apply a stricter rule for avoidance than in other cases when the mistake occurs on the side of the business operator.[224] Secondly, in regard to the concrete standard for the decision of gross disparity, case law in China seems to have reached no consensus. While some courts adopted the objective criterion (e.g. Case 3-11, 3-13, 3-17 and the court of first instance in Case 3-15), others have decided the issue from a subjective standpoint (e.g. Case 3-16 and the court of second instance in Case 3-15). There are also cases where the court did not reveal its ground of decision (e.g. Case 3-12 and 3-14). Despite the uncertainty in the judicial practice, it is still arguable that only the objective standard is compatible with the purpose of the rule for the relief of errors in expression as a mechanism of fairness restoration. Thirdly, in the cases where the objective standard was applied, gross disparity was admitted when the performance offered or asked by the party in error has lost at least half of its value due to the mistake. Although it is inadequate to say that the 50% loss of value is the general threshold for the occurrence of gross disparity, this proposition may still act as an initiatory indication to the courts. In situations such as Case 3-13 and 3-17 where the lost proportion was more than 90%, the avoidance for mistake could be allowed without much dispute. Last but not least, due attention must also be paid to Case 3-14. In this type of compromise contract, there was often no available market price as to the parties' obligations, as a result, we will have no choice but to refer to the subjective standard as an exception.

[223] See BPC Pudong, Shanghai, 2008, CLI.C.1998399.
[224] See for detail *supra* Section 3.4.3.

3.3.2 Frustration of contractual purpose

Parallel to the criterion of gross disparity, another group of Chinese cases tend to allow avoidance when the error in expression has rendered it impossible for the mistaken party to achieve his contractual purpose. The legitimacy behind this rule is that it would be unfair for the law to hold the mistaken party to a contract against his will when the whole arrangement is meaningless to him.

Theoretically a person's contractual purpose could be divided into two categories: the typical-objective purpose and the atypical-subjective purpose.[225] Typical contractual purposes are those that any reasonable man would have been perusing when entering a specific type of contract, the opposite party must be deemed to have known and agreed to the other party's typical purpose at the level of contractual interpretation, because without the typical purpose the transaction is meaningless, and no one, when manifesting his consent to a contract, would be intending to enter a contract that makes no sense. Atypical contractual purposes, on the other hand, are specific aims of a specific person in a specific transaction, they are not generally known to the opposite parties and consequently, not a part of the contract.

Chinese courts normally will provide relief only when the mistaken party's error in expression has frustrated his typical contractual purpose. Case law has concentrated mainly on the following fact patterns.

(1) Mistake as to the identity of the subject matter. In sales contract involving specific goods, the typical contractual purpose of the buyer is to attain property on a particular thing, if, due to the defected communication he expressed objective consent to pay for a completely different item, his purpose of transaction will be frustrated even when the price is appropriate in the market. Under these circumstances, if the contract is enforceable, the buyer would be compelled to purchase completely useless to him and be deprived the fund for the thing he actually needed. The law should avert this unfair (and also inefficient) result by allowing avoidance of the contract.

For example, in Case 3-18,[226] X contracted to buy apartment I from Y. But prior to the formation of the sale, X was shown under the name of apartment I another apartment II, his true intention was to buy apartment II. In Case 3-19[227] with similar fact, an auction buyer confused the house specified in the auction notice with another

[225] See Jianyuan Cui, "Contractual Purposes and Thier Frustration," *Jilin University Journal Social Sciences Edition*, no. 3 (2015), 41 and below.
[226] See IPC Changsha, Hunan, 2015, CLI.C.7826294.
[227] See BPC Longkou, Shandong, 2012, CLI.C.16917022.

house and made the highest bid. In both cases, the court ruled for the buyer to avoid the contract.[228]

The result should be the same if it was not the buyer but the seller who has made a mistake as to the identity of a specified good. Here the law shall not compel the seller to surrender his right on a particular item even with a reasonable price.

It would make no difference, either, if the error in expression involves the identity of a specified right instead of a tangible thing.

For example, in Case 3-20,[229] X purchased a truck from Y with ¥40,000. The price was made up of two parts: ¥10,000 was for the truck and the other ¥30,000 was 'money for the line'. X thought that the 'money for the line' was for the transportation permit of the truck while it customarily meant the price of customer information to be provided by Y. X's request of avoidance was allowed by the court.

If, on the other hand, the contract involves sale of generic goods which was not clearly identified at the time when the contract was formed, there would be no room for the occurrence of a mistake as to the identity of the subject matter. Nonetheless, under these circumstances, the parties may have confused the genus or description of the goods required by the contract, such type of mistake could also result in the frustration of the parties' contractual purposes and lead to avoidance.

Things will be different, however, if the buyer or seller's mistake concerned only the model number, producer or origin of the goods, these factors do not necessarily have influence on the quality or efficacy of the subject matter, therefore the contractual purpose of the mistaken party may not be impaired.

(2) Mistake as to the nature of the contract. If the manifesting party intended to enter a certain type of specific contract but mistakenly expressed consent to a contract of another type, he will normally be unable to achieve his typical contractual purpose and should be allowed to invoke avoidance. For example, in Case 3-21,[230] X agreed to sell his real estate to Y when his true intention was to hypothecate it, the court voided the contract on the ground of mistake.

If, however, the manifesting party has not confused the type of the contract, but has promised or let to be promised to him an obligation that was substantially different with the one in his mind, the result would be the same.

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[228] See also IPC Luoyang, Henan, 2013, CLI.C.2020335; BPC Baoan, Guangdong, 2017, CLI.C.48352601.
[229] See IPC Chaoyang, Liaonin, 2014, CLI.C.5263737.
[230] See BPC Mulei, Xinjiang, 2016, CLI.C.46747162.

For example, in Case 3-22,[231] X hired Y to provide internet technical service, X thought that the content of Y's service was to secure his exclusive use of certain keywords in all major search engines, while in fact Y was only obliged to secure that X's information would come out under certain keywords in a particular search engine. The court held that X's contractual purpose had been frustrated and the contract is therefore voidable.[232] Similarly, in Case 3-23,[233] X mistakenly believed that he was contracting to become the sole agency of Y's product in certain area when the contract contained no such exclusive clause, the court also allowed avoidance, stating that X's mistake had a serious impact on the content of the juristic act.

(3) Mistake as to the identity of the opposite party. Apart from the two types of mistake discussed above that often emerge in legal practice, the manifesting party's mistake as to the identity of the recipient was also said to be operative by the old judicial interpretation (§71 OGPCL) and legal theories. This approach was deeply influenced by the German doctrine of mistake which must be further examined before introduced into the existing frame of Chinese law.

First of all, in the case where it has been made clear by interpretation that the manifestation of intent was addressed to X but was mistakenly sent to Y, the manifesting party is in no error in expression since he neither misunderstood the meaning of his language nor unconsciously used wrong words for communication. Here, the manifestation was not binding not for the mistake but because it has never arrived at the sphere of the recipient, or, when the manifestation was made in dialogue, never become known to him (§137 GP).

The same would apply when the contract is to be concluded in written form (§32 CL) and is signed or sealed by a person other than the parties stated in the document. There would be no contract in these cases since no one could be allowed to insist upon a transaction that was obviously not intended for him.

The problem of error in expression only arises when the manifestation of intent *per se* contains no ascertainable indication as to its recipient. Under these circumstances, it is necessary to further inquire into the question whether the mistaken identity has led to the frustration of the typical contractual purpose of the party in error. If the parties are dealing with each other face to face, it is normally presumable that the mistaken

[231] See IPC Guangzhou, Guangdong, 2014, CLI.C.4075874.
[232] See also HPC Hainan, 2012, CLI.C.1436500; IPC Nanning, Guangxi, 2012, CLI.C.1197688; BPC Chancheng, Guangzhou, 2015, CLI.C.35470510.
[233] See IPC Nantong, Jiangsu, 2017, CLI.C.9261907.

party intends to deal with the person physically present, thus his confusion as to the name of that person is not important. Similarly, if the contract involves massive trade between a businessman and a consumer, there is also a strong presumption that the identity of the consumer is not a significant factor considered by the business operator. In these cases, the avoidance for mistake should not be allowed.

Things will again be different if the mistaken identity is deliberately caused by the opposite party who is acting under someone else's name. In this scenario, the juridical task is also to first ascertain the importance of the opposite party's identity for the party in mistake: if, as was discussed above, the mistaken party does not care much about the name of his counterpart and is willing to deal with anyone comes to him, the contract is binding despite the mistake; if, however, the manifesting party reasonably relied on the false name the opposite party was using and intended only to contract with the person claimed to be, the rule concerning unauthorized agency must be applied analogically prior to the law of mistake. The reason behind this conclusion is that a person who is pretending to be someone else should not be granted a better position than the one who claims to be the agent of another person, both of them are attempting to swindle a bargain with the identity and fame of other people. As a result, in both cases, the manifesting party should be treated in the same way as is stipulated in §171 GP: he may withdraw the contract before it is ratified by the person claimed to be, without subjecting to the time limitation set out in §152 GP; he may also request the opposite party to perform the contract or to pay damages in lieu of the performance.

3.3.3 Causation

To invoke avoidance for mistake the manifesting party must establish the causal link between the mistake and the manifestation of intent, i.e. he would not have made the manifestation with its current content had he known the truth. In cases of error in expression the requirement of causation will always be fulfilled since it is empirical law that no reasonable person would leave his expression in contradiction with his intention had he been aware of the true meaning of his words. Therefore, the court may normally skip the test of causation if the mistake in question is one that concerns contractual communication.

3.4 Several exceptions for the fairness review

The construction of the law‘s remedy for error in expression as a mechanism of

equity restoration must allow some exceptions under certain circumstances due to the following considerations: firstly, in cases where the juristic act involves no exchange of performances, the test of equivalence will become meaningless; secondly, when the weight of transactional safety has substantially increased and surpassed the importance of commutative fairness, the legitimacy for the law to consider the relief of mistake will become questionable; thirdly, if the manifesting party is required to pay more attention to avoid his own mistake but failed to do so, he is less likely to be excused from the binding force of his juristic act; lastly, in cases where the manifesting party, due to some special reasons, lacks the ability to fully understand the nature of a document to which he appended his signature, the law may grant him stronger protection when the content of the document is materially different with his intention.

3.4.1 Juristic acts without the exchange of performances

The necessity of fairness review vanishes when the juristic act based on mistake involves no exchange of performances between two parties. Nonetheless, this does not mean that error in expression in these cases will always be legally irrelevant. Different rules should apply according to the nature of the juristic act.

In cases where the manifesting party is acting to give benefit to the opposite party at his own cost by ways of entering unilateral contracts (e.g. gift contracts), releasing the obligor of his obligation (§91 CL), waiving his right for the interest of the opposite party (e.g. §152.1 GP), etc., he should be entitled the right to avoid if there was an error in expression. This is because the binding force of a gratuitous act is relatively weaker than a promise with valuable consideration; in other words, the law should not compel the mistaken party to be generous when he does not intend to sacrifice his own interests for free.[234]

However, if the manifesting party has executed by mistake certain unilateral act that was purely for his own benefits, e.g. invoking his creditor's right of cancellation (§74 CL), revoking the bestowal promised by him (§186 CL), etc., to allow him to avoid will have little meaning since he can easily withdraw the cancellation during the lawsuit or redo the gift contract to eliminate the effect of his mistake.

The result will again be different if the error in expression occurs when the manifesting party is exercising his right to terminate a contract (§94 CL) or the right of choice for an alternative obligation. Since the effect of such kind of rights may influence

[234] See also F. Bydlinski, "Das Österreichische Irrtumsrecht", 128.

the content of an existing bilateral contract, the general rule of fairness review must apply.

3.4.2 The increased importance of transactional safety

In certain areas of commercial transaction, the importance of transactional safety may increase to a degree substantially higher than that of the consideration of commutative fairness. Under these circumstances, the relief of mistake must be excluded or at least limited in favour of the reasonable reliance of the other person. This principle could be seen in many special regulations of civil law in China, for example, §120 SL provides that any trading result of a transaction of security, which has been conducted in accordance with the trading rules stipulated by law, shall not be altered. As a result, neither party of a transaction of security may invoke avoidance for mistake as a way to alter the result of the trade.

3.4.3 The mistaken party's duty to avoid defective communication

In cases where the manifesting party failed to fulfil his duty to take reasonable measures to avoid the occurrence of errors in expression, his request for relief may not be allowed by the court. In practice, such a duty to prevent defective communication is often held to have been assumed by an internet business operator.

For example, in Case 3-24,[235] X mistakenly set the price of his product which was worth ¥28,000 to be ¥2,800 on his online sales platform, and Y, a consumer, bought it before X corrected his error. Despite the general rule of fairness review should have entitled X the right to avoid the contract, the court in this case refused X's request on the following grounds,

> *'In the scenario of internet transaction, the consumer is in a position that is even weaker than the one he would be in had the trade been made offline, and a business operator is normally obliged to pay due attention to the pricing of his product. Therefore, the risk of the mistaken price and so on, can only be borne by the operator whether on the ground that he caused the risk or that he was the best avoider of it. There is no reason to shift such risk to the side of uncertain consumers. Only by allocating the risk of mistake to business operators will they be prompt to innovate their technology, and to*

[235] See IPC I, Chongqing, 2017, CLI.C.10521335.

adjust and normalize their marketing behaviour. If the law allows them to easily avoid the sales contract for reasons of major misunderstanding, the consumer's confidence will not receive any protection.'

In the analysis cited above, the court set out four arguments for denying the relief of mistake: firstly, a consumer who is dealing online is normally in a weaker position than the one who contracts in a traditional ways, therefore deserves better protection; secondly, the internet business operator is the producer and the best avoider of the risk concerning mistaken pricing, hence it is more reasonable to allocate such risk to him than to uncertain consumers; thirdly, from the perspective of legal policy, to let the risk of mistake be borne by the operator will motivate him to take measures to avoid its realization and will achieve better social effect; lastly, the limit of the operator's right for avoidance will benefit the preservation of the consumer's confidence which is a crucial factor for the healthy development of the national economy.

Among the four arguments brought out by the court, the last one cannot be held against the general rule which sees the relief of error in expression as a mechanism of fairness review, since the requirement for the equity restoration is strict enough to prevent any business operator from 'easily avoid the sales contract'. The first three arguments, on the other hand, can be combined into one, they provide legitimacy for the allocation of the risk of mistaken pricing to the side of the business operator in the scenario of online trade, therefore could act as an exception for the general rule of mistake.

In another case with similar fact (Case 3-25),[236] the online business operator X has mistakenly labelled the price of his product to be only 11% of the sum he intended, later he brought up an action against the consumer Y who purchased three set of the product with the lower price. The court ruled for the defendant on the ground that X 'has a duty of care as to the statement of price, quantity, description, etc., of his own products' when exhibiting them via internet commercial platform. As a result, he may not invoke avoidance after the consumer has regularly placed an order online.[237]

Different from Case 3-24, in the present case, the court seemed to have emphasised more on the duty of care of the business operator. However, if the operator had paid due attention to the pricing of his product, there would be no mistake whatsoever. In other

[236] See BPC Laixi, Shandong, 2017, CLI.C.47288154.
[237] See also IPC III, Beijing, 2014, CLI.C.11545827; BPC Lubei, Heibei, 2016, CLI.C.38237478.

words, letting the operator to assume the duty to avoid defective communication is another way of asking him to bear the risk of error in expression, thus the consideration of the court is essentially the same with the previous case.

The attitude of Chinese courts towards the relief of mistaken pricing changes if the contract is made offline or when the opposite party is not a consumer. For example, in Case 3-16 cited earlier that involved offline trade, there was also a missing '0' as in Case 3-24 when the seller was labelling the price, but the avoidance for mistake was allowed; in Case 3-15 which concerned also the problem of mistaken pricing in online trade, the judgment of the court again did not stay in concord with that in Case 3-24 and 3-25. The specialty of this case is that the buyer bought 2,500 units of the seller's product, which obviously excessed the purpose of consumer use, therefore he can no longer be treated as a consumer.[238]

The question is then, why the business operator of an online consumer contract must bear the risk of the mistaken pricing. Two reasons could be derived from the argumentation of the courts. First of all, in comparison to a regular consumer, the one who is dealing online is normally in a weaker position which in turn aggravates the imbalance of power between the consumer and the business operator. This weaker position of the online consumer has its roots in the virtual trading environment where it will be harder for the consumer to negotiate with the operator in order to protect his own interests but easier for the operator to carry out improper conduct since he is the controller of the computer system. In practice there had been many cases in China where the business operator intentionally labelled a lower price to his product to lure the consumers into the contract and then required them to pay a higher amount.[239] It is easily imaginable that the operator may attempt to disguise his fraudulent arrangement as an accidental mistake when the consumer seeks legal aids. Such cases of 'fake discounts' can be better controlled if the law excludes the right for avoidance of the business operator on the basis of errors in expression.

A more important reason to allocate the risk of mistaken pricing to the business operator is that such risk is one that occurs in the scenario of a burgeoning new mode of trade with the support of new technology, it is therefore crucial to enhance the duty of care of the operator, in order to motivate him to invest more to improve his system and management.

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[238] See also BPC Pudong, Shanghai, 2008, CLI.C.1998399.
[239] See Qiuyu Lei, Su Ni, "On the Formation of Online Shopping Contract and Mistaken Pricing," *Journal of Kunming University of Science and Technology* 14, no. 1 (2014), 51.

3.4.4 The enhanced protection for person lacked comprehensive ability

It is general rule that a person voluntarily appended his signature to a written contract may not be allowed to invoke avoidance for mistake on the ground that he has not read the document and would not have agreed to it had he known its content.[240] By abandoning his opportunity to read the document, the signer has shown his consent to any possible contents of the written contract, he therefore must bear the risk if it turns out to be a surprising deal. Nonetheless, in some cases where the courts have found that the person appending signature on a document provided by others lacked the ability to fully understand what he was signing due to special reasons such as defected education, advanced age or illness, they may exceptionally allow the signer to deny the binding force of his signature.

For example, in Case 3-26,[241] X, a victim of a traffic accident, signed a contract prepared by Y, an insurance company, in which X stated to release Y from part of its obligation of paying damages (¥50,000 of ¥110,000). Later, X brought up an act for avoidance on the ground of a major misunderstanding in his statement. The court ruled for the plaintiff, finding that he was not able to fully understand the content and legal effect of his conduct when appending his signature due to defected education, and Y, on the other hand, failed to fulfil his duty of explanation when the contract was entered. Similarly, in Case 3-27,[242] X marked his fingerprint on a document prepared by Y, in which X promised to exchange the land under his management with that of Y. X later sought for avoidance of the document. His request was upheld by the court after it found that X was an old man suffering from senile encephalatrophy, he was unable to comprehend the content of the document, and there was no one around to whom he can turn to for help when he marked his fingerprint.

In the above two cases, the courts allowed avoidance for the errors in expression considering neither the equivalence between the performances of the parties nor the contractual purpose of the person in mistake. Instead, they invented an exception to the general rule of mistake as a fairness restoration. This exception is necessary on the level of legal policy given that China is approaching an aging society, therefore the law must enhance its protection especially for those who lacked comprehensive ability for written contracts due to their advanced age and accompanied illness, or other similar reasons.

[240] See SPC, 2013, CLI.C.2227487; SPC, 2013, CLI.C.2227570.
[241] See IPC Lianyungang, Jiangsu, 2016, CLI.C.8920323.
[242] See BPC Huixian, Henan, 2016, CLI.C.39602398.

Three factors must be examined for the court to invoke the said exception: first of all, there should be ascertainable objective reasons such as defected education or illness that can prove the lacked comprehensive ability of the mistaken party, it is not adequate if that party just unilaterally argued for his incompetence;[243] secondly, for the purpose of the enhanced protection, if the party providing the document has carefully explained its content to his opponent with comprehensive impediment, the latter will no longer be able to rely on the exceptional rule and must take full responsibility of his signature; similarly, in cases where the signer of the written contract has sufficient ability and opportunity to consult a third party about the content of the document before appending his signature, the general rule of error in express will have to be applied even if the signer did not know the legal effect of his conduct.

3.5 Summary

Several conclusions can be drawn from the analysis of this chapter:

(1) The relief-friendly attitude towards the error in expression in German law and the relief-conservative approach in English law are both influenced by the historical and theoretical traditions of the two countries. They are not compatible with the social reality of China where there is a prosperous but regional-imbalanced market system. In compared to the German and English doctrines of mistake, to construct the avoidance for error in expression as a mechanism to restore fairness of a transaction, which could be seen as a compromised approach, is a more reasonable choice for Chinese law even from the perspective of legal policy.

(2) The prerequisite for the relief of error in expression as a fairness restoration is that the normative interpretation has attributed unwanted meaning to the words of the manifestation of intent (interpretation comes before avoidance for mistake). However, in Chinese judicial practice, there are many courts that tend to confuse the functional distinction between the two set of rules, resulting in improper extension of the right for avoidance. The unitary theories in China also failed to pay adequate attention to the systematic relationship between interpretation and the law of mistake. Their 'unified treatment' for all categories of mistake can *de facto* never be applied to cases of error in expression, these theories therefore secretly swung to a relief-conservative approach similar to that in English law without providing any argumentation.

[243] See SPC, 2013, CLI.C.2227487.

(3) Either of the following two special requirements must be fulfilled for an error in expression to be legally relevant: a) as the result of mistake, the manifesting party had promised a performance of substantially larger scale or had let to be promised to him a performance of substantially smaller scale, as he intended to, causing gross disparity between the obligations of the parties. For the judgement of gross disparity, the objective valuation of parties' performances is generally decisive, only when there is no available market price for the objective valuation should the gross disparity be determined with reference to the mistaken party's intended scale of performance or anti-performance. b) the error in expression has rendered it impossible for the manifesting party to achieve his typical contractual purpose. Paradigm examples: mistake as to the identity of the subject matter in sale of specific goods; mistake as to the nature of the transaction; mistake as to the identity of the opposite party when the manifestation does not specify its recipient and is intended only for the person thought to be.

(4) The general rule of fairness review must allow some exceptions in cases where the juristic act involves no exchange of performances; where the weight of transactional safety has substantially increased and surpassed the importance of commutative fairness; where the manifesting party is required to pay more attention to avoid his own mistake but has failed to do so; and where the manifesting party, due to some special reasons, lacks the ability to fully understand the nature of a document to which he appended his signature.

Chapter 4 Case Groups on the Relief of Error in Motive

In the following Chapters, I will turn to the issue of the relief of motive errors. The relevant discussion will be divided into three parts: First, in this chapter, I will introduce several groups of cases where the relief for error in motive tend to be upheld by Chinese courts; then, in the next chapter, I will run a comparative study to see how the problem of error in motive is dealt with in some foreign legal systems, and to summarize from them various arguments justifying the legal relevancy of certain types of motive errors; lastly, in Chapter 6, I will further examine the arguments obtained from the comparative study in connection with the case groups organized in this chapter and the internal value order of Chinese civil law, in order to finally come up with a set of (proposed) case group norms for the relief of motive errors.

4.1 Overview of the case samples

On 30 September 2018, I conducted a full-text search in the 'Pkulaw Database' with the keywords 'major misunderstanding' and 'mistake' to the 'analysis' part of the court instruments whose cause of action is 'contractual dispute', the total hits were 3,551; I then ran another full-text search with the keyword 'major misunderstanding' in the same database to decisions made by the SPC, the total hits were 153. After reading through these cases, I picked out 253 samples relating to the issue of error in motive. Among the 253 selected decisions, 144 are valid judgments made by courts of first instance; 118 are valid judgments of courts of second instance; 15 are rulings dismissing or allowing a petition for retrial; 6 are valid judgments of retrial. Most of the selected decisions were made by BPCs and IPCs, the total numbers are 115 and 116; only 15 of the samples are from HPCs, and only 7 are from the SPC.

As to the time of the decisions, 79% of the samples are within the recent five years (2014-2018), the total number is 200, among them 38 are from 2014; 50 from 2015; 50 from 2016; 55 from 2017; 7 from the first nine months of 2018. The remaining samples are mostly decisions after 2005, with three exceptions form 1997, 1999 and 2000.

In regard to the geographical distribution of the samples, nearly half of the selected cases are from the five provinces of East China: Shandong, 11; Jiangsu, 46; Anhui, 6; Zhejiang, 17; Fujian, 9; Shanghai, 11; in total, 100. The number of samples for South

China is 32: Guangdong, 25; Guangxi, 6; Hainan, 1. Decisions made by courts in North China is 25: Beijing, 10; Tianjin, 3; Hebei, 6; Shanxi, 3; Inner Mongolia 3. The total number of Cases from Central China is 28: Hubei, 5; Hunan, 9; Henan, 11; Jiangxi, 3. There are 31 cases that are from Southwest China (Sichuan, 11; Yunnan, 3; Guizhou, 8; Tibet, 1; Chongqing, 8) and 15 that are from Northwest China (Ningxia, 0; Xinjiang, 4; Qinghai, 1; Shaanxi, 8; Gansu, 2). The rest 14 of the samples are from the northeast provinces of China: Liaoning, 5; Jilin, 7; Heilongjiang, 2.

Thus, the samples selected in this chapter have covered nearly all provinces in China (except for Ningxia), and since most of the cases are decided in recent years, they may to some extent reflect the newest trend in the Chinese judicial practice. However, as could be seen, most cases concerning the relief of motive errors are judged by lower courts, their value as precedents are limited, we must provide further justifications to strengthen their rationality. This is, however, the task of subsequent chapters.

4.2 Preliminary organization of case groups

In this section, I will preliminarily divide the selected cases into six case groups. See the following Table 4-1 for details:

Basis of reasoning / Fact patterns	§71 OGPCL	Other bases
Error in nature	Case Group A	Case Group B
Legal error		Case Group C
Calculation error		Case Group D
Reconciliation error		Case Group E
Other situations		Case Group F

Table 4-1: Overview of case groups that allowed relief for motive errors[244]

In the above table, the column lists the detailed fact patterns of motive errors that may be considered by the courts. These fact patterns are specified according to the following criteria: a) the so-called ‘error in nature’, i.e. the mistake as to the nature of the subject matter or the opposite party, and ‘legal error’, i.e. the mistake as to the

[244] See for detail in Appendix I.

existence or contents of certain law, are specified according to the object of the misunderstanding. Such misunderstandings may occur in all types of juristic act, therefore should be sorted out first; b) 'calculation errors', as the computational failures in the process of manifestations of intent, may also happen in different kinds of transactions, but since such type of mistake normally will not overlap with the situations of error in nature and legal error, it can be listed parallel to them; c) the 'reconciliation errors', on the other hand, are mistakes that occurred only in civil reconciliation contracts, in practice, this type of error is often seen, therefore needs to be discussed separately; d) there are still some other cases of motive error that cannot be classified into the above categories, these cases are to be analysed under the heading of 'other situations'.

The horizontal line of Table 4-1 then further divides the above fact patterns into two categories according to the ground of reasoning of the courts. The first category includes cases where the court directly applied §71 OGPCL; the other category contains cases where the court did not cite the provision of the judicial interpretation, or did not actually relied on that provision to justify its decision. The purpose of this distinction is to reflect the limited function of the old judicial interpretation in practice.

In addition to the above cases where the avoidance for mistake was allowed, due attentions must also be paid to the decisions where the relief of mistake were denied by the court. These cases are organized into the following two Case Groups.

Basis of reasoning	§71 OGPCL	Other bases
Negative examples	Case Group G	Case Group H

Table 4-2: Overview of case groups that denied relief for error in motive[245]

In the following sections, I will mainly introduce the six groups of cases where the relief of motive error was granted, cases from Group G and Group H will also be cited for the purpose of comparison when it is necessary.

4.3 Mistakes as to the nature of the subject matter or the opposite party (Case Group A, B)

First, I will analyse the cases involving mistakes as to the nature of the subject

[245] See for detail in Appendix I.

matter or the opposite party of the juristic act. In order to cover more situations, the concept 'nature' here will be grasped in a wider sense: the nature of the subject matter should include not only its natural properties (i.e. 'quality' in the sense of §71 OGPCL), but also any factual and legal relationships of the thing that can consistently affect its value or utility; similarly, the nature of the opposite party should include all characteristics persistently attached to or identifying that party.

4.3.1 The subject matter lacked agreed nature

In many cases, the parties to a contract have reached an agreement as to the nature that the subject matter must possess, when the subject matter later delivered failed to conform to the agreement, some injured parties may claim liabilities for the breach of contract whilst others may request relief of mistake. Chinese courts usually allow that party to freely choose between the two remedial approaches, and when he chooses to invoke avoidance (or adaption under the old law) for the error in motive, the court normally will uphold his request. There are also cases in which the nonconformity of the subject matter does not constitute a breach of contract (e.g. delivery of goods with better quality), in these occasions, the relief for mistake is also generally allowed. See the following examples.

(1) The conditions of the real estate failed to conform to the contract. In Case 4-A1,[246] X sold his apartment to Y at a price calculated on the basis of the agreed area of the subject matter which was predetermined by Z, a survey institute hired by X. Later it was found that the measurement of Z was incorrect, the area of the apartment was in fact larger than expected. Similarly, in Case 4-A2,[247] the buyer and the seller of an apartment agreed on the area of the subject matter according to the record on its Property Certificate. Several years later, when the buyer wanted to resell the apartment, he found that its actual area was much smaller than agreed in the first contract. In the above two cases, both parties in mistake sued for adaption of the price with reference to the actual state of the subject matter, their request were admitted by the courts.[248]

However, in Case 4-H1 concerning also mistaken area of the subject matter,[249] the court had come to a completely different conclusion. There the parties to the contract was dealing with a house that was about to be constructed and will be awarded to the

[246] See IPC V, Chongqing, 2014, CLI.C.5770721.
[247] See IPC Nanjing, Jiangsu, 2017, CLI.C.10992256.
[248] See also BPC Tiedong, Liaoning, 2009, CLI.C.49062675; IPC II, Beijing, 2017, CLI.C.9255485; BPC Economic Zone Weihai, Shandong, 2014, CLI.C.20817416; BPC Gaoming, Guangdong, 2014, CLI.C.16965613.
[249] See BPC Jiangning, Jiangsu, 2017, CLI.C.52743317.

seller as compensation for expropriation. At the time the contract was entered, both parties were unaware of the actual area of the house, they decided this point according to the usual area of a house that would be awarded as compensation for expropriation under similar circumstances. The court denied the existence of a major misunderstanding on the ground that the parties knew that the area they agreed could be different with the actual area of the house, they were not mistaken about any facts. Both of them must assume the risk that the real state of affairs could turn out to be disadvantageous to them.

In Case 4-A3,[250] the parties agreed that the floor height of the purchased apartment should be 5.8m but it was 4.5m; in Case 4-A4,[251] they agreed that the house should be one that was constructed in 1988 but it was in fact built in 1983. In both cases, the court upheld the request of the buyer to avoid the contract for mistakes.[252]

(2) The conditions of the vehicle failed to conform to the contract. In Case 4-A5,[253] the seller X contracted to sell a used car to the buyer Y, which, according to the mileage recorder, was supposed to have run 130,000 Km. However, after receiving the vehicle, Y discovered that the reading on the mileage recorder was falsified, the actual mileage of the car was more than 200,000 Km. Y then sued for avoidance on the ground of X's fraud. The court found that the reading of the mileage recorder was not falsified by X but by the former owner, X was unaware of such fact thus had no fraudulent intention. Nonetheless, since the parties were commonly mistaken about the mileage of the used car, the contract may be voided for major misunderstanding.

Case 4-A6 also involved a mistake as to the mileage of a used car.[254] In this case, the parties had not explicitly agreed on the mileage of the vehicle in the contract, but the court held that the car was sold in its appeared state, including the condition that was indicated by the mileage recorder. On this basis, the court reached the same conclusion as that in the previous case.[255]

The error in motive may involve other nature of the subject matter as well. For example, in Case 4-A7,[256] the parties entered a sales contract for a new car which was actually a repaired old car; in Case 4-A8,[257] the parties agreed that the colour of the car

[250] See IPC Ganzhou, Jiangxi, 2016, CLI.C.10713054.
[251] See BPC Gulou, Jiangsu, 2014, CLI.C.19219538.
[252] See also MPC Qingdao, 2006, CLI.C.73318 (involving the age of a ship); IPC Yueyang, Hunan, 2013, CLI.C.2530088 (involving agreed nature of standing trees)
[253] See IPC Changzhou, Jiangsu, 2017, CLI.C.9665890.
[254] See IPC Changchun, Jilin, 2018, CLI.C.10922589.
[255] See also BPC Gangzha, Jiangsu, 2014, CLI.C.5207442.
[256] See BPC Guangan, Sichuan, 2017, CLI.C.54532299.
[257] See BPC Quanshan, Jiangsu, 2010, CLI.C.1927430.

should be 'royal blue' but in fact this model of car does not have such colouring; in Case 4-A9,[258] the parties had agreed on the vehicle identification number (VIN) and the engine number of the used car, but later it turned out that both the VIN and the engine number were illegally falsified. In all these cases, the buyer's right to avoid the contract was recognized by the courts.[259]

(3) The subject matter was not suitable for the agreed use. In some occasions, the parties to a contract may not have agreed directly on the nature of the subject matter but had reached consensus on its intended use. If the subject matter did not possess the nature necessary to enable such use, the court will normally allow the relief for mistake. For example, in Case 4-A10,[260] X rented a house from Y for the purpose of running business, however, when X applied for business license to the government, he was told that the house was planned as residential and cannot be used for commercial purposes. X then sued for avoidance of the contract and the court gave judgment for him. In this case, although the contractual document did not indicate the intended business use of the subject matter, it was implied considering the amount of rent, the size and location of the house, and the actual condition of the house failed to meet such need.[261]

4.3.2 The subject matter lacked nature required by supplementary contractual interpretation or law

In some cases, the contract *per se* may contain no indication as to the quality of the subject matter. Under these circumstances, according to §§61, 62 CL, as long as the parties failed to reach a supplementary agreement afterwards, the court should first attempt to construct the contract by referring to relevant contractual terms or usages (§61 CL); if such sources do not exist, the law stipulates that the quality should be determined on the basis of national or industry quality standards of the good, and, in absence of which, according to usual quality standard or the standard that is in confirm with the purpose of the contract (§62 CL). In these cases, if the subject matter failed to meet the quality requirements supplemented by the court or law, the disadvantaged party may also request avoidance of the contract.

In Case 4-A11,[262] the house sold turned out to be an uninhabitable dilapidated

[258] See IPC Meizhou, Sichuan, 2016, CLI.C.8930165.
[259] See also BPC Anxi, Jilin, 2017, CLI.C.48869291; IPC Meizhou, Sichuan, 2014, CLI.C.5889137.
[260] See BPC Yuhang, Zhejiang, 2017, CLI.C.52957020.
[261] See also BPC Kecheng, Zhejiang, 2017, CLI.C.43747451; IPC Nanchong, Sichuan, 2015, CLI.C.15909030; IPC Zhongshan, Guangdong, 2014, CLI.C.6378843; BPC Nanzheng, Shaanxi, 2017, CLI.C.48525423; BPC Jianhu, Jiangsu, 2017, CLI.C.54193308.
[262] See IPC Jiujiang, Jiangxi, 2017, CLI.C.9210006.

building;[263] in Case 4-A12,[264] there were serious cracks in the wall of the house; in Case 4-A13,[265] the house was suffering from severe termite damages. In all these cases, the subject matter lacked usual qualities of residential houses, and the relief for mistake were all allowed by the court.

4.3.3 Public law restrictions on the use of the subject matter and its transferability

In practice there are also many cases in which the subject matter, although has no quality defects, possesses certain nature which led to public law restrictions on its utility or transferability. In these cases, the relief for major misunderstanding is also normally permitted by the courts.

(1) Restrictions on the use of the subject matter. In Case 4-A14,[266] X purchased a used vehicle from Y, the dealer. X didn't know at the time that the car was subject to a government regulation which limited its driving area to only a part of the city due to its poor environmental performance. Similarly, in Case 4-A15,[267] the logistic company X bought four trucks from the dealer Y for the transportation of its goods, later it turned out that the environmental performance of these trucks failed to meet the municipal standard, and was forbidden to be used for road transport. In both cases, the contract was voided by the courts.

(2) Restriction on the transferability of the subject matter. In Case 4-A16,[268] X contracted to purchase Y's real estate, after paying the price, X found that the real estate was registered as 'industrial building' which, according to local regulations, may not be transferred to a party that is not an enterprise. X then filed a suit for the avoidance of the contract, and the court upheld his request.[269]

4.3.4 Erroneous estimation of the value of the subject matter

In a part of the selected decisions, the court held that the manifesting person's error as to the 'actual value' of the subject matter will constitute a major misunderstanding. This part of cases may be further divided into the following two situations: under the first situation, the manifesting party was not directly mistaken about the value of the

[263] See also BPC Qingshan, Hubei, 2014, CLI.C.6919597; BPC Jiaojiang, Zhejiang, 2014, CLI.C.4107061.
[264] See IPC Zhuhai, Guangdong, 2016, CLI.C.9487011.
[265] See BPC Kunshan, Jiangsu, 2014, CLI.C.51845097.
[266] See IPC Taiyuan, Shanxi, 2015, CLI.C.8679935
[267] See IPC Changsha, Hunan, 2015, CLI.C.15569709.
[268] See IPC Shenzhen, Guangdong, 2016, CLI.C.9819944.
[269] See also BPC Kunshan, Jiangsu, 2016, CLI.C.42476707.

subject matter, but was mistaken about a factor that may affect the its evaluation, this type of 'mistaken value' is essentially another expression of the 'error in nature'; In contrast, in the other situation of mistaken value, the manifesting party was in error directly as to the market price of the subject matter. The market price of a thing does not constitute one of its 'nature', thus this type of cases should not be included into the present case group. Nonetheless, for the purpose of providing comparison, it will also be discussed here.

(1) Mistake as to factors affecting the value of the subject matter. In Case 4-A17,[270] the debtor and the creditor had agreed to settle part of the debt with a batch of liquor provided by the former. The liquor was of A brand, however, since the packaging of A brand liquor was similar to that of another well-known B brand, the creditor mistakenly believed that it was of similar grade to the latter. In fact, the liquor of brand A was much cheaper than brand B. In Case 4-A18 involving also a settlement of debt,[271] the creditor was mistaken about the nickel content in the nickel slag provided by the debtor. In both cases, the court allowed avoidance of the settlement.[272]

In Case 4-A19,[273] the buyer of a house entered the contract without knowing that the house was the crime scene of a terrible homicide happened four years ago, he later insisted on avoiding the transaction. The court gave judgment for him holding that the idea that the house was a 'unlucky abode' normally will cause its resident to feel scared or uncomfortable, which would impair its market value, thus the buyer's unawareness as to this fact constituted a major misunderstanding.[274] However, in Case 4-G1[275] where the subject matter of the contract was also a 'unlucky abode', the court refused to grant relief for the mistake. This difference is understandable considering that the present case involved only a lease of business premise instead of a purchase of residential house, the death incident may not have such a serious impact on the business of the lessee as that on the buyer of the house.

(2) Mistake as to the market price of the subject matter. Unlike the cases cited above, in Case 4-A20 decided by SPC,[276] X contracted to purchase some metal cadmium from Y at the price of ¥10,850 per Kg. The market price of metal cadmium with the same purity, however, was only ¥650-700 per Kg at the time. X suffered huge

[270] See IPC Rizhao, Shandong, 2017, CLI.C.9964640.
[271] See BPC Lianshui, Jiangsu, 2015, CLI.C.51880515.
[272] See also BPC Fukang, Xinjiang, 2016, CLI.C.36337313.
[273] See BPC Yanbian, Jilin, 2017, CLI.C.9892099.
[274] See also HPC Jilin, 2014, CLI.C.3985530; BPC Huli, Fujian, 2015, CLI.C.41533070.
[275] See IPC Xuzhou, Jiangsu, 2012, CLI.C.868957.
[276] See SPC, 1999, CLI.C.47930.

loss from the transaction, he therefore refused to perform the contract on the basis of his mistake. The court of first instance ruled for the seller, the SPC overturned the judgment of the lower court, holding, *inter alia*, that the buyer was in a major misunderstanding 'as to the value of the subject matter'.

The above proposition adopted by the SPC was rarely followed by lower courts in subsequent cases. In fact, most of the recent judgments tend to refuse the relief of mistake when it involves only the market price of the subject matter.

For example, in Case 4-G2 of the HPC of Zhejiang,[277] X promised to provide a piece of bloodstone to Y to settle ¥300,000 of his debt. Y later discovered that the market reference price of the bloodstone was only ¥30,000-50.000, he then brought up an action for the avoidance of the settlement. Y's request was dismissed by the court of both instances. In its judgment, the Zhejiang HPC held that the bloodstone in this case is a type of collectible to which different collectors will make different valuations, as a result, its market price may fluctuate greatly in different time periods, and the creditor must bear the risk of his own evaluation.

Not only in situations concerning misevaluation of collectibles, in Case 4-G3[278] where the seller offered a much lower price for his house due to incorrect estimation of its market value, the court also denied the relief of motive error on the ground that the seller was not mistaken 'as to the variety, quality, specifications or quantity, etc. of the subject matter' (§71 OGPCL). Also, based on the same reason, in Case 4-G4[279] where the lessor was mistaken about the market rent of the subject matter, the court dismissed his request for avoidance.[280]

The position of most judgments in China is consistent with the common practice in comparative law.[281]

4.3.5 The nature of rights

In addition to the above cases where the error in motive involved the nature of tangible things, Chinese courts would also allow relief when such error was to the nature of certain legal rights.

(1) Mistake as to the utility of land usufructuary. In Case 4-A21,[282] X obtained

[277] See HPC Zhejiang, 2016, CLI.C.8707837.
[278] See IPC Guiyang, Guizhou, 2014, CLI.C.6484044.
[279] See IPC Shenzhen, Guangdong, 2011, CLI.C.837678.
[280] See also IPC Heze, Shandong, 2017, CLI.C.9787901.
[281] See Ernst Kramer, *Der Irrtum beim Vertragsschluss: Eine Weltweit Rechtsvergleichende Bestandsaufnahme* (Zürich: Schulthess Polygraphischer Verlag, 1998), 110.
[282] See HPC Jilin, 2016, CLI.C.9880381.

from Y a usufructuary right for the management of a piece of forest land. In the contract it was specified that the land should be used for X's business of wood frog breeding. X did not fully investigate the environment the land prior to the conclusion of the contract, based on the statement of the former contractor, he mistakenly believed that the scope of the usufructuary right included part of a river. After finding out the truth, X brought up an act for the avoidance of the juristic act, alleging that he was unable to use the land for his business and was in error as to this fact. The court of first instance dismissed X's claim on the ground that his evidence failed to prove his mistake. The court of second instance disagreed with the factual finding of the lower court, it held that X was in mistake as to whether his right included a river, and Y, who was aware of the intended use of X, should have clarified such fact for him. Since Y failed to do so, X may avoid the contract. After the judgment of second instance came into effect, Y submitted a retrial petition to the HPC of Jilin, arguing that although the land included no river, there were many hatching pools and winter ponds within it, which could meet the need of frog breeding, X was not suffering under any major misunderstandings. This petition, however, was not accepted by the court, the HPC held, citing §71 OGPCL, that despite the objective possibility of frog breeding on the land, X himself did not have such capability, he should be allowed to avoid the contract for his mistake as to the nature of the subject matter.

Similarly, in Case 4-A22,[283] X obtained from Y a right to use state-owned land for construction, later he discovered that a large part of the land belongs to a national ecological protection zone where the building of industrial facilities is forbidden. In this case, the court also allowed relief for the mistake.

(2) Mistake as to the expected output of land usufructuary. In Case 4-A23 decided by the HPC of Tibet,[284] X, a county government, entered a contract with Y, an enterprise, on transferring the operation of a logging farm. The contract stipulated that Y will take over the logging farm and obtain corresponding usufructuary right to harvest from certain forest. At the time the contract was concluded, both X and Y believed that the forest could provide 50,000 m³ of logs in five years. However, due to the limited harvesting quotas given by the higher government and the large proportion of hollow woods in the forest, the expected amount of harvest was impossible to be reached. The court eventually voided the contract on the basis of gross mistake.

[283] See BPC Dengkou, Inner Mongolia, 2014, CLI.C.4017396.
[284] See HPC Tibet, 1997, CLI.C.85385.

(3) Mistake as to the possibility to realize a right. In Case 4-A24,[285] X assigned his right to a third party to Y, who later discovered that the third party had already entered the process of bankruptcy and the possibility of full realization of the assigned right was extremely small. Similarly, in Case 4-A25,[286] the assignee of a debt found that the right was determined by the court as unenforceable, therefore cannot be realized. In both cases, the court affirmed avoidance of the contract.

(4) Mistake as to the remaining term of a right. In Case 4-A26,[287] X contracted to sublet a shop to Y. The contract confirmed that the term of the lease between X and the owner of the shop was four months remaining. After the expiration of the term, Y must renew the lease with the owner. The contract contained no guarantee for obtaining the renewal, however, it could be inferred from the amount of rent that Y had the expectation that the lease would be renewed and X was aware of that expectation. In fact, at the time the deal was made, the shop had been included into the government's demolition plan, and the renewal of the lease was already impossible. In this case, the court supported Y's request to avoid the contract.

In Case 4-A27,[288] X purchased Y's business of operating a hotel. Y didn't tell X that the hotel's venue was leased from a third party and the term of the lease was about to expire. X promised a high price for the purchase in the expectation of continuing the business in the future. However, after the lease expired, the owner of the venue refused to renew it. The court also allowed excuse of the mistake.[289]

4.3.6 Misidentification of the nature of the opposite party

Compared to the cases of error in the nature of a thing, mistakes involving the nature of a person are not frequently seen in the judicial practice of China. Typical examples are as follows:

(1) Mistake as to certain qualification of the opponent. In Case 4-A28 recently decided by the First Circuit Court of the SPC,[290] X, a town government, concluded a compensation agreement with Y, whose usufructuary right to the management of farm land was expropriated by the state. The contract stipulated that X shall compensate Y's loss of the right and the facility stationed on the land. Later it turned out that Y was not

[285] See IPC Xuzhou, Jiangsu, 2016, CLI.C.9109934.
[286] See IPC Zhengzhou, Henan, 2013, CLI.C.2203544.
[287] See IPC Changsha, Hunan, 2009, CLI.C.1303361.
[288] See IPC Maanshan, Anhui, 2018, CLI.C.11134948.
[289] See also BPC Longchuan, Yunnan, 2015, CLI.C.34028425.
[290] See SPC, 2015, CLI.C.10090161.

the owner of facility thus should not be awarded compensation for it. The circuit court allowed partial avoidance of the agreement.

The above position of the SPC was generally followed by the lower courts. For example, in Case 4-A29 of the HPC of Chongqing,[291] X, a state-owned enterprise incorporated for the management of national assets for eco-migration affairs of the Three Gorges Dam, was instructed by the state to provide preferential houses for immigrants with certain qualification. On the basis of this instruction, X entered a sales contract with Y, believing Y was entitled to buy the preferential house. In fact, Y was not qualified for the purchase. X then filed a suit for the avoidance of the contract, his request was upheld by the lower courts, and Y's application for retrial was also dismissed by the HPC.[292]

Not only mistakes as to the qualification of the opposite party in public law, errors involving its qualification in private law may also receive protection from the court. For example, in another decision made by the Chongqing HPC (Case 4-A30),[293] X, the Chairman of Company Y, obtained 5 million shares of the said company in the process of its reform from a state-owned enterprise into an LLC. Later, the company decided to convert some of its profits into employee shares and distribute them to the shareholders according to their shareholding ratio. As a result, X obtained another 2.5 million shares. It was then discovered that, during the reform process of Y, X had misused his power in the enterprise and intentionally depressed its value in order to obtain more shares at a lower price. X's subscription to the first 5 million shares was confirmed to be invalid, causing him to lose the qualification to be awarded the second 2.5 million shares. Y's distribution of these shares was therefore avoided by the HPC on the ground of a major misunderstanding.

(2) Mistake as to the kinship of the opponent. In Case 4-A31,[294] the plaintiff gave up his share on the family house upon devoice in consideration of the benefit of his daughter. After finding out that he was not the biological father of the daughter, the plaintiff invoked avoidance of the juristic act. Similarly, in Case 4-A32,[295] X and Y sold their house to Z at a very low price thinking that Z was their grandson. In fact, Z had no blood relationship with them. In both cases, the relief of mistake was upheld by

[291] See HPC Chongqing, 2016, CLI.C.15716795.
[292] See also IPC Shenyang, Liaoning, 2017, CLI.C.10886093; IPC II, Shanghai, 2017, CLI.C.9978210; IPC I, Beijing, 2015, CLI.C.6728497; IPC Xiangtan, Hunan, 2015, CLI.C.8661997; BPC Kunshan, Jiangsu, 2016, CLI.C.53951756; BPC Huairou, Beijing, 2014, CLI.C.83139088; BPC Pudong, Shanghai, 2009, CLI.C.497327.
[293] See HPC Chongqing, 2017, CLI.C.10550755.
[294] See IPC Jinzhong, Shanxi, 2017, CLI.C.9283206.
[295] See BPC Xihu, Zhejiang, 2016, CLI.C.34342499.

the court.[296]

4.3.7 Errors in nature caused by the opposite party (Case Group B)

Until now, I have analyzed cases that mostly could be categorized into Case Group A. In these cases, whether there was a major misunderstanding may be determined by the formal application of §71 OGPCL. Nonetheless, there are also many cases where the relief of errors in nature is better explained on other grounds.

(1) Mistake induced by the misrepresentation of the opponent. In Case 4-B1 recently decided by the SPC,[297] X contracted to assign his exploration right as to a coal mine to Y. During the process of negotiation, X sent Y a copy of 'Study Report' which indicated the feasibility of the development of the coal mine. Later it was discovered that the copy of the Study Report had many differences with its original version. These differences involved many crucial aspects of the mine. Y therefore brought up an action against X, arguing that the copy of Study Report had caused serious misconceptions as to the content of the contract, thus the contract must be avoided.

The court of first instance gave judgment for Y, holding that it was suffering from major misunderstandings about certain important points of the mine. The SPC, however, disagreed with the position of the lower court with the following reasons: a) The Study Report was not the only basis for the whole transaction, in fact, X had provided other materials for the valuation the core indicators of the subject matter, and had promised their authenticity and reliability. The court of first instance should not have decided the case relying only on the Study Report. b) The court of first instance had not conducted any professional comparative analysis on the different points between the Study Report sent to Y and its original version. Its conclusion, that the two versions of Study Report had essential differences, lacked firm factual basis. c) Y was a commercial company specialized in prospecting and mining, it should have sufficient professional knowledge, judgment ability and risk expectations. The question, whether Y should have noticed the differences between the Study Report and other materials provided by X if due attention was paid, was also unanswered by the court of first instance. Based on the above analysis, the SPC sent the case back for retrial.

Thus, in the above judgment, the SPC was not denying the basic idea of the lower court which stands for the relief of error in motive when such error was induced by the

[296] See also BPC Huangpu, Guangdong, 2015, CLI.C.26764936.
[297] See SPC, 2017, CLI.C.11525197.

misrepresentation of the opposite party. The SPC sent back the case only because the lower court failed to ascertain two crucial facts: one is that whether Y was actually suffering from a fundamental mistake as to the nature of the subject matter because of the statement of the Study Report; the other is that whether Y could have avoided the mistake had it paid due attention to the representations of the opponent.

In Case 4-B2 decided by the HPC of Shanghai,[298] X arranged an auction for one of his houses. In the 'Special Notice' provided to the bidders, X stated that the buyer of the house will not be obliged to pay land transfer fee to the state. Based on this notice, Y participated in the auction and obtained the house. X's statement about the land transfer fee was later found to be false, Y brought up an action for the avoidance of the purchase. The Shanghai HPC upheld the decision of the lower court in support of Y's request. The judge held that the misrepresentation of X had induced the mistaken conceptions and expectations of the buyer, which led to his misunderstanding as to an important factor of the subject matter, thus he was entitled the right to avoid the contract on the ground of major misunderstanding. The position of the HPC of Shanghai is in consistent with the precedent of the SPC.[299]

It should be noted that although the misrepresentation of the opposite party is often a key element for the relief of mistake, if circumstances of the case indicate that the manifesting party should not have completely relied on the other party's statement, the validity of the juristic act may not be harmed. This position was already reflected in the above Case 4-B1 and could also be seen in other decisions of the SPC. For example, in Case 4-H2,[300] the auction seller had made incorrect representation as to the nickel content of the nickel mine on sell. Nonetheless, in the 'Auction Notice' it was also stated that the mine was to be sold in its current condition, and the bidders should inspect and examine the lot by themselves. The SPC held that this statement exempted the seller from its liability, and the previous misrepresentation was therefore irrelevant.

(2) Mistake caused by the opponent's non-disclosure of certain information. In contrast to the scenario of misrepresentation, there are also many cases in which the opposite party caused the mistake not positively by his untrue statement but passively

[298] See HPC Shanghai, 2005, CLI.C.77862.
[299] See also IPC Xi'an, Shaanxi, 2017, CLI.C.10158228; IPC Nanjing, Jiangsu, 2017, CLI.C.9707484; IPC Anyang, Henan, 2017, CLI.C.10184479; IPC Luzhou, Sichuan, 2016, CLI.C.8778015; IPC II, Tianjing, 2016, CLI.C.8414862; IPC Nanchong, Sichuan, 2016, CLI.C.8897643; IPC Changzhou, Hebei, 2015, CLI.C.8245217; IPC Nanning, Guangxi, 2013, CLI.C.2664112; BPC Jiawang, Jiangsu, 2017, CLI.C.52230816; BPC Longquanyi, Sichuan, 2015, CLI.C.35838690; BPC Beichen, Tianjing, 2015, CLI.C.18241818; BPC Longhua, Hainan, 2014, CLI.C.16924129; BPC Jiahe, Hunan, 2013, CLI.C.2986814; BPC Dongcheng, Beijing, 2000, CLI.C.6854.
[300] See SPC, 2012, CLI.C.2432479.

by breaching of his duty to disclose certain information. Under these circumstances, the court normally will also allow the relief of mistake. Two typical situations of non-disclosure may be distinguished from the judicial practice.

First of all, in cases where the existence of a mistake was known to the opposite party before the juristic act was completed, that party generally should have informed the manifesting party about the error, if he concealed this fact in order to capitalize on it, the law may avoid the transaction for major misunderstanding. In Case 4-B3 decided by the Jiangsu HPC,[301] the area of the apartment on sale was much larger than that stipulated in the contract, the court upheld the seller's request of avoidance considering the fact that the buyer had conducted measurements on the apartment before the contract was concluded, he should have notice the seller about the mistake instead of 'attempting to take advantage of the other party's major misunderstanding for the purpose of obtaining illegitimate interests'.[302]

Secondly, if the opposite party was obliged to provide information on certain issue but failed to fulfill this duty, the court may also allow avoidance even when the mistake *per se* was not known to the first party. For example, in Case 4-B4 of the HPC of Fujian,[303] a vehicle dealer did not inform the consumer that the car he purchased was a sightseeing vehicle which can be used only in a specific area. The court held that the dealer, as a professional seller, should have explained to the consumer about certain conditions of the vehicle as long as they might influence the usual use of it, and because the dealer failed to do so, the consumer may avoid the contract. Similarly, in Case 4-B5 decided by the HPC of Hunan,[304] the seller did not disclose the fact that the planned use of the land in auction had been changed from commercial to educational, the court also avoided the contract on the ground of the seller's breach of his information duty. The SPC is of the same opinion, in Case 4-B6,[305] the seller of a coal mine concealed the fact that there were spontaneous combustions in the mine. On this basis, the SPC recognized the existence of a major misunderstanding even though the buyer had previously expressed acceptation as to the condition of the subject matter.[306]

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[301] See HPC Jiangsu, 2013, CLI.C.2520489.
[302] See also BPC Jianggan, Zhejiang, 2016, CLI.C.38151366.
[303] See HPC Fujian, CLI.C.10683706.
[304] See HPC Hunan, 2016, CLI.C.9392534.
[305] See SPC, 2015, CLI.C.81326786.
[306] See also IPC Yanbian, Jilin, 2018, CLI.C.11133397; IPC 8th division of Xinjiang Production and Construction Corps, 2018, CLI.C.10808683; IPC Guangzhou, Guangdong, 2017; CLI.C.10919693; IPC Guangzhou, Guangdong, 2017, CLI.C.10030489; IPC Guangzhou, Guangdong, 2016, CLI.C.9475886; IPC 12th division of Xinjiang Production and Construction Corps; 2016, CLI.C.15658600; IPC Foshan, Guangdong, 2015, CLI.C.8407565; IPC Weinan, Shaanxi, 2015, CLI.C.7484085; IPC Hangzhou, Zhejiang, 2014, CLI.C.6664608; IPC Quzhou, Zhejiang,

4.4 Legal errors (Case Group C)

In this section, the term 'legal error' is used in a broad sense, it includes all the ignorance or misconception as to the existence and contents of a legal norm.[307] Although in some cases such a mistake may also result in an error in expression (a paradigm example is the misunderstanding of the meaning of a legal terminology),[308] these cases will not be categorized in the present case group.

4.4.1 Misconceptions involving the burden of taxes and fees

Legal errors occur most frequently in the field of tax law, the attitude of the court towards their relief is divergent.

(1) Cases where the relief was granted. In Case 4-C1,[309] X assigned its usufructtuary right on an industrial land to Y. Upon assignment, the parties reached another agreement stipulating that the taxes generated from the transaction, including corporate income tax and other items, should all be borne by the assignee. Y paid most of the taxes according to this agreement. However, with regard to the corporate income tax, Y claimed major misunderstanding and refused to undertake the burden of payment. The court ruled for Y, holding that, given the particularity of the calculation method of the corporate income tax, Y was unable to know the accurate tax rate and amount when the contract was concluded, therefore, when the burden of payment turned out to be excessively heavy, it constituted a major misunderstanding.

The above analysis of the court is confusing. In fact, Y as a professional business entity, was completely aware at the moment of contracting that the final rate and amount of the corporate income tax cannot be determined at the time, it undertook its payment on the basis of such knowledge, thus has assumed the risk of the uncertainty. Y was not mistaken about any legal norms in the present case.[310]

In Case 4-C2 with fact that is slightly different,[311] the buyer of an apartment was told by a real estate broker that the purchase will generate approximately only ¥20,000

2014, CLI.C.6255483; IPC Guangzhou, Guangdong, 2005, CLI.C.109545; BPC Zhunhua, Hebei, 2017, CLI.C.51684455; BPC Changshu, Jiangsu, 2017, CLI.C.43114802; BPC Luohu, Guangdong, 2016, CLI.C.37886141; BPC Xiaodian, Shanxi, 2016, CLI.C.44677622; BPC Canghai, Fujian, 2016, CLI.C.52206631; BPC Jiangnan, Guangxi, 2016, CLI.C.37319750; BPC Pingxiang, Hebei, 2016, CLI.C.26810205; BPC Quzhou, Zhejiang, 2015, CLI.C.20286276; BPC Nanan, Chongqing, 2014, CLI.C.5780749; BPC Tongzhou, Jiangsu, 2014, CLI.C.5209058.

[307] See Junqing Li, "On 'Legal Errors' in Civil Law," *Political Science and Law*, no. 6 (2017), 133.

[308] See Flume, *Das Rechtsgeschäft*, 467.

[309] See IPC Shaoxing, Zhejiang, 2013, CLI.C.2540463.

[310] Compare *supra* Case 4-H1.

[311] See BPC I Zhongshan, Guangdong, 2016, CLI.C.46865817.

of taxes and no other fees, the buyer therefore promised to the seller to undertake the payment of all taxes and fees. In fact, the transaction will result in another ¥40,000 as land transfer fee. The buyer then sued for avoidance of the contract. The court held that the payment of the additional fee was beyond the expectation of the buyer and was overly burdensome for him, thus he should be granted the relief of mistake.[312]

(2) Cases where the relief was denied. In Case 4-G5,[313] X was the first buyer of Y's house. In its contract with Y, X assumed the payment of all taxes and fees generated from the purchase. Later, X assigned his contractual position to the second buyer Z (X was the representative of Z). Y and Z then concluded a new contract with similar content to the contract assigned. Both contracts, however, was not performed by the buyers, who alleged that, due to their unfamiliarity as to the law, they were both under major misunderstanding as to the payment of taxes and fees. The pleas of X and Z were not accepted by the court on the following reasons: First, Z was a real estate development company, X was its representative, they could not have been unfamiliar as to the regulations of taxed and fees; Second, even if they were mistaken about the law, such error was not one that involved an elementary content of the contract, thus was legally irrelevant.[314]

4.4.2 Misconceptions involving legal liabilities

Another type of legal error occurs when the manifesting party is mistaken about the existence or scope of his legal liability. See the following examples.

(1) Cases where the relief was granted. In Case 4-C3 decided by the SPC,[315] X was accused of contract fraud because the company he was in charge of breached its contract to Y. The criminal court of first instance found him guilty, and sentenced him to 15 years in prison together with a penalty sum of ¥500,000. During the criminal trial of second instance, X issued a 'Commitment Letter' to Y in order to alleviate or exempt his criminal responsibility. In the letter, X promised that he will perform the contractual obligation to Y within a limited period, and that all remaining obligations of Y under the contract are to be discharged. Later, X was found innocent by the higher court, he then refused to admit the binding force of the Commitment Letter.

The court of first instance insisted on the validity of the letter, the court of second

[312] See also BPC Zhongyuan, Henan, 2016, CLI.C.45200171; BPC Xinbei, Jiangsu, CLI.C.47583238; BPC Haidian, Beijing, 2014, CLI.C.3866996; BPC Xiacheng, Zhejiang, 2009, CLI.C.2716757.
[313] See IPC III Beijing, 2014, CLI.C.6283647.
[314] See also IPC II Beijing, 2013, CLI.C.3806677.
[315] See SPC, 2014, CLI.C.2973973.

instance, however, gave judgment for X on the ground that X was unable to make proper decisions during criminal detention and that the criminal judgment underlying the letter was revoked, thus the letter should also become invalid. The case was finally brought to the SPC for retrial. The SPC ruled that the Commitment Letter was not invalid, but was voidable by X since he was in error about his criminal responsibility, hence was suffering from a major misunderstanding as to 'the nature of the juristic act' (§71 OGPCL). Here, the SPC had understood the provision of the judicial interpretation in a very unusual way, normally the nature of the act refers to essence of the obligations generated from the juristic act, in the present case, however, the manifesting party had made no mistake as to the content of the juristic act, he was in error only to the state of law.[316]

(2) Cases where the relief was denied. In Case 4-G6,[317] X was killed in a car accident on his way back home after doing a favour for Y. Y believed that he was responsible for the death of X, therefore reached a compensation agreement with X's family promising a payment of ¥80,000 to the latter. After finding out that he was not liable for X's death, Y brought up an action seeking avoidance of the compensation agreement. Y's request was dismissed by the court. It was of the opinion that an error in law generally may not be excused.

The same position could also be seen in many other cases as is listed below.

4.4.3 Other cases where the relief for legal error was denied

In Case 4-G7,[318] X entered a precontract with Y for the lease of Y's shop, the term of the lease was agreed to be 50 years. Shortly after the precontract was signed, X sued to avoid the transaction, alleging that according to §214 CL, the term of a lease may not exceed 20 years, since he was unaware of this provision, the precontract should not bind him. The court held that there was no major misunderstanding in this case because the error in law was not included within the scope of §71 OGPCL.[319]

In Case 4-G8,[320] X sold his house to Y. In the contract, the parties agreed that X was obliged only to transfer the title of the house to Y, but was not responsible for

[316] See also IPC Jinan, Shandong, 2017, CLI.C.10701365; IPC Bijie, Guizhou, 2015, CLI.C.7357215; IPC Chengdu, Sichuan, 2014, CLI.C.5796373.
[317] IPC II Beijing, cited from Jianyong Hu, "The Scope of Relievable Mistakes in Manifestations of Intent," *People's Court Daily*, 27. June 2006, C03.
[318] See IPC Luoyang, Henan, 2016, CLI.C.9408407.
[319] See also BPC Chaoyang, Beijing, 2017, CLI.C.53431590; BPC Gulin, Sichuan, 2016, CLI.C.36751639; BPC Chongchuan, Jiangsu, 2015, CLI.C.40874267; BPC Nanshan, Guangdong, 2012, CLI.C.36926080.
[320] See BPC Songxi, Fujian, 2014, CLI.C.5635529.

assisting Y to obtain the certification of the right to the use of land. However, according to §147 PL, when the title of the building is transferred, the right to the use of land should also be assign to the buyer. X was unaware of this provision, therefore, when Y brought up an action against him for performance, X proposed a counterclaim for the adaption of the price on the basis of his mistake. X's claim was rejected by the court, it held that the ignorance of law is not legally relevant since the law was published and accessible to every person.[321]

In the above cases, the court generally denied the relief of legal error on no solid grounds. Firstly, as was pointed out in previous chapters, the provision of the old judicial interpretation was no longer reliable after the legislation of CL. In fact, in a tremendous number of court decisions, the relief of error in motive as to an issue not listed in §71 OGPCL was also allowed. It is unclear why cases of legal errors must be treated differently. Secondly, the idea that the ignorance of law is irrelevant because one should know the law seems to be following the Roman legal maxim of *ignorantia iuris nocet*.[322] Nonetheless, it is notable that even in Roman law this was not considered to be a hard-and-fast rule. Its application depended to a certain extent on what could reasonably be expected of the people subject to the law.[323] Women, minors, soldiers and some other inexperienced persons (*rustici*) were allowed to be excused for their ignorance of the law.[324] Also, it would be odd to apply this Roman doctrine strictly to cases of legal error in modern time, given that today even legal experts cannot be expected to know all the law, to impose such a requirement to ordinary people in legal transactions is obviously unrealistic.[325]

4.5 Calculation errors (Case Group D)

Calculation errors are failures that occur in the computational process of a juristic act, this type of mistake will fall into Case Group D when the defected computational process constitutes the basis of the manifestation of intent. This case group could be further divided into the following two constellations.

4.5.1 Situations where the mistake was shared by the parties

[321] See also BPC Yixing, Jiangsu, 2014, CLI.C.7709788.
[322] See Paul in *Digesta*. 22. 6. 9 pr.
[323] See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990), 606.
[324] See Max Kaiser, Rolf Knütel, *Römisches Privatrecht*, trans. Shiyong Tian (Beijing: Law Press, 2018), §8 para.27.
[325] See also Li, "On 'Legal Errors' in Civil Law", 135.

In Case 4-D1,[326] X hired Y for the construction of a project. In the contract it was agreed by the parties that the price should be determined according to the formula in the bid quotation submitted by Y. Later, X and Y signed a 'Memorandum' in which they modified the formula for the calculation of price. After the project was completed, Y entrusted a third party to conduct a settlement audit on the construction price, the result was over 78 million yuan, which was confirmed by X. Nonetheless, it was not known to both parties that, according to relevant law, the modification of the formula for the calculation of price imported by the Memorandum was invalid. The price of the project should have been determined under the old formula in the bid quotation, which will come to the result of only about 51 million yuan. X therefore sued for avoidance of its confirmation to the mistaken price. His request was upheld by the court.

In Case 4-D2,[327] X, a county government, was obliged to pay compensation to Y for the expropriation of three hydropower stations owned by the latter. Both parties jointly entrusted a third party to evaluate the facilities within the scope of compensation. However, in its evaluation process, the third party incorrectly applied the 'liquidation value type' instead of the 'market value type' as calculation standard. As a result, the compensation value of the subject matter was seriously underestimated. Unaware of this mistake, Y issued a confirmation to the amount of compensation determined by the third party. The court eventually avoided the confirmation on the ground of Y's major misunderstanding.

In the above two cases, the calculation error was made by a third party entrusted to do the computation, the result will not be of any difference if the miscalculation originates from the parties themselves.

For example, in Case 4-D3 decided by the HPC of Guizhou,[328] the joint holders of a usufructuary right for the management of a farm land reached a distribution agreement as to the price of assigning the right to another person. They estimated that the area of the land was 21 *mu* and the total amount of the price was then calculated and distributed on this basis. Later it was discovered that the actual area of the land was about 30 *mu*, some of the participants to the distribution agreement therefore brought up an action for its avoidance. The HPC of Guizhou agreed with the judgements of the lower courts favouring the relief of mistake. Citing §71 OGPCL, the HPC held that the parties were mistaken about the nature of the subject matter, i.e. the area of the land.

[326] See IPC Shangluo, Shaanxi, 2017, CLI.C.10594271.
[327] See BPC Xishui, Guizhou, 2017, CLI.C.47625153.
[328] See HPC Guizhou, 2017, CLI.C.10646140.

However, the subject matter of the distribution contract was not the land *per se* but the price of the land calculated on a wrong basis, it was a case of calculation error that cannot be subsumed by the provision of the judicial interpretation.

In Case 4-D4,[329] the parties to a construction contract agreed to determine the price of the project after the completion of the construction according to the actual work done by the contractor. However, in the process of calculation, the developer mistakenly included payments not owed to the contractor into the total price and issued an incorrect Confirmation Letter. In this case, the developer's request of avoidance was also upheld by the court.[330]

4.5.2 Unilateral calculation errors

In Case 4-D5 decided by the HPC of Sichuan,[331] district government X concluded with company Y an investment contract, according to which X was obliged to provide land for X for the construction of leisure food production facilities, while Y must pay 2.88 million yuan to X as the land transfer fee. The contract also stipulated that after Y' the payment, X will provide a subsidy to Y in a total amount of 1.98 million yuan. After the contract was formed, the parties fulfilled their payments in time, but due to some insurmountable obstacles, X was unable to provide the land, and the project had to stop. The parties then concluded another 'Dissolution Agreement' to liquidate the original transaction. X promised in the Dissolution Agreement that it will return all the land transfer fee to Y, but later he brought up an action seeking adaption of the agreement, alleging that because of the mistake of its employee, it did not deduct the amount of subsidy from the total payment promised in the Dissolution Agreement.

The lower courts both gave judgment for X, Y's application for retrial was also dismissed by the HPC of Sichuan. In its ruling, the HPC pointed out that a major misunderstanding can only be affirmed under the following conditions: a) there is a causal link between the misunderstanding and the making of the contract and its content; b) the misunderstanding is spontaneously made by the manifesting party, not caused by the opponent's fraud; c) the misunderstanding must involve 'basic terms of the contract which closely relate to the effect of the contract'; d) the mistaken party must not have assumed the risk of the misunderstanding. In the present case, X was suffering from a major misunderstanding, thus the contract should be adapted according to the correct

[329] See BPC Qinyang, Henan, 2015, CLI.C.45363257.
[330] See also IPC Lianyungang, Jiangsu, 2015, CLI.C.7641570.
[331] See HPC Sichuan, 2016, CLI.C.10083278.

calculation.[332] The court based its analysis on the ground of §71 OGPCL, but in this case, X apparently made no mistake as to any term of the Dissolution Agreement, the miscalculation was only an error in motive. In fact, the relief of mistake could be better explained without relying on the provision of the judicial interpretation, since X's calculation error was obvious to Y, it should have notified the former about it instead of attempting to capitalize on the mistake.

4.6 Errors in civil reconciliation (Case Group E)

The agreement of civil reconciliation is a type of innominate contract in Chinese law (§124 CL). Nonetheless, in practice such contracts of 'private settlement' (*siliao*) are constantly seen. The purpose of a civil reconciliation is to replace or exclude uncertainties in a legal relation or a claim by importing clear rules agreed by the parties, so that disputes could be avoided. In order to reach this goal, the parties will have to make mutual concessions.[333] These mutual concessions are normally based on solid convictions as to certain facts which may turn out to be incorrect. This type of mistake is included in Case Group E, it is most frequently seen in civil reconciliations involving tort liabilities. See the following examples.

4.6.1 Common misunderstandings about the status of injure

In Case 4-E1 decided by the HPC of Jiangsu,[334] the goose farm of X was harmed by a pipeline explosion accident of gas company Y, which caused a decrease in its egg production. X and Y then reached a settlement contract in which Y promised to pay X 500,000 yuan as compensation of 'all his losses'; X agreed in exchange that he will not put forward any claims on this issue in the future. However, after the contract was formed, the breeding goose in X's farm began to die from the shock of the accident, X had to sell all the gooses to alleviate further damages. He therefore brought up a legal action seeking avoidance of the settlement contract. The HPC upheld X's request, holding that the death of the gooses was not foreseen by the parties when they reached the reconciliation, therefore the contract is based on a major misunderstanding.

In Case 4-E2,[335] X was injured by Y in a traffic accident, Y then reached a

[332] See also BPC Xuyi, Jiangsu, 2015, CLI.C.33917517; BPC Yanta, Shaanxi, 2013, CLI.C.3601023.
[333] See Limin Wang, "On Reconciliation Agreements," *Political Science and Law*, no. 1 (2014), 50; Jun Xiao, "The Civil Law Tradition of Reconciliation Agreements and the Application of Relevant Rules," *Modern Law Science*, no. 5 (2016), 69.
[334] See HPC Jiangsu, 2015, CLI.C.9532067.
[335] See IPC Yancheng, Jiangsu, 2017, CLI.C.10344148.

compensation agreement with X's family, which stipulated that Y shall pay in advance only the medical expenses of X, and the rest of the losses will be borne by the insurance company. However, unexpected by the parties, X's injury later developed into a lung infection which eventually cost her life. The compensation agreement was avoided by the court.

In Case 4-E3,[336] X fell and injured his chest in a bus due to the fault of the driver of bus company Y. X was sent to the hospital where he was examined for rib fractures. Being told by the doctor that no signs of fracture were discovered, X and Y reached a settlement in which Y promised to pay 600 yuan for X's loss. Later it was discovered that the accident had caused a concealed fracture to X, resulting in medical expenses of more than 7,000 yuan. In this case, X's request to avoid the settlement was also upheld by the court.[337]

4.6.2 Common misunderstandings about the existence or extent of liabilities

In Case 4-E4,[338] X was investigated and detained by the police for the suspicion of intentional injury to Y. In order to alleviate X's criminal liability, his family reached a civil reconciliation with Y and promised to pay all the medical expenses. In fact, the crime was not committed by X. Similarly, in Case 4-E5,[339] the truck driven by X's employee collided with Y's car, causing the death of Y and other passengers. In order to appease the deceased's family, X concluded with them a reconciliation in which it assumed 70% of the total loss, but later it was found by the traffic police that the accident was mainly caused by Y, who was drunk driving at the time. In the above two cases, the relief of error in motive were both allowed by the court.[340]

4.6.3 Unilateral misunderstandings

There are also cases where the error in civil reconciliation involves only one of the parties. Under this circumstance, the court may deny the avoidance for mistake.

For example, in Case 4-G9,[341] X was charged by the procuratorate for committing intentional injury to Y. In order to alleviate his criminal liability, X signed a reconci-

[336] See IPC Nanjing, Jiangsu, 2016, CLI.C.15764929.
[337] See for more examples in Appendix I.
[338] See. IPC Bijie, Guizhou, 2015, CLI.C.7357215.
[339] See IPC Huaian, Jiangsu, 2015, CLI.C.15576817.
[340] See also IPC II Chongqing, 2017, CLI.C.11258276; BPC Wengan, Guizhou, 2015, CLI.C.6917497; BPC Wolong, Henan, 2015, CLI.C.25850578; BPC Jintai, Shaanxi, 2011, CLI.C.16859216.
[341] See BPC Jinjiang, Fujian, 2013, CLI.C.2225387.

liation agreement promising to compensate Y all his losses. However, the prosecution was finally withdrawn. X therefore filed a suit requesting avoidance of the reconciliation. The court denied the relief of mistake, holding that the consideration of alleviating criminal liability was the unilateral motive of X, the agreement, however, was reached to compensate of Y's loss, X made no mistake as to the nature, object and amount of the compensation, there was no major misunderstanding in this case.

4.7 Other situations of error in motive (Case Group F)

Case Group F includes other situations of motive error that cannot be covered by the aforementioned case groups. They could be further categories into three types.

4.7.1 Mistakes in debt recognition agreements

Theoretically, debt recognitions may either be abstract or causal depending on the intention of the parties. Abstract debt recognitions refer to the cases where the validity of the recognition is independent to the basic relation from which the debt generates; causal recognitions, on the other hand, are subordinated to the basic relation, if such relation no longer exists or was defective from the beginning, the recognition will also become invalid.[342] As a result, in cases of abstract recognition, it is impossible for the parties to invoke avoidance for mistake when the recognition is inconsistent with the basic relation, the disadvantaged party can only seek remedies under the provisions of unjustified enrichment. The relief of error in motive is also questionable when the recognition is causal, since the recognition is nothing more than a confirmation of the basic relation, if it fails to confirm to the latter, the doctrine *falsa demonstratio non nocet* shall apply, and the original content in the basic relation prevails.

However, Chinese courts generally recognize no distinction between abstract and causal recognitions. The basic relation and the recognition are viewed as two separate juristic acts, when the recognition does not stay in concord with its basic relation, the court tend to provide relief for the parties via the law of mistake.

For example, in Case 4-F1,[343] X's wife issued a 'Repayment Assurance' to Y who claimed to be her creditor. Both Y and X's wife were convinced that there was a debt owed by X to Y, which latter turned out to be a mistake. The court held that X's wife

[342] See Wolfgang Fikentscher, Andreas Heinemann, *Schuldrecht Allgemeiner und Besonderer Teil*, 11 ed. (Berlin: de Gruyter 2017), para. 1375, 1376.
[343] See IPC Qinhuangdao, Hebei, 2013, CLI.C.4243193.

was in error as to the fact induced the assurance, such assurance was therefore avoidable for a major misunderstanding.

Similarly, in Case 4-F2,[344] the client promised an excessive commission to its sales agent due to a mistake to the sales performance of the latter; in Case 4-F3,[345] the debtor recognized a higher sum of payment to the assignee of the debt because of his erroneous conception as to its original amount. In both cases the relief of mistake was granted by the court.[346]

4.7.2 Mistakes in asset splitting agreements

In Case 4-F4 decided by the HPC of Heilongjiang,[347] A, B, and C concluded an agreement on the division of the inheritance they received from D. The agreement stipulated that D's house I shall be jointly owned by A and B, while C shall obtain the ownership of D's house II. In fact, house II was not within the scope of D's estate, C therefore brought up a suit for the avoidance of the agreement. The court of first instance gave judgment for C, the court of second instance, although agreed with the understanding of law of the lower court, reached different conclusion based on its finding that C actually knew that house II was not owned by D, thus had no mistake. The HPC, however, issued retrial of the case, holding that the court of second instance was mistaken about the fact, and the decision of first instance was actually not wrong.

In Case 4-F5,[348] X assigned his right to the management of a land to Y. In the assignment contract there was term stipulating that if the land was expropriated by the government, the compensation for the expropriation should be divided between the parties in a ratio of 2:8. Later, the government did expropriate the land as expected. Believing that the amount of the compensation was 7 million yuan, X and Y concluded another contract affirming the amount they should each get with reference to the previously agreed ratio. But in fact, the total amount of the compensation was over 10 million yuan. The court eventually avoided the second contract on the basis of major misunderstanding.[349]

4.7.3 Mistakes caused by the opposite party

[344] See IPC I Chongqing, 2014, CLI.C.8237085.
[345] See BPC Mouding, Yunan, CLI.C.40347690.
[346] See also BPC Longsha, Heilongjiang, 2015, CLI.C.36555455; BPC Luojiang, Fujing, 2015, CLI.C.53513546.
[347] See HPC Heilongjiang, 2016, CLI.C.8724763.
[348] See IPC III Beijing, 2016, CLI.C.8369292.
[349] See also BPC Zhongyuan, Henan, 2016, CLI.C.44745433; BPC Xiashan, Guangdong, 2015, CLI.C.26262692.

In Case Group B I have analysed the situations where a mistake as to the nature of the subject matter is caused by the opposite party. Other types of error in motive may also occur in this matter, and their relief are generally allowed.

(1) Mistake induced by the misrepresentation of the opponent. In Case 4-F6 of the Shaanxi HPC,[350] X leased its commercial space to Y for the business of a supermarket. According to the contract, the rent for the first two years of the lease was to be paid in a fixed amount, but from the third year on, it shall be 2.5% of the annual sales volume of the supermarket with tax. X agreed with this arrangement because during the negotiation, Y's manager said repeatedly that judged from other supermarket run by his company, the annual sales volume of the present supermarket would not be less than 300 million yuan without tax. In fact, the supermarket achieved an annual volume of only 150 million in the third year of the lease. X suffered a huge loss of rent, it therefore filed a suit claiming an adaption of rent clause in the contract.

The court of first instance ruled for X, it held that the misrepresentation of Y's manager on the annual sales volume induced the incorrect expectation of X, resulting in its defected judgment as to the amount of the rent, hence it was entitled the right to adapt the contract. The court of second instance agreed with the lower court on the existence of a major misunderstanding, it only altered the way the contract was adapted. The HPC of Shaanxi upheld the decision of the second instance.

In Case 4-F7,[351] the employee of real estate company X told his client Y that he can help Y to obtain a provident fund loan, Y agreed to purchase X's house on this basis. In fact, X was not qualified to apply for the loan. X's request of avoidance was upheld by the court.[352] In contrast, in Case 4-G10[353] where the seller of the house did not involve in the buyer's mistake about his qualification of obtaining the provident fund loan, the court refused to grant relief for the buyer. Obviously, whether the mistake was induced by the misrepresentation of the opposite party is a decisive factor for a motive error to be considered by the courts.

(2) Mistake caused by the opponent's non-disclosure of certain information. In Case 4-F8,[354] one of the heirs concealed part of the inheritance, causing another heir to enter into an erroneous division agreement; in Case 4-F9,[355] a sub-tenant did not

[350] See HPC Shaanxi, 2015, CLI.C.7379825.
[351] See IPC Xuzhou, Jiangsu, 2013, CLI.C.1791935.
[352] See also IPC Guangzhou, Guangdong, 2017, CLI.C.10919693; IPC Liuzhou, Guangxi, 2017, CLI.C.10349762.
[353] See BPC Chishui, Guizhou, 2016, CLI.C.26808168.
[354] See IPC Shaoyang, Hunan, 2016, CLI.C.9542074.
[355] See IPC Anyang, Henan, 2014, CLI.C.6995258.

inform the lessee about the rent and the lease term stipulated in the contract between him and the owner; in Case 4-F10,[356] an insurance company failed to explain relevant provisions of law on the calculation of damages to the victim. For all these cases, the relief of error in motive were allowed.

4.8 Some common grounds for denying the relief (Case Group G, H)

(1) §71 OGPCL. The provision of the old judicial interpretation is still frequently cited by judges when they are reluctant to avoid the juristic act.[357] It is convenient for the court to do so since most situations of motive error are excluded by this provision. The judicial practice is self-contradictory. In fact, as could be seen in tremendous cases cited before, the courts will not hesitate to ignore §71 OGPCL when it has become an obstacle for the relief of mistake.

(2) The mistaken party's negligence. In some cases, the court found the mistake inexcusable because the party in error failed to pay due attention to avoid the mistake.

For example, in Case 4-H3,[358] X made a mistake as to the amount of the debt when the debt was transferred to him. The court held that the rule of mistake 'is intended to provide relief for misunderstandings that are caused by the mistaken party's minor negligence', in the present case, X was guilty of gross negligence, thus cannot avoid the contract. In Case 4-H4,[359] the buyer contracted to purchase the house without paying a site inspection, his request for avoidance on the ground of a mistake about the floor plan of the house was rejected by the court, holding that the buyer must bear the result of his own negligence.[360]

(3) Risk allocation. There are also cases where relief of mistake was not allowed because the person in error should bear the risk of certain misunderstandings.

In Case 4-H5 decided by the HPC of Shanghai,[361] a fake antique was purchased as authentic. The court held that 'in the occasion of antique sales, it is transactional custom that the buyer must rely on his own technique and professional knowledge to evaluate the subject matter and bear relevant risks'. Therefore, the contract in the

[356] See BPC Jintai, Shaanxi, 2017, CLI.C.45929130.
[357] For more examples, see Appendix I.
[358] See IPC Chifeng, Inner Mogolia, 2018, CLI.C.83039593.
[359] See IPC Guilin, Guangxi, 2013, CLI.C.60690443.
[360] See also IPC 5th division of Xinjiang Production and Construction Corps, 2015, CLI.C.8215057; IPC Shaoxing, Zhejiang, 2013, CLI.C.1763526; BPC Longkou, Shandong, 2017, CLI.C.54363797; BPC Nanhai, Guangdong, 2017, CLI.C.51755668; BPC Kaiping, Guangdong, 2016, CLI.C.48496697; BPC Gongshu, Zhejiang, 2016, CLI.C.35517716; BPC Yixing, Jiangsu, 2014, CLI.C.7709788.
[361] See HPC Shanghai, 2008, CLI.C.179852.

present case cannot be avoided.

4.9 Further organization of case groups

At the end of this chapter, I will further organize the case groups of excusable motive error into the following four more abstract situations.

[Situation 1] the motive of the manifesting party is no longer purely a factual assumption. Rather, the opposite party has assumed an obligation, either by his promise or by the court's construction of the contract, to put the first party in the position he should have been in when the factual assumption was true. This situation mainly occurs in cases of error in motive as to the nature of the subject matter, namely Case 4-A1~A13, Case 4-A16, A22, A23, A24, A25.

[Situation 2] the parties are caught in the same erroneous factual assumption, they both entered the juristic act on the basis of that assumption, but neither of them has assumed an obligation to put the other in the position as if the assumption was true. This situation is most frequently seen in cases of civil reconciliations (Case Group E), it may also occur to errors in nature (Case 4-A14, A15), calculation errors (Case 4-D1~Case 4-D4), debt recognitions and asset divisions (Case 4-F1, Case 4-F4, F5).

[Situation 3] the mistake is caused by the other party's misrepresentation or non-disclosure of certain information, namely, Case Group B; Case 4-A31; Case 4-D5; Case 4-F6~Case 4-F10.

[Situation 4] the mistake of the manifesting party is neither known or shared by the opposite party, but that party knew or ought to know at the time the juristic act was formed that the first party made his decision on the basis of certain factual assumption. This situation is not often seen in practice, only Case 4-A21, Case 4-C2, C4 may be included therein. There are also counter-examples to this position, e.g. Case 4-G5, G9.

The remaining cases are not categorised in any of the four situations because the judgment did not reveal some crucial facts of the case. For example, Case 4-F2 may fall into [Situation 2] if the mistake was shared by the parties, otherwise it will become a case of [Situation 3]. See also Case 4-A17~A20, A26, A28~A30, A32; Case 4-F3. However, since these cases will eventually fall into one of the four categories, it will not influence our overall understanding as to the judicial practice of China.

In addition, it is notable that Chinese courts generally will not provide relief for pure unilateral motive errors, this tendency could be seen in Case 4-G1, G3, G4 and G10.

The courts will sometimes cite §71 OGPCL as the legal basis for the decision of major or non-major misunderstandings especially in cases where the mistake can be subsumed or is explicitly excluded by this provision. Nonetheless, when the courts feel that an error in motive outside §71 OGPCL should also be excused, they tend to ignore or distort this article to remove the legal obstacle. In a word, the provision of the old judicial interpretation has already become a hollow ornament for the legal reasoning of the courts.

Chapter 5 Comparative Law on the Rule of Error in Motive

In the previous chapter, I have introduced four main case groups where the Chinese courts tend to allow avoidance for error in motive. Now I will turn to the analysis of several foreign legal systems to see their arrangement concerning the same issue. This comparative study will improve our understanding of the judicial practice in China and provide basis for the formation of case group norms from the following aspects: firstly, when certain types of error in motive are commonly relevant in both Chinese and other legal systems, the theoretical construction underlying the foreign doctrine of mistake may act as important references for the concretization of §147 GP; secondly, when certain types of error in motive are treated differently by Chinese and foreign courts, the arguments for the distinguished treatment from other jurisdiction may shed some light on the reflection of the juristic choices of Chinese courts; lastly, when certain types of motive error are excused in foreign law through not the avoidance for mistake but other legal institutions, such different technical approaches may also provide crucial references for the systematic arrangement of the Chinese law.

However, it is obviously beyond the competence of this author to run a worldwide investigation on the rule of mistake, as representatives I will select the law of Germany and Japan for my comparative study. The reason behind this decision is twofold: a) historically, the legal materials from Germany and Japan have long been sources of the theory reception among Chinese scholars, it is therefore necessary to invest more attention to the latest developments in these two jurisdictions; b) systematically, both the BGB and the JCC have adopted the pandect structure which contains a General Part organized on the basis of several central concepts, such as ‘the manifestation of intent’ and ‘the juristic act’, the Chinese civil law has also adopted this structure, which means that the solutions for the issue of error in motive in German and Japanese law will have more indicative value for China.

5.1 The treatment of error in motive in German law

In Germany, the issue of mistake has long been not only one of the central topics of the theory of juristic acts, but also a major point of dispute in civil dogmatic ever

since the age of European common law.[362] In this section, I will concentrate on its treatment for cases of motive from the perspective of functional comparison.

5.1.1 Mistake as to the nature of a person or thing

Under the title of avoidance for mistake, the German BGB provides relief only for one situation of error in motive, i.e. the misidentification of the manifesting party as to 'the nature of a person or thing which is considered fundamental in transaction' (§119 II BGB). This provision is often said to be unsuccessful by some commenters.[363] On the one hand, it fails to specify the relationship between the 'error of nature' (*Eigenschaftsirrtum*) here and the error in expression as is regulated in the first paragraph of the same article; on the other hand, the question when should the mistaken nature of a person or thing be deemed to be of importance in transaction is left open. This provision therefore possesses, to some extent, also the character of a general clause.[364]In the following part, I will briefly introduce the efforts made by the German RG and BGH for the concretization this provision.

(1) Decisions of the RG prior to World War II. The RG touched the issue of mistaken nature for the first time in its judgment on 11 September 1906 (Case 5-G1).[365] The fact of this case is as follows.

X, the bankruptcy administrator of a company, sold to Y an item which was listed in the catalogue of the insolvency estate for a total price of RM 6300. Y decided to buy this item because the middleman entrusted by X informed him that the price recorded in the catalogue was determined after discounting the purchase price, Y relied on this statement which later turned out to be false. The listed price of the subject matter was not calculated by its purchase price but by its sale price. Y therefore refused to perform the contract on the ground of his mistake, X sued.

Y's plea for avoidance was upheld by the court of first instance. In its view, the misperception of Y as to the fact was one that involved the fundamental nature of the subject matter within the meaning of §119 II BGB.

The RG disagreed with the opinion of the lower court. In response to the issue of error of nature it held,

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362 See Schermaier, *Die Bestimmung des Wesentliehen Irrtums von den Glossatoren bis zum BGB*, 309 and below..
363 See Medicus, *Allgemeiner Teil des BGB*, para.767.
364 See Jan Dirk Harke, *Irrtum über Wesentliche Eigenschaften* (Berlin: Duncker & Humblot, 2003), 11.
365 RGZ 64, 266.

'Although what falls under the concept of the nature of the thing in the sense of §119 II includes not only the natural (physical) properties but also any factual and legal relationships of the thing that, according to experiences of transaction, can affect the valuation of it by virtue of their characteristics and presupposed durations, such relationships in the sale of individually specified goods, as is the present case, are generally considerable as nature of the thing in the sense of §119 II only when they were recognizable for the opposite party as the basis for the conclusion of the contract, without the negotiation being intensified into a guarantee according to §463 BGB. For the approval of a nature from such factual or legal relationships of the thing, the key requirement, however, is that they relate directly to the thing and are decisive for the formation of its value. Transaction value, market price, or purchase price are generally only the result of the assessment of all decisive factors for the value formation of the thing on the ground of the general context or the special circumstances of individual sales contracts. They are not a factual or legal relationship of the thing that is decisive for its value formation; they are not the internal nature of the thing.'[366]

In the above analysis, the RG, on the one hand, had extended the concept of the nature of the thing to include not only the physical properties of the subject matter but also all factual and legal relationships around the thing that may have a lasting effect on its value; on the other hand, it imported limits for the scope of this concept from the following two aspects: first, whether a nature of the thing can be established depends on whether the relevant factual and legal relationships have become the very foundation of the contract in a way recognizable for the opposite party; second, even if the first requirement is met, these relationships must be directly related to the subject matter and have a decisive impact on its value.

In its judgment on 22 November 1935 (Case 5-G2),[367] The RG provided further clarification for the requirement of 'directive relevancy'. This case involved the transfer of land charge (*Grundschuld*). X, the defendant, relied on the misrepresentation made by the landowner as to the rent amount of the residential lease on the land and therefore offered to buy the land charge from Y, who was fully aware that the rent amount was a

[366] RGZ 64, 266, 269.
[367] RGZ 149, 235.

significant ground for X's decision. X regretted it after finding out the truth and refused to pay the price to Z, the assignee of Y's right. Z sued.

The court of first instance held that X was in mistake about an important nature of the land charge, i.e. the economic profitability of the land. This fact had already become the 'basis of transaction' (*Geschäftsgrundlage*) known by both parties. X therefore was entitled the right to avoid his manifestation. The RG, however, was of the opinion that the above analysis of the lower court had brought with it the risk of dissolving the certainty of the concept of the nature of the thing and may unduly expand the scope of avoidance for mistake. It emphasised that the important nature could only include those factual and legal relationships that give the subject matter its own characteristics, but not those that only indirectly affect its valuation. In the present case, the profitability of the land charge did not fall within this scope, X may not avoid the contract.

In the two cases cited above, the RG focused mainly on the scope of factual or legal relationships that may constitute an important nature of the thing. In Case 5-G3 of 2 May 1930,[368] the RG discussed the conditions for the physical characteristics of the subject matter to be considered as within the meaning of §119 II BGB.

In this case, X, the plaintiff, purchased a sea ferry from Y, the defendant. Prior to the conclusion of the contract, Y informed the agent of X that the construction time of the ferry was around 1917, X therefore decided to purchase. In fact, the ferry was built in 1884, it was a much older ship than X expected. He then filed a suit for the refund of his paid price on the ground, *inter alia*, of the avoidance for mistake.

The court of first trial ruled against X, X appealed and the RG ordered a retrial of the case. The retrial court of first instance overturned the earlier judgment and allowed avoidance of the contract. Y's appeal, alleging that the retrial court failed to follow the precedence of the RG (namely Case 5-G1) and did not examine whether the age of the ship had constituted a recognizable transactional basis, was later dismissed by the RG. In its judgment, the RG pointed out that the aforementioned Case 5-G1 did not involve the 'direct nature of the substance', but only 'the factual and legal relationships whose status or result would normally affect the valuation of the thing according to the experiences of transaction'. These relationships were not the 'original characteristics' of the subject matter, so it was necessary to set up additional requirement of becoming recognizable basis of the contract in order to treat them the same way as the original characteristics of the thing. This additional requirement is therefore not the general rule

[368] RG LZ 1931, 240.

for the decision of important natures in the sense of §119 II BGB.

Here, the RG distinguished the natural properties of the thing, i.e. its 'direct nature', from the factual and legal relationships directly linked to the subject matter. For the former, there is no need to consider whether they have constituted basis for the contract knowable to the other party. This is understandable given that such natural properties are public by nature, so the opponent could not have been unaware that the deal was made on the basis of these properties.

(2) Decisions of the BGH after World War II. The opinion of the RG as to the issue of mistaken nature was generally followed by the BGH.

In Case 5-G4 decided on 18 December 1954,[369] an ultrasound treatment device purchased by doctor X from the seller Y was unable to achieve the desired effect of certain therapy, although it was suitable for the performance of a specific treatment. Later, in a legal action brought up by Y for the purchase price, X plead, *inter alia*, avoidance of the contract for mistake.

In response to the question whether there was an error of nature in the present case, the BGH cited several decisions of the RG, arguing that the value of the subject matter does not in itself constitute an important nature (Case 5-G1), and that only those 'factual and legal relationships that give the subject matter its own characteristics' could be included in the scope of §119 II BGB, not those that only 'indirectly affect its valuation' (Case 5-G2). In the present case, the therapeutic effect of the ultrasound device was not a direct decisive factor for its value, therefore not an important nature of the thing. The BGH then went further and stated that,

> *'even when it could be assumed that the suitability of the ultrasound device for the treatment of certain kinds of illness was attached to the object itself [i.e. was directly related to it], it could be viewed as a transactional important nature only when the assumptions of the defendant or both parties about it had been raised to the level of the content of the contract. This is however…not proved [in the present case].' (Notes and emphasis added)*

As a result, the BGH has imported a stricter requirement than that of the RG for the factual and legal relationships of the thing to be included into the scope of important natures: there must be consensus between the parties as to their existence and contents.

[369] BGHZ 16, 54.

This stricter requirement, however, was not followed by most subsequent cases of the BGH. For example, in its judgment of 22 September 1983 concerning mistaken nature of a person (Case 5-G5),[370] the BGH returned to the position of the RG cases according to which the important nature includes only those characteristics 'that was set to be the basis of the contract by the manifesting party in a way recognizable to the counterparty, without having made them part of the contents of his manifestation'.[371]

On the other hand, in its decision of 26 October 1978 (Case 5-G6),[372] the BGH introduced some amendments to the opinion of the RG in Case 5-G3.

This case involved the sale of a used car. X, the buyer, alleged that the contract was not binding since Y, the seller, had fraudulently induced him into making the deal by providing false information as to the age of the vehicle. The court of first instance, although found no evidence of the fraud, upheld X's claim on the basis of §119 II BGB. The BGH agreed with the judgment of the lower court for the following two reasons: firstly, the court held that at least in scenarios of the trade of second-hand vehicles, the valuation of the subject matter is depended on its age, it is therefore belongs to 'the factual and legal relationships that may affect the efficacy and value of the thing by virtue of their characteristics and presupposed durations'; secondly, the court pointed out that for the age of the used car to viewed as an important nature, the plaintiff did not need to import his assumption concerning this fact into the content of his manifestation, nor it was necessary for the court to examine in detail whether such assumption had be made basis of the contract by the plaintiff in a way recognizable for the other party, because,

> *'It is self-explanatory, like in this case, that the age of the vehicle was of decisive significance for the formation of the sale and that the buyer had thus taken a specific age as his starting point, so the exact content of the said assumption needed not to be brought into expression.'*

The above analysis of the BGH had therefore modified the position of the RG in Case 5-G3, it no longer set apart 'the direct nature of the thing' from 'the factual and legal relationships directly affect its valuation', rather, it emphasises more on the

[370] BGHZ 88, 240.
[371] See also BGH NJW 2001, 226.
[372] BGH NJW 1979, 160.

distinction between what is typical and what is atypical.[373] For those factual or legal relationships that are typically linked to the person or the thing, e.g. the age of the used vehicle in the present case, there is no need to examine the question whether they have become recognizable bases of the contract because the opposite party could not have been unaware of them and their significance. For the relationships that are atypical, on the other hand, such examination cannot be omitted before they can be viewed as transactional important natures in the sense of §119 II BGB.

(3) Summary of the Case law rules. §119 II is one of the few provisions in the BGB that directly provide relief for errors in motive. In order to meet the need of transactional practice, both the RG and the BGH have adopted a more lenient definition for the concept of the 'nature of the person or thing' within the meaning of this article. Such nature includes not only natural attributes, but also all relevant factual and legal relationships that may have an impact on the evaluation of the person or thing according to trading experiences by virtue of their characteristics and durations. Based on this definition, for the purpose of coordinating the relief of mistake and transactional safty, German courts then imported the following two requirements for the decision of the 'importance' of the natures: first, they must be directly related to the person or thing, not just having indirect influences on their evaluation; second, they must have been made recognizable as the bases of the transaction by the manifesting party. This could be done either explicitly or implicitly. In cases where it involves typical natures of the person or thing, it is normally presumable that the opposite party is aware of their existence and significance without the necessity of bringing them into expression.

5.1.2 The 'extended error in content'

Although the German courts have adopted a lenient definition for the concept of important nature in §119 II BGB, in practice there were still a number of cases where a motive error deserves relief cannot be covered by this provision. In order to deal with these cases, the RG developed the doctrine of 'extended error in content' (*Erweiterter Inhaltsirrtum*), allowing certain motive error to be treated as an error in content in the sense of §119 I BGB. Such extension of the scope of §119 I BGB appeared mainly in scenarios of miscalculation (*Kalkulationsirrtum*) and mistake as to the legal effect of the juristic act (*Rechtsfolgenirrtum*).

(1) Case law involving calculation errors. In cases where the manifesting party

[373] See in detail also BGH DB 1972, 479 (481).

has offered or accepted a wrong price due to a mistake in his calculation process, he may not invoke avoidance according to §119 II BGB because the price itself cannot be viewed as an important nature of the subject matter. Such kind of calculation errors is therefore legally irrelevant if the rule of mistake is strictly interpreted. This train of thought was followed by the early decisions of the RG.

In a case decided on 16 October 1903 (Case 5-G7),[374] X, the seller, miscalculated the price of 100 kg of pig iron from RM 935 to RM 890 and made an offer to Y, the buyer. Y sent out his acceptance before X's notification of correction arrived. As both parties have agreed to maintain the contract, X filed a lawsuit requesting Y to pay the difference between the offered and intended prices. The court of first instance ruled for X. This judgment, however, was reversed by the court of second instance. X's appeal was eventually dismissed by the RG. It held that,

> *'the error in the calculation of price was neither a mistake in the process of expression nor a mistake as to the content of the manifestation. The plaintiff intended to ask for a price of RM 890 and did in fact asked for it…the plaintiff's calculation of price was never the object of the parties' expression, for motive errors of this kind, §119 [BGB] will provide no relief'.*

However, it was not long until the RG abandoned its position in the above case. In Case 5-G1 cited earlier, the RG imported exceptions for the general rule in the following two scenarios: one is 'when the calculation was made the topic of the negotiation decisive for the conclusion of the contract'; the other is 'when by the negotiation decisive for the conclusion of the contract, the sales price asked or offered was recognizably shown to the opposite party as was formed via a more closely described calculation process'.[375] Under the above circumstances, the calculation process could be deeded to have become the content of the manifestation, and the mistake involving this process will then be legally relevant according to §119 I BGB.

In the above analysis, the RG made a distinction between what is later called 'the internal calculation error' and 'the external calculation error', and provided relief only for the latter under the title of error in content which is stipulated in the first paragraph of §119 BGB. This doctrine was widely followed by the subsequent decisions of the

[374] RGZ 55, 367.
[375] RGZ 64, 266, 268.

RG. The following are some famous examples.

In Case 5-G8 of 23 May 1917,[376] the parties to a sale of scrap metal estimated that the total amount of the goods could fill 40 train wagons. The sales price was then determined on this basis. However, a few days later the seller found that the scrap metal could actually fill 80 train wagons. The RG allowed avoidance of the contract on the ground that the seller had made a mistake as to the content of his manifestation.

In Case 5-G9 of 16 October 1918,[377] the plaintiff intended to purchase the stock of a particular company. On 10 October 1916, he issued a mandate to the defendant, who was a bank, asking it to bought in the stock at the lowest price between 340% to 342% of its par value. The defendant made the purchase through its agent from the stock market according to the exchange price of the stock on that day which was 437.5% of its par value. The defendant's agent, however, mistakenly informed the defendant that the purchase price was 337.5% of the par value, and the plaintiff was also so notified by the defendant. Later, after the defendant refused to hand over the stock at the informed price of 337.5%, the plaintiff sued for damages of non-performance, to which the defendant plead avoidance for mistake. The RG eventually gave judgment for the defendant, holding that the content of the notice of purchase made by the defendant to the plaintiff was to deliver the stock 'at the exchange price of the day which is 337.5% of the par value', the defendant was mistaken about this content, therefore may avoid its manifestation under the provision of §119 I BGB.

Similar to the above case, in Case 5-G10 of 12 November 1919,[378] the plaintiff was told by the defendant, a bank, that the exchange price of a particular company was 207% of its par value, he then sent an offer to the latter to sell this stock for 198% of the par value. The defendant eventually purchased the stock at the price of 198%-199%. After the conclusion of the contract, the defendant found that it had misread the price catalogue, and the trade was made on the basis of the exchange price of another stock, it therefore invoked avoidance for mistake, and the plaintiff sued. The RG held that the defendant's mistake as to the exchange price 'was not a purely motive error but an error concerning the content of the manifestation in the sense of §119 [BGB]', therefore the defendant should be entitled the right to avoid the contract.

In Case 5-G11 of 17 December 1920,[379] the defendant offered to sell silver of 800

[376] RGZ 90, 268.
[377] RGZ 94, 65.
[378] RGZ 97, 138.
[379] RGZ 101, 107.

purity for RM 320 per kilogram to the plaintiff. The plaintiff, intended to buy silver of 1000 purity, then inquired about the price. This price was supposed to be calculated on the basis of the price for silver of 800 purity, and the result should be RM 400 per kilogram (1000/800*320=400). Nonetheless, the defendant made a mistake during the process of calculation and sold 200 kg. of silver of 1000 purity for only RM 360 per kilogram to the plaintiff, who later brought up an action when the contract was not performed. The RG, citing its previous decisions of Case 5-G1, G8 and G9, ruled for the defendant on the ground that her mistake was an external calculation error.

In Case 5-G12 of 30 November 1922,[380] the defendant borrowed 30,000 roubles from the plaintiff for his trip from a POW camp in Moscow back to Germany. Both parties thought at the time that 1 rouble could exchange for 25 pfennigs, the defendant then issued to the plaintiff a receipt in which he obliged himself to repay the latter RM 7,500. In fact, the exchange rate from rouble to pfennig was 1:1 when the contract was entered. The defendant therefore insisted to repay the plaintiff according to the correct exchange rate (RM 300). The plaintiff sued. The RG gave judgment for the defendant stating that the mistaken exchange rate was not just the internal consideration of the defendant prior to his manifestation but a part of its content which was recognizable to the opposite party at the time of the negotiation. It was therefore a case of error in content which is legally relevant under §119 I BGB.

As can be seen from the cases listed above, by treating 'external calculation errors' under the concept of error in content in the sense of §119 I BGB, the RG clearly expanded the scope of that provision. In fact, whether or not the formula for the calculation was disclosed to the opposite party, in the event of a computational error, the manifesting party has never misunderstood the meaning of his words. In Case 5-G8, the seller did intend to set the price of the scrap metal according to his estimation that there were 40 wagons of them; in Case 5-G9 and G10, the bank expressed exactly what it believed to be the exchange price of the stock; in Case 5-G11, the seller wanted to offer the silver of 1000 purity for RM 360 and did say so; in Case 5-12, the defendant was clearly aware that the receipt he issued would oblige him to repay RM 7,500 to the plaintiff. There had never been any inconsistency between the intention of the mistaken parties and the language of their manifestations in any of the above decisions. The effect of the calculation errors in these cases took place not in the process of contractual

[380] RGZ 105, 406.

communication, but at the stage of decision-making of the mistaken party, they are therefore typical scenarios of error in motive, which was not included in §119 I BGB by the legislator.

By importing the doctrine of 'extended error in content', the RG had constructed a new rule for the relief of motive errors. Although this rule was placed under the first paragraph of §119 BGB, it followed the same considerations of the RG for cases of mistaken natures within the meaning of the second paragraph this article. In both situations, the error in motive is legally relevant only when it involves certain assumption that was made recognizable to the opposite party as the basis of the transaction.

(2) Case law about mistake as to the legal effect of the juristic act. The RG expanded the scope of §119 I BGB in a different way in cases where the default norms of the law have attached unexpected legal effects to a manifestation of intent of a party (*Rechtsfolgenirrtum*).[381] The leading case in this respect was a decision made by the RG on 3 June 1916 (Case 5-G13).[382]

In this case, X, the mortgagee of first sequence of a land, waived his right after becoming the owner of the property. At the time when he was applying to write off his mortgage right from the land register, X stated that Y, the mortgagee of third sequence, should take his place. X did not know that according to the provisions of BGB, when he abandoned his right, the mortgagee of second sequence would automatically raise to the first sequence, he then sought to avoid his manifestation after finding out the truth. The RG ruled for X, stating that,

> *'If the manifestation was made because of the misunderstanding or unawareness as to its legal meaning, resulting in legal effects that was not intended for, but something substantially different and completely unwanted, there was an error in content of the manifestation. On the contrary, if the juristic act which was made without mistakes in law and was intended for may lead to certain results that exceeded the legal effects pursued by the manifesting party and were neither known nor wanted by him, there was no error in content.'*

In the present case, X's error was one that involves the content of the manifestation,

[381] See *Münchener Kommentar zum BGB*, 1, §119 para.82 (Armbrüster).
[382] RGZ 88, 278.

he was therefore entitled to avoid his juristic act.

The above analysis has shown that in determining whether or not a mistake as to the legal effect of the manifestation is operative, the RG had attached importance to the impact of the error on the original expectation of the manifesting party about the result of his act. Only in scenarios where the intervention of certain provisions of law fundamentally altered the effect originally sought by the manifesting party can his misunderstanding or unawareness as to these provisions be excuse under §119 I BGB. If, on the other hand, the provisions of law did not alter the legal effect but only added something new outside the plan, the mistake will be irrelevant. In this connection, the RG had once again expanded the scope of the error in content. Now, it can not only refer to the inconsistency between the intention and the expression, but also to the cases where the intention is in concord with the expression but is inconsistent with the final effect of the latter which is modified by non-autonomous norms from the law.

5.1.3 The theory of disrupted transactional basis

The doctrine of the extended error in content developed by the RG was not widely accepted by German scholars. Instead of breaking through the binary system of §119 BGB, German scholar inclined to seek solutions for the problem of motive error outside the law of mistake. Their main foothold is the theory of 'disrupted transactional basis' (*Wegfall der Geschäftsgrundlage*).

(1) From the theory of premise to the concept of transactional basis. It is well known that the concept of transactional basis was first theorized by Paul Oertmann, who in turn piled on the wisdom of Bernhard Windscheid.

Windscheid was the founder of the theory of premise. He opined that the premise of a manifestation of intent (*die Voraussetzung*) was an independent type of the 'self-restriction of will' parallel to the clause of condition. Just as when the manifestation is conditional, in the occasion where it was made on certain premise, the manifesting person is willing to be bound by his act so long as a particular circumstance exists, occurs or continues. However, since the manifesting party was in no doubt about the existence, appearance or continuity of such circumstance at the time of act, there would be no driving force for him to turn this premise into a condition. The premise, therefore, can only stay in the dimension of an 'undeveloped condition',[383] it is not a part of the

[383] See Bernhard Windscheid, *Die Lehre des Römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus, 1850), 1.

manifestation of intent. In cases where the premise is not satisfied, the legal effect of the manifestation is still in line with the 'actual will' of the manifesting party, but will contradict his 'final will', that party therefore must be able to invoke the *exceptio doli* when being requested to fulfil his obligation, or be entitled a right for restitution on the basis of unjustified enrichment if he has already tendered performance.[384]

However, if the concept of 'premise' is defined only as an undeveloped condition, it would be reduced to no more than another expression of 'motive'. In order to draw a clear line between the two concepts, Windscheid later pointed out that the premise, in essence, is a special type of motive that was already incorporated into the manifestation of intent, thus has become part of it.[385] Only in cases where the opposite party is able to recognize that the manifesting party is willing to be bound only when certain premise is sustained, i.e. when 'the motive is made recognizable as a self-restriction of will', may the mistaken person obtain relief relying on the non-existence of the premise.[386]

Despite the above limit added, the theory of premise can still not spare itself from the critique that it considers only the one-sided interest of the manifesting party without taking the reliance of the opposite party into account. This shortcoming directly let to its failure of being absorbed into the BGB. The legislator rejected this theory for the purpose of the protection of transactional safety.[387] However, if we compare the threshold for the relief of error in motive in the frame of the premise theory to that adopted by the RG in cases of mistaken nature and calculation error, we may find that they are essentially very close, despite some technical differences in terminology and normative basis. Whether the RG had stealthily received the 'military aid' from the theory of promise, is therefore open to doubt.

What need not be doubted, however, it the kinship between Oertmann's notion of transactional basis and the theory of premise. In order to overcome Windscheid's tendency of overly protecting the interest of the erroring party, Oertmann introduced a set of significantly stricter requirements for the relief of motive errors under the concept of transactional basis. According to Oertmann, the publicization of motive, i.e. making the decisive assumptions of fact recognizable to the opponent, is not adequate for these assumptions to become transactional bases that are legally relevant. The opposite party must **actually know** these assumptions and **have at least 'implied' his consent to them**.

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384 See Ibid., 2.
385 See "Die Voraussetzung," *AcP* 78 (1892), 195.
386 See Ibid., 198.
387 See *Protokolle zum Entwurf des BGB*, vol. 2 (1898), 2690.

Such an implied consent may appear in the following two forms: one is when the opponent was aware of the premise of the manifesting party but did not bring up any objections to it; the other is when the assumption as to certain fact was shared by the parties as their decisive motives. Based on this idea, Oertmann defined his concept of transactional basis as

> *'[t]he assumption of one party came to light at the time of the conclusion of the transaction, whose significance was known and not objected by the possible opponent; or, the common assumptions among multiple participants regarding the existence or occurrence of a particular situation on which basis the transactional intentions were build.* '[388]

If such assumption is subsequently found to contradict the reality, the party, whose interest is so harmed, should be entitled a right to terminate the contract unless he has assumed the risk of the failure of the assumption.

It is important to note that Oertmann's theory of disrupted transactional basis was designed not only as a solution for cases of motive error, its main purpose, in fact, was to deal with the great economic crisis in Germany during and shortly after World War I, when severe inflation destroyed the equivalence in a large number of contracts. For this purpose, Oertmann had no choice but to consider the general economic condition of the society as one of the common assumptions underlying the contact, so that the aggrieved party may invoke termination when such condition dramatically changes due to unexpected social disorder. But the problem is, when the parties were entering a contract, they normally would give no thought to the general social and economic orders surrounding the trade, the 'assumption' that the social background of the contract would stay unchanged, was never in the mind of the parties, they could not have reached any consent on admitting such 'assumption' as the basis of the transaction.[389] This contradiction in Oertmann's theory later incurred critiques from other German scholars, Karl Larenz was among them.

(2) The binary theory of disrupted transactional basis. Shortly after the end of World War II, facing a social context similar to that in Oertmann's era, Larenz introduced some important amendments to the theory of disrupted transactional basis.

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[388] Paul Oertmann, *Die Geschäftsgrundlage − Ein Neuer Rechtsbegriff* (Leipzig: A. Deichert, 1921), 37.
[389] See Karl Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 2 ed. (München: Verlag C. H. Beck, 1957), 9.

According to Larenz, a clear line must be drawn between the 'subjective' and 'objective' transactional basis. The concept of subjective transactional basis intended to deal with the issue of error in motive, thus should be attributed to the institution concerning defects in manifestation of intent in the General Part of the BGB; the concept of objective transactional basis, on the other hand, involves the subsequent failure of contractual purposes or common intentions of the parties, therefor is a component of the law of obligation.[390] The Oertmann's formula, which focused entirely on the party's motivational process, should be viewed as only a definition for the subjective transactional basis, and cannot be applied to cases concerning changed circumstances. What's more, this formula must be amended so that unilateral motives of the manifesting party are removed from the scope of the legally relevant transactional bases. The reason behind this amendment is that, according to Larenz, even if the opponent is well aware of the premised assumption of the manifesting person, he is generally not obliged to give any thoughts to its correctness, he also does not have the duty to respond to this issue. In this context, the silence of the opposite party, i.e. the fact that he did not brought up any objection, can in no way be constructed as an agreement to the assumption of the party in mistake.[391] Therefore, in the frame of Larenz's theory, only the common mistake of the parties as to a shared motivational assumption is operative as a disruption of the subjective basis of the transaction. The reason behind this conclusion is not that the parties have reached an implied agreement alongside the contract to treat the existence of certain circumstances as the premise of the binding force of juristic act, but because that the opposite party is estopped from relying on the contract under the principle of good faith since

> *'he could not claim himself to be an honest thinker if he wants to make demands on a much higher profit against what was recognized by himself as proper standard for valuation and what was actually acknowledged at the time of contract formation as the 'valuation basis', only because the 'words' of the contract appeared to have entitled him such a right.'*[392]

Based on this modified concept of the subjective transactional basis, Larenz re-considered the decisions of the RG under the doctrine of the 'extended error in content'.

[390] See Ibid., 17 and below.
[391] See Ibid., 8.
[392] See Ibid., 164.

In his opinion, the RG cases of calculation error (Case 5-G8-G12) should not have been treated the same way. Except for Case 5-G11 and G12 that could have been solved by the formula '*falsa demonstratio non nocet*', others were all cases of disrupted subjective transactional bases. It was not adequate for the court to provide relief to these scenarios simply on the ground of the externalization of the calculation process.[393]

(3) Flume's theory of risk allocation. While Larenz's new version of the theory of disrupted transactional basis was exerting great influence in the German academic circle, Werner Flume took another path and started questioning the functional necessity of this doctrine.

According to Flume, the theory of disrupted transactional basis is intended to solve the problem of the relationship between the juristic act and the reality.[394] But the answer to the question, how the juristic act would be affected if the reality it involved turned out to be incorrect or had changed after its foundation, lies first in the content of the juristic act and the relevant provisions of the law (e.g. the rules for impossibility of performance, etc.). Only when neither of them can provide an answer is there room for the theory of disrupted transactional basis to play a role. Nonetheless, even at this point, setting up a general solution with this theory is hard to work.[395] Flume then looked into the cases generally considered as examples of the disrupted subjective transactional basis. He found that most of these cases possessed the same characteristic, that is, the inconsistence between the contract and the reality has directly affected the content of the contract, resulting in the existence of two sets of contradictory contractual terms. In this scenario, the problem of the conflict of terms must be resolved. Sometimes, one set of terms may exclude the application of the other; sometimes, the terms are at the same level and their effects must be further clarified; whichever is the case, there is no room for a separate 'basis' of the transaction because the underlying assumption of the reality has already become part of the contract.[396]

The question is only how to solve the cases involving two sets of contradictory terms without resorting to the unified concept of transactional basis. Flume attempted to answer this question by a case-by-case analysis of the decisions of the RG. Firstly, in Case 5-G12 cited earlier where the defendant on the one hand promised to repay the loan basing on the present exchange rate, on the other hand acknowledged an excessive

[393] See Ibid., 23 and below.
[394] See Flume, *Das Rechtsgeschäft*, 497.
[395] See Ibid., 499.
[396] See Ibid., 507.

amount because of the mistake, the content of 'repay the loan' should take precedence over the expression of the concrete amount due to '**the meaning of the act**', therefore the contract was concluded at the true exchange rate.[397] In contrast, for example, in Case 5-G9 which involved the trade of security, 'buying and selling at the exchange price' is the content this '**type of juristic act**' should be deemed to have, but the parties had agreed on a different sum at the same time. These two sets of conflicting terms, however, were at the same level, hence cannot exclude the effectiveness of each other. Neither party in this case would have the right to hold the other party to the terms that was unfavourable for the latter, they may only seek to maintain the contract by showing without delay their consent to the set of terms asserted by the opponent. The contract is void only when neither party is willing to accept the content of the other party.[398] The result will once again be different, if the mistake as to the exchange price occurs in mandate contracts, e.g. Case 5-G10, in this specific type of contract, the person who gave instruction to the bank to sell out his stock must bear the consequences of his mistake and let himself to be bound by the contract made by the latter.[399]

In Flume's theory, whether one set of the conflicting terms should be on the same level with the other or take precedence over it depends on which party bears the risk of the misconception of fact. If such risk should not be allocated exclusively to one of the parties, neither of them will be allowed to impose a set of disadvantaged terms on their opponent; otherwise, the party bearing the risk must accept the terms asserted by the other.[400] This idea of risk allocation is applicable also to cases where the incorrect reference to the reality does not directly affect the content of the contract.[401] To the question, which of the parties should bear the risk of the reality, exits no general unified solution. The criteria for the allocation of risk must be found by the legal theory as *naturale negotii* with regard to the concrete contract types.[402] The effort to solve all the cases once for all using the concept of transactional basis is therefore helpless.

(4) The understanding of transactional basis in judicial practice. The development of the theory of disrupted transactional basis was soon noticed by German courts. The RG began to invoke Oertmann's proposition to solve cases of common error in motive shortly after it was published. The leading case was the decision on 3 March

[397] See Ibid., 502.
[398] See Ibid., 503; similarly also, Case 5-G8, Case 5-G11, etc., See Ibid., 503-507.
[399] See Ibid., 503.
[400] See Ibid., 525.
[401] See Ibid., 500.
[402] See Ibid., 500-501.

1924 (Case 5-G14).[403]

In this case, X and Y each inherited a piece of land (Land I and Land II) under the will of their parents. The will stipulated that Land I was accompanied by a 'burden' to provide convenience for the operation of a florist's shop situated on it which was managed by Y. At that time, both parties were of the opinion that this provision obliged X to lease the shop on Land I to Y, X therefore issued an acknowledgement for this obligation. Later it turned out that the will did not impose such an obligation on X, who then brought up an action to avoid the acknowledgement. The RG, although did not allow avoidance of the juristic act, held that X was entitled a right to deny its binding force by invoking the *exceptio doli*. The court's argument is that, in the present case, the existence of the obligation was the common basis for the formation of the contract, therefore the case involved not a unilateral motive error of X but 'a shared mistake [among the two parties] as to the objective foundation of the agreement'. Under this circumstance, it would be contrary to the principle of good faith if Y was allowed to insist on the contract.

The BGH basically followed the precedence of the RG. For example, in Case 5-G15 of 23 October 1957,[404] X's land was expropriated by the state at wartime, after the war was over, the government decided to give compensation to X at the amount of 30,000 Reichsmarks which was to be paid in Deutschmarks according to the Currency Reform Act (*Umstellungsgesetz*). The government thought that the conversion rate from RM to DM was 10:1 therefore offered to pay X 3,000 DM. X accepted the compensation based on the same idea. In fact, the actual conversion rate was 1:1. X filed a suit claiming the rest of the compensation. The BGH eventually gave judgment for X on a similar ground as the one in Case 5-G14. It held that

> *'a bilateral mistake in the assessment of the status of law at the time of the conclusion of the contract can be a defect in the transactional basis if without such error in law the contract would not have being made the way it was…a contractual party, who wants to keep the profit that would flow to him in contradiction with the real legal status after the mistake is cleared up, is normally acting against good faith. It is especially the case when he has, even innocently, shown the false legal assessment as the right one to the party*

[403] RGZ 108, 105.
[404] BGH NJW 1958, 297.

disadvantaged by the mistake.

The case law of the BGH didn't adopt the distinction between the subjective and objective transactional basis advocated by Larenz, it defined the concept of transactional basis generally in the way Oertmann did. According to the BGH

> *'transaction basis refers to the assumption of one party that came to light at the time of the conclusion of contract, whose significance was recognizable to and not objected by the opposite party; or, the common assumptions of the parties regarding the existence or occurrence of a particular situation on which the transactional intentions were build.' (emphasis added)*[405]

Thus, the BGH has made an important modification to Oertmann's formula of transactional basis, it no longer requires the actual knowledge of the opposite party as to the unilateral motive of the person in mistake, such a mistake is operative so long as it was recognizable to the opponent and was not objected by him.

On the other hand, the theory of risk allocation put forward by Flume and others also has an impact on the jurisprudence of the BGH.

For example, in Case 5-G16 of 20 May 1970,[406] X leased Y's land for the purpose of business operation but failed to achieve the expected profit. The BGH held that X should nonetheless be bound by the contract because

> *'[i]n principle, an event that falls within the sphere of risk of one party cannot be used for a claim basing on § 242 BGB because the application of the principle of transactional basis may not lead to the removal of the risk allocation lying in the contract.'*

In the present case, whether the business on the leased land was profitable or not, was obviously a risk that must be borne by X himself, his expectation that 'the lease of land will be profitable' did not constitute a contractual basis within the meaning of §

[405] See *Münchener Kommentar zum BGB*, vol. 3 (München: Verlag C. H. Beck, 2019), §313 para.24 (Finkenauer)
[406] BGH NJW 1970, 1313.

242 BGB. Simply a common error in motive is therefore insufficient for the application of the doctrine of disrupted transactional basis, if it goes against **the typical risk allocation inhered in the contract**.

Although the BGH has, in the above case, not fully accepted Flume's theory of risk allocation, it has realized that certain typified standards for the allocation of the risk of false assumption of fact may be deprived from the provisions of law concerning specific contracts. The difference between the opinion of BGH and that of Flume is, the latter believed that these typified standards of risk allocation are sufficient to solve the problem, hence there is no room for a general concept of transactional basis, whilst the former insisted on the necessity of such concept as a supplement for the typified arrangement. By importing the consideration of risk allocation, the BGH has, to some extent, enabled itself to mitigate the side effect which may have been the result of including recognizable unilateral assumptions into the scope of transactional bases. In such scenarios, the party in error could still be held to the contract because he must bear the risk of his own mistake.

(5) Codification of the doctrine of disrupted transactional basis. The 2002 Modernization Act of Obligation Law eventually absorbed the case law doctrine of disrupted transactional basis into the Civil Code. §313 of the amended BGB provides for the following,

> *'**§313 Disruption of the transactional basis.***
>
> *(1) If circumstances which have become the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents had they foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.*
>
> *(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.*
>
> *(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may terminate the contract. In the case of continuing obligations, the right for cancelation*

takes the place of the right for termination'.

It is not difficult to see that this article is influenced by Larenz's binary theory of disrupted transactional basis. Thus, it distinguished in the first two paragraphs the change of objective circumstances and the incorrectness of subjective conceptions. However, this provision does not provide any further instruction as to the requirements for the material conceptions to become the basis of the contract. As a result, the formula adopted by case law is still applicable under the new legislation, and it is in fact applied by the BGH in its subsequent cases.

(6) The decline of 'extended error in content'. With the establishment of the rule of disrupted transactional basis, the BGH gradually deserted the doctrine of extended error in content developed by the RG. This trend could be seen especially in its decision on 7 July 1998,[407] in this case, the BGH explicitly rejected the application of this doctrine to a typical situation of 'external' error in calculation. The BGH so far has not changed the precedence of the RG that allows avoidance under §119 I BGB for mistakes as to the legal effect of the juristic act (Case 5-G13), however, after the doctrine of disrupted transactional basis became widely accepted, cases applying this precedence was hardly seen.[408]

(7) §119 II as a special provision of §313 BGB. As was mentioned earlier, case law of the BGH has defined the 'important nature of the person or thing' in the sense of §119 II BGB as any factual or legal relationships that have been made recognizable as the bases of the transaction by the manifesting party. This criterion is very similar to the formula of transactional bases adopted by the BGH. Therefore, it can be argued that after the Modernization Act, §119 II BGB has become a *lex specialis* of the provision concerning disrupted transactional basis provided in §313 BGB.[409]

5.1.4 Cancellation due to precontractual liability

Relying on the doctrine of disrupted contractual basis, the scope of excusable error in motive in German law was significantly extended beyond §119 II BGB. Even so, there are still a number of motive errors worth protection that are not included. The BGH soon had to make new breakthroughs, this time, it chose the institution of precontractual liability as its starting point.

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[407] For details of this case, see *supra* Case 5-G19.
[408] See Tianke Ban, "Legal Error in Civil Law," *Peking University Law Journal* 23, no. 5 (2011), 1004 and below.
[409] See Mario Schollmeyer, *Selbstverantwortung und Geschäftsgrundlage* (Tübingen: Mohr Siebeck, 2014), 122.

(1) Mistakes induced by the misrepresentation of the opposite party. In a case decided by the BGH on 31 January 1962 (Case 5-G17),[410] X ordered a set of sawing machine from Y for the replacement of his old one. Prior to the conclusion of the contract, X asked the employee of Y whether the new machine was suitable to be installed in the position of his old device. The employee answered yes after carrying out measurement at X's place, X then decided to purchase. However, the measurement of Y's employee later turned out to be incorrect, the new machine was unable to fit in expected position. X refused to pay the price, Y sued.

The BGH ruled for X. It held that the statement of Y's employee about the fitness of the new machine in the specific position was a suggestion that was decisive for the buyer to enter the contract, this suggestion will create a collateral duty on the side of Y to pay due attention to the accuracy of the information. Y's negligent violation of this duty in the present case gave X the right for compensation. X has exercised this right in the form of a defense against Y's claim for performance. The aim of the compensation was to place X in the position where he should have been in had Y fulfilled his duty, which meant that X may request exemption from the contractual obligation induced by the negligent misrepresentation from the side of Y.

The BGH then discussed in detail the relationship between the right to request exemption as a form of the precontractual liability and the right to avoid the contract for fraud under §§123, 124 BGB. Its basic position is that, although the subjective requirement of fraud is more stringent than that of the precontractual liability, §§123, 124 BGB is not the *lex specialis* that will exclude the application of the right for exemption, the aggrieved party, therefore, are free to choose between the two rights. The court provided the following analysis.[411]

First of all, the case law of the RG had allowed the co-existence of the right to compensation on the ground of tort law that may lead to the exemption of the obligation and the right for avoidance under §§123, 124 BGB. The aggrieved party may claim exemption even after the time limit for avoidance has expired. This conclusion could be based on the following two reasons: a) 'the effect of the right for exemption is simply to prevent the obligor from obtaining any rights from the contract, whilst the avoidance according to §142 BGB also leads to full elimination of the obligation that is effective to a third party', so there is a difference in the strength of the two; b) taking account of

[410] BGH NJW 1962, 1196.
[411] BGH NJW 1962, 1198f.

the very short time limit of §124 BGB for the right to avoid, it is arguable that the victim of fraud has an interest to make full use of the much longer time limit for the right to claim exemption, and there is no reason for the law to mitigate the usual consequence of tort for the benefit of the fraudster. The above analysis of the RG can also be used to explain the relationship between the provisions for avoidance and the right for exemption derived from the precontractual liability of the representor.

Secondly, there is no doubt that the provisions of §§123, 124 BGB will not prevent a victim of a negligent misrepresentation to seek damages for his loss of reliance interests on the basis of the other party's precontractual liability. He may, for example, request compensation for his expenditures or for the loss of a more beneficial transaction. Such loss of reliance interests is normally of a higher value than the victim's interest to be released from the obligation. If we'd allowed damages for this kind of loss, there is no reason to exclude the aggrieved party's right for exemption which is less burdensome for the opposite party.

Last but not least, even if the mistaken party is allowed to be exempted from the obligation in the event of a negligent misrepresentation, the right for avoidance based on fraudulent misrepresentation will not loss its meaning, because, on the one hand, the liability for defective goods in sales contract does not influence the applicability of §§123, 124 BGB but will take precedence over the precontractual liability when it involves false statement as to the characteristics of the goods; on the other hand, as was mentioned above, the legal effect of the two rights are different.

As a result, the BGH has established in the above case a new rule for the relief of errors in motive, which was widely followed by its subsequent decisions.[412]

Two important supplements were later adopted to this rule. First, in its decision on 2 June 1980,[413] the BGH made it clear that in the occasion of induced mistakes, the aggrieved party may choose from the right for exemption of the obligation and the right for monetary compensation as two forms of the opposite party's precontractual liability. Second, in another case of 26 September 1997,[414] the BGH held that the manifesting party's right for exemption is available only when he has suffered property losses due to the misrepresentation. Such property losses will not occur automatically with the conclusion of the contract, the victim must further prove the 'economic disadvantages'

[412] See BGH NJW 1968, 986; NJW 1969, 1625; NJW 1974, 849; NJW 1978, 41; NJW 1978, 2145; NJW 1979, 1983; NJW 1984, 2814; NJW 1985, 1769; NJW 1989, 1793; NJW 1993, 2107; NJW 1997, 254.
[413] BGH NJW 1980, 2408.
[414] BGH NJW 1998, 302.

resulted from the bad bargain.

(2) Mistakes known to the opposite party. In a case decided by the BGH on 4 October 1979 (Case 5-G18),[415] X participated in the bidding of Y's construction project and offered the lowest price of 63,056.44 DM. Later he found that an error had occurred during the process of calculation, the correct price he should have offered was 107,352.32 DM. X then refused to perform the contract on the ground that Y should have checked the price with him because the number he offered was abnormally low. Y brought up an action for damages of non-performance.

Y's claim was upheld by the BGH. with regard to the defense of X, the court held

> *'Meanwhile there is no claim here on the basis of fault in contractual negotiation. Such a claim is based on the requirement of reliance protection. Since the plaintiff called for bids of construction works and the defendant made an offer, they both assumed under the principle of good faith with consideration of the transactional custom (§242 BGB) a legal duty to act honesty. Therefore, an inviter of bid who is aware of the calculation error of the bidder before conclusion of the contract must point it out to the bidder. If he does not do so, he may not hold the bidder to the contract according to §242 BGB. Here, this requirement is not fulfilled.'*

It could be seen from the above analysis that although the BGH did not reach a positive conclusion to abolish the contract due to the matter of fact, it has explicitly adopted the following rule, that is, in cases where the opposite party knows the error of the manifesting party and fails to inform the latter, the manifesting party will also be entitled a right to be exempted from the contractual obligation on the basis of the opposite party's precontractual fault. However, if the error is not actually known to the opposite party, he is not obliged to inspect the correctness of the manifesting party's decision, he will not be held liable if he failed to notice and to point out the mistake.

Although the present case involved only the situation where the error in motive is unproperly maintained by the opposite party's violation of his duty to inform, it should also be applicable to cases where the error is caused by the silence of the opposite party as to certain fact that should have been clarified by him.

[415] BGH NJW 1980, 180.

5.1.5 Exploitation of other people's mistake as an abuse of right

In contrast to Case 5-G18 which attempted to solve the problem of calculation error in the frame of precontractual liability, the BGH soon imported a much stricter new rule. The turning point was its decision on 7 July 1998 (Case 5-G19).[416]

In this case, X, a bidder of Y's construction project, mistakenly calculated and offered a much lower biding price due to the malfunction of his software. After the bid was opened, X immediately informed Y of the miscalculation and asked the latter to not consider his bid. Y ignored X's notice and accepted the offer as the lowest bid. X then refused to perform the contract, Y sued.

The court of first instance ruled for X following the precedence of BGH in Case 5-G18. It held that although in the present case, Y did not actually know the calculation error in X's bid, he should have been and in fact was aware of the possibility of such an error since the price offered by X was significantly lower than Y's own evaluation and was very close to another bid admitted by Y to be the result of a miscalculation. Under this circumstance, when X informed Y of the mistake, Y should have granted X an opportunity to further explain the situation. However, by ignoring X's notice, Y had dishonestly prevented himself from learning the fact, he therefore must be treated as if the mistake was actually known to him. As a result of his precontractual fault, Y cannot hold X to the contract.

Nonetheless, the above reasoning of the lower court was later overturned by the court of second instance, and X's appeal to the BGH was also dismissed.

In its judgment, the BGH explicitly abandoned the doctrine of 'extended error in content' developed by the RG which allows avoidance for external calculation errors under §119 I BGB. According to the BGH, although the teleological basic value underlying §119 BGB does not prevent its analogical application for situations where the error in calculation is actually known to the opposite party, such application is not in consistent with the statutory system of the rules concerning avoidance for mistake, because, a) according to §§119, 122 II BGB, the knowledge of the opposite party of the mistake is not the precondition for the right to avoid but an excuse for the mistaken party's liability to pay damages after avoidance, this arrangement would be disrupted if the above provisions were applied to cases of external calculation error; b) §121 I BGB provides that the right for avoidance must be exercised without undue delay after the manifesting party is aware of his right, if the opposite party's knowledge were to be a

[416] BGH JZ 1999, 365.

precondition for avoidance, the time when the mistaken party knows that the opposite party knew his mistake would be decisive, this overlay of two subjective facts would seriously exacerbate the legal uncertainty that accompanies every right for avoidance, and in cases where the opposite party dishonesty prevents himself from knowing the mistake, §121 I BGB would lost all its meaning; c) the exercise of the right to avoid will influence the interest of a third party since the effect of such right not only involves the manifestation of intent that generates obligations between the parties, it may also negate the mistaken party's will to dispose his real rights.

The BGH then went on to state that, while the idea of expanding the scope of the avoidance for mistake is not desirable, it does not prevent the law to excuse an error in motive on the basis of the principle of good faith in forms of precontractual liability or the prohibition of the abuse of right. The court of first instance has chosen the former approach, but the problem is, the precontractual liability is established only when the recipient of the manifestation knew the error and failed to point it out to the manifesting party. However, in the present case, the manifesting party discovered the calculation error by himself and then notified his counterparty, there was no precontractual fault on the side of the opponent. The only possible remedy left, therefore, was the prohibition of the abuse of right. With regard to the requirements for this prohibition, the BGH held that

> *'Meanwhile, it may constitute an inadmissible exercise of right (§242 BGB) if the recipient accepts a contractual offer and insists on the performance of the contract although he knew (or dishonestly prevented himself to know) that the offer was based on a calculation error of the manifesting party…however, the positive knowledge of the calculation error of the manifesting person alone is not adequate for the acceptance of an inadmissible exercise of right. Whether a conduct of the recipient is dishonest could only be judged according to all circumstances of the individual case, and the extent of the calculation error is here of significant meaning. Just as is already stipulated in the second half of §119 I BGB, a mistake is only legally relevant when the manifestation of intent would not have been made with sensible understanding of the situation. This is to be admitted only when the mistake is of some importance. The acceptance to a miscalculated offer could be viewed as inconsistent with the principle of good faith only when the*

performance of contract by the manifesting party cannot be expected because, for instance, he would in this way be caught in serious financial difficulties. At the same time, the knowledge of the recipient of the manifestation must also cover these circumstances at the decisive moment.'

In the present case, Y was aware of neither the calculation error nor the facts that would make the performance of the contract unexpectable at the decisive moment of contract formation, there was no abuse of right when he insisted on the contract.

Further, contrary to the opinion of the court of first instance, the BGH held that Y in this case had also not dishonestly prevented himself from knowing the calculation error by refusing to check the situation with X. It stated that

'The starting point of the judgement must be that a defective calculation in a bid lies within the sphere of risk of the bidder; generally, the bidder must bear the risk of his own miscalculation. As a result of this, it is in principle entirely the matter of the bidder to let the inviter of the bid be fully aware of the calculation error and its unbearable economic impact on his business in a verifiable way. Therefore, the inviter, during the bidding process, is not obliged to examine the offers given to him for possible calculation defect or to run further investigations for it without any obvious clues. The inviter is not required to clarify by himself whether there is a calculation failure or not. However, a duty for clarification may exist when the fact of the calculation error with its unbearable result for the bidder is notable from the offer of the bidder or from comparison with other offers or from other circumstances knew to the inviter of the bid. Only in such an exceptional occasion is it justifiable under the principle of good faith to hold the inviter obliged to help verifying a calculation error against his own interest.'

In this case, Y did not have the duty to check for the calculation error of X, X must bear the consequence of his own mistake.

The following conclusions could be derived from the above analysis of the BGH, a) the opposite party is prevented from insisting upon performance under the principle of good faith only when he is aware of not only the error in calculation but also its significant impact on the equivalence of the contract; b) if the opposite party does not

actually know the above circumstances, he generally is not obliged to check the correctness of the calculation process of the offer by himself, and the manifesting party must bear the risk of his own miscalculation; c) the opposite party may have an exceptional duty to verify the situation when there are some obvious clues for the possibility of a mistake from the circumstances of the individual case, if he failed to fulfill such duty, he will be held to have dishonestly prevented himself from knowing the miscalculation and its significance, therefore must be treated as if he had known these circumstances.[417]

5.1.6 Summary and Comments

The treatment of motive error in German law has gone through four stages of development.

At first, the drafters of BGB were very cautious about the relief of error in motive because of the influence of the mainstream legal theory at the time. As a general rule, §119 II BGB only allows a small part of this type of mistake, namely the misidentification of the nature of a person or thing which is considered fundamental in transaction, to be legally relevant.

Nonetheless, soon after the legislation of BGB, German courts, in order to meet the needs of social reality, adopted a quite lenient standard for the judgment of such fundamental nature. Included are not only the natural attributes of the person or thing, but also all factual and legal relationships that may affect the evaluation of the person or thing by virtue of their characteristics and presupposed durations, as long as they are directly related to the person or thing and are made recognizable as the bases of the transaction by the manifesting party to the counterparty. Despite the above lenient understanding of the concept of fundamental nature in §119 II BGB, in practice there are still a number of cases in which the motive error deserves relief cannot be covered by this provision. Confronted with this problem, the RG further expanded the scope of excusable error in motive by adopting a new doctrine of ‘extended error in content’ which allows certain misconception of fact to be treated as an error in content in the sense of §119 I BGB. As a result of this expansion, the bifurcated structure within §119 BGB was seriously obscured, and the relief widely acknowledged for recognizable unilateral motive errors also sparked fierce criticism for overly burdening the security

[417] For criticism of this decision, see Reinhard Singer, "Der Kalkulationsirrtum - Ein Fall für Treu und Glauben?" *JZ* 54, no. 7, 342.

of legal transactions.

Due to the above shortcomings, the doctrine of extended error in content was not supported by the mainstream legal theory in Germany. With the introduction and continuous improvement of the theory of disrupted transactional basis, German scholars provided an alternative solution for the problem of motive error from outside the law of mistake while maintaining the binary distinction expected by the legislator. This theory was soon adopted by the RG and the BGH as replacement of the doctrine of extended error in content. Finally, in the 2002 Modernization Act, the case law rule of disrupted transactional basis was incorporated into the BGB.

In addition to the jurisprudence of disrupted transaction basis, with the regulation of contractual negotiation process strengthened in German law, the BGH also began to deal with the problem of defected information from the perspective of precontractual liability. According to the BGH, the party in error may request the counterparty to exempt him from his obligation as a way of paying damages if the mistake was caused by the latter with fault either by breaching a duty to disclose certain information or by making a misrepresentation. Also, in a case involving calculation error, the BGH recognized the possibility of granting relief for a mistaken offeror on the ground of prohibiting abuse of rights when the offeree simultaneously knows the mistake in the offer and its significant influence on the interest of the offeror, but still accepts the offer and requests performance.

In the end, a four-track system concerning the treatment of error in motive was established in German law. The mistaken party may seek relief through the institution of disrupted transactional basis, the rule of error in nature (§119 II BGB, which may be viewed as the *lex specialis* of §313 BGB), the damages for precontractual fault, and the prohibition of the abuse of rights. Since the law of mistake only plays a subordinate role in the above system, this system may be referred to as a **decentralized mode** of the rule for the relief of motive errors.

5.2 The amendment of Japanese Civil Code

On 26 May 2017 (only 2 months after the passing of the GP in China) the Diet of Japan adopted the Act for the Modification of a Part of Civil Code, putting an end to the 8-year-long process of the so called ‘biggest amendment in 120 years’ of the JCC.

[418] The Modification Act involved nearly 40% of the provisions of the JCC most of which belongs to the law of obligations. Rules for the establishment and legal effect of obligations, which are mostly stipulated in the General Part of JCC, was also a key point of the amendment. Among all the provisions being modified, the rule of mistake (§95 JCC) has seen the most changes.

The old version of §95 JCC provided that

'A manifestation of intent is void if there was a mistake in any element of the juristic act. However, if the manifesting person was guilty of gross negligence, he may not assert such nullity by himself.'

Whilst the amended §95 provides that

'(1) a manifestation of intent made on the basis of any of the following mistake is voidable if the mistake is significant according to the purpose of the juristic act and the common sense of the society,

a) mistake that occurs when there is no corresponding intent to the manifestation; or

b) mistake that occurs when the manifesting party's conception as to circumstances that have been made the basis of the juristic act is inconsistent with the reality.

(2) the avoidance of a manifestation of intent under b) of the previous paragraph is allowed only to the extent when it has been expressed that the said circumstances were treated as basis of the juristic act.

(3) in cases where the mistake resulted from the gross negligence of the manifesting party, the avoidance of the manifestation of intent under the first paragraph is excluded except in any of the following circumstances,

a) the opposite party knew the mistake or was unaware of it due to his gross negligence; or

b) the opposite party was caught in the same mistake as the manifesting party.

(4) the avoidance of the manifestation of intent under the first paragraph cannot be asserted against a third party who innocently relied on the validity

[418] See Yamamoto Keizo, *The Amendment of Civil Law* (Tokyo: Iwanami Shoten, Publishers, 2017), 1.

of the manifestation.

Compared to the old version of §95, the new law of mistake is much more detailed, this is mainly the result of one of the guidelines of the amendment, which aims 'to make the Civil Code easier for ordinary citizens to understand'[419] by importing restatement of the case law rules into the text of the code.[420]

Japanese courts developed the old law of mistake under §95 JCC in the following aspects. Firstly, in determine whether the mistake involved 'elements of the juristic act', the judicial practice in Japan, influenced by opinions of some scholars,[421] has defined the concept of 'element' as 'important part' of the juristic act and then decided the 'importance' of the mistaken part relying both on its subjective causation (i.e. the mistaken party would not have made such manifestation had he known the truth) and its objective significance (i.e. any reasonable man with transactional common sense at the same position would not have made such manifestation as well).[422] The new §95 JCC adopted this dual requirement with minor adjustments to its wording (para.1). Secondly, in regard to the legal effect of mistake which was set to be the invalidity of the manifestation by the old version of §95 JCC, the courts have imported a more lenient understanding, according to which the invalidity can only be asserted by the mistaken party himself and may not be asserted against him by his opponent or any third parties.[423] The new law further changed this effect of 'relative invalidity' into a right to avoid the manifestation (para.1).[424] Thirdly, the old §95 JCC denies the relief of mistake when the person in error was guilty of gross negligence. Scholars, however, advocated an exception being added to this rule in cases where the opposite party lacks protectable interests on maintaining the juristic act.[425] This idea was adopted by some lower courts[426] and is now becoming para.3 a), b) of the new §95 JCC.

The most important breakthrough made by case law to the old §95 JCC is that, contrary to the explicit decision of the legislator against the excuse of motive errors, it has included some of them into the scope of this provision. The basic structure of the

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419 See "Consultation No.88 of the Minister of Justice to the DCL", http://www.moj.go.jp/content/000103338.pdf.
420 See CROL Materials no.1, 1.
421 See Masaaki Tomii, *Basic Theory of Civil Law*, vol. 1 (Tokyo: Yuhikaku Publishing, 1903), 366.
422 See Decision of GCJ on 15 December 1914, in GCJC 20, 1101; Decision of GCJ on 3 October 1918, in GCJC 24, 1852.
423 See Decision of SCJ on 10 September 1965, in SCJR 19 (6), 1512.
424 See CROL Materials no.53, 7.
425 See Yamamoto Keizo, *Lectures on Civil Law I General Provisions* (Tokyo: Yuhikaku Publishing, 2005), 219; Kazuo Shinomiya, Nomi Yoshihisa, *General Provisions of Civil Law* (Tokyo: Koubundou, 2010), 226; Takashi Uchida, *Civil Law I* (Tokyo: University of Tokyo Press, 2008), 69.
426 See for example Decision of the District Court of Tokyo on 8 March 2002, in *Hanrei Jiho*, no.1800, 64.

case law rule was absorbed by the Modification Act. The new version of §95 JCC clarified the meaning of motive error in paragraph 1, b) on the one hand, and provided the preconditions for its legal relevancy on the other (paragraph 2). As a result, a bifurcated legal frame which deals with situations of error in expression and error in motive in different ways but within the scope of mistake law was eventually established in the text of JCC.

In this part, I will provide a brief introduction to the three-way interaction between the case law, the legal theories and the legislation in Japan on this issue.

5.2.1 The jurisprudence of the GCJ and the reliance theories

First, let us have a glimpse on the judicial practice of the highest court of Japan prior to World War II.

(1) The position of the GCJ. The GCJ started to allow cases of motive error into the scope of §95 JCC in its decision on 15 December 1914 (Case 5-J1).[427] In this case, X agreed to create a revolving mortgage on the real estate of Y to secure his future claims to the latter. The maximum amount of the secured claims was set to be 1,500 yen according to X's evaluation of the property. Later, it turned out that the price of the mortgaged property at that time was no more than 700 yen, X then refused to admit the validity of the mortgage because of the mistake.

On the top of defining mistakes as 'accidental inconsistencies between the internal intention of legal effect and the expressed intention of legal effect which constitutes the content of the manifestation of intent', the GCJ held that

> *'even when it was a fact that belongs to the motive of the manifestation, if the manifesting person has explicitly or implicitly expressed his intention to include it into the content of the manifestation, it will become a part thereof.'*

As a result, a mistake involving such fact may also fall into the scope of §95 JCC. Since the lower court had overlooked the possibility that the value of the mortgaged property was incorporated into the content of the manifestation thus lead to nullity of the juristic act, the GCJ sent the case back for retrial.

[427] GCJC 20, 1101.

Subsequently, in another decision on 24 February 1917 (Case 5-J2),[428] the GCJ reaffirmed its position in Case 5-J1. This case involved a mistake as to the nature of the subject matter. X, when selling his horse to Y, told the latter that the horse was 13-year-old, capable of reproduce and was currently pregnant. Y decided the purchase believing he was purchasing a horse that will soon give birth to another sound horse. In fact, the horse was not pregnant. Y then brought up a legal action asserting nullity of the sales contract. The GCJ ruled for the plaintiff, it held that although the nature of the subject matter is normally nothing more than a motive of the juristic act, it could be added into the content of the manifestation. If it was shown that the manifesting person would not want the juristic act to become valid without the existence of certain nature, such nature will become the element of the juristic act in the sense of §95 JCC, as long as it was a substantial part of the manifestation of intent according to transactional experiences and the common state of the matter. In the present case, Y has made the age and fertility of the horse a substantial party of his manifestation, his mistake, therefore, was one as to the element of the juristic act.

By equating the 'expressed intention' to the 'content of the manifestation' (Case 5-J1) the GCJ has actually limited the application of §95 JCC to the scenarios where the 'internal intention' and the 'content of the manifestation' accidentally fail to stay in concord with each other. Such inconsistency is called a 'mistake' (*sakugo*) and if it involves a 'substantial part' of the content, there is a mistake as to the element of the juristic act (Case 5-J2). Following this line of reasoning, a motivation-related matter will fall into the range of the law of mistake, provided it was in some way 'added to' the content of the manifestation. The GCJ didn't indicate, however, how such 'adding' should be carried out. In fact, if the 'content of the manifestation' is equivalent to the 'expressed intention', it would contain only statements as to the legal effect of the juristic act, in other words, it should be constituted by deontic propositions indicating how '**shall**' the legal relationships between the parties be varied by the juristic act, therefore is not compatible with pure judgment of fact which is formed by descriptive propositions specifying what '**is**' the reality. The motive for the manifestation of intent is a type of factual judgment ('the mortgaged property **is** worth 1,500 yen'; 'the purchased horse **is** 13-year-old and pregnant'), logically it cannot be simply 'added to' the content of the manifestation without being converted into a normative mode.[429] In

[428] GCJC 23, 284.
[429] See Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen*, 216.

this regard, the jurisprudence of the GCJ did not provide any guidance.

Even if we set aside the problem of incompatibility between the motive and the content of the juristic act, the definition of 'mistake' adopted by the GCJ is still questionable. It cannot cover the situation of error in motive at all, because such misconception of fact occurs at the stage of decision making, it has the same influence on the internal intention of the manifesting party as well as on its external expression, there would be no inconsistency between the two. Whether or not is the motive 'added into' the content of the manifestation does not affect this conclusion.

(2) Optimization of the case law rule by Wagatsuma's bifurcated theory. The above-mentioned shortcomings of the jurisprudence of the GCJ was later clarified by Wagatsuma Sakae in the 1930s. His theory of mistake, known as the representative of the traditional bifurcated approach, has introduced a new formula for the interpretation of the case law rules.[430]

Wagatsuma interpreted the 'mistake in the element of the juristic act' in the former §95 JCC as an 'error in the important part of the content of the manifestation',[431] which stayed in concord with the judicial practice. However, unlike the GCJ, Wagatsuma did not equate the 'content of the manifestation' with the 'expressed intention', he redefined it as the 'factual effect intended to be achieved by the manifesting person' as is shown in his expression.[432] This new definition has greatly expanded the scope of the 'content of the manifestation'. Now, it can be formed not only on the basis of a series of deontic propositions, but also by descriptive propositions that indicate the factual effect pursued by the manifesting party. In this way, motivational assumptions of the manifesting party will directly become the content of the manifestation the moment they are expressed, since these assumptions will always reflect the factual state pursued by the manifesting party.[433] The special process to 'add in' the motive is therefore no longer needed.

On the other hand, realizing that the definition of 'mistake' adopted by the GCJ was too narrow to cover situations of motive error,[434] Wagatsuma stated that

> *'If we accept the above opinion [that error in motive could exceptionally be operative], it would be proper to say that the so-called mistake in the*

[430] See Sakurako Nakamatu, "Mistakes", in *Seminars on Civil Law I*, Eiichi Hoshino ed. (Tokyo: Yuhikaku Publishing, 2012), 181.
[431] Wagatsuma, *General Provisions of Civil Law*, 319.
[432] See Ibid.
[433] See Ibid., 318.
[434] See *General Provisions of Civil Law (Revised Edtion)* (Tokyo: Iwanami Shoten, Publishers, 1965), 296.

manifestation of intent refers to the inconsistency between what is derived for the expression, and the intention of the addresser which is not determined purely by the intention of legal effect but by all economic and social goals pursued under the juristic act."[435] *(emphasis added)*

Under this new definition of mistake, not only cases of error in expression but also those of error in motive are included.

Based on the above analysis, Wagatsuma came up with his own formula for the relief of motive errors: they are legally relevant only when the motivational conceptions were expressed and therefore became important parts of the content of the manifestations.

(3) The substantive reason underlying the traditional bifurcated approach and the formation of the reliance theories. In Wagatsuma's theory, whether an error in motive is legally relevant depends largely on its publicity, this requirement was imported by him in order to strike a balance between the protection of the self-determination of the manifesting party and the consideration of transactional safety within the semantic range of §95 JCC.[436] After World War II, Wagatsuma provided further explanation for this purpose, he wrote:

'For me, the most reasonable result is that the validity of a manifestation of intent made by mistake is only harmed where the opposite party knew or ought to know the existence of a mistake on the side of the manifesting party, because it is at this point the interest of the manifesting party and his opponent is harmonized…however, for the interpretation of §95, if it was suddenly understood as [allowing nullity of a manifestation] 'when there was an important mistake as to matters that are known or ought to have been known by the opposite party…' it would become far away from its language. Therefore, it is better to explain the law as admitting important mistakes only in the matters expressed…this explanation, on the one hand, will not deviate from the text of §95 other than interpreting the "manifestation of intent" in this article as "what was expressed"; on the other hand, can get closer to the ideal point of interests harmonization as was mentioned above."[437] *(empha-*

[435] *Introduction to Civil Law II: General Provisions*, 187.
[436] See *General Provisions of Civil Law*, 318.
[437] *Introduction to Civil Law II: General Provisions*, 188 and below.

sis added)

However, for many scholars, only to 'get closer to' the optimal result is far from satisfactory, Wagatsuma's theory was therefore criticized. The dissenting opinions no longer want to abide strictly to the text of §95 JCC, they argued that a requirement of 'recognizability' of the error should be incorporated into the law of mistake in order to achieve the best balance between the interest of both parties. Nonetheless, these new theories have not agreed on the object of the said recognizability. There are two different criteria as to this issue. Kawajima Takeyoshi opined that the manifestation could only be nullified when circumstances of the individual case have shown that the mistake was known or ought to have been known to the opposite party.[438] He was therefore in favour of a complete realization of the 'optimal result' advocated by Wagatsuma.[439] Nomura Toyohiro, on the other hand, argued that the requirement of recognizability involves not the mistake *per se*, but rather the significance of it, i.e. the fact that 'the mistaken matter is of importance to the manifesting party'.[440]

If we look closer to the theory of Wagatsuma, Kawajima and Nomura, we would find that despite their different results, these theories all treated the law of mistake as a mechanism to balance the interest of self-determination on the side of the manifesting party and the interest of reasonable reliance of the opposite party, and they all laid more weight on the reliance interest of the latter. According to them, the relief of mistake is only justifiable when the opposite party has no reasonable reliance on the validity of the manifestation because the mistake or its significance is recognizable to him.[441] Therefore, a manifestation of intent suffering under a mistake is not binding for itself, it is nothing more than an 'appearance of right',[442] the mistaken party is held to the manifestation not because he voluntarily accepted it, but because he created such appearance of right and must be treated as if the right does exist, as long as the opposite party reasonably relied on the appearance.

Once we accept the idea that the nullity for mistake is only exceptionally

[438] See Kawajima, *General Provisions of Civil Law*, 289.
[439] See also Kobayashi, *A Study in the Law of Mistake*, 430; Tooru Ikuyo, *General Provisions of Civil Law* (Tokyo: Seirin Shoin, 1984), 273; Sunaga Jun, *Essentials of the General Provisions of Civil Law (Revised Edition)* (Tokyo: Keisoshobo, 2005), 208 and below.
[440] See Toyohiro Nomura, "Mistake in Manifestations of Intent (7)," *Journal of the Jurisprudence Association* 93, no. 6 (1976), 83 and below.
[441] See Keizo, *Lectures on Civil Law I General Provisions*, 190.
[442] See Canaris, *Die Vertrauenshaftung im Deutschen Privatrecht*, 9.

permissible where there is no reliance interest on the side of the opposite party, the necessity of setting a separate rule for the relief of motive error will vanish. This is because the task of reliance protection is of no difference whether it is a case of error in motive or a case of error in expression, thus the requirement of 'recognizability' must be applied to both of them. Based on this logic, except for Wagatsuma who was bound by the text of the article, both the reliance theory of Kawajima and Nomura had abandoned the bifurcated approach and started to deal with all types of mistake under unified rules.[443] This unitary understanding of the law of mistake later gained broad support from other Japanese scholars.[444]

5.2.2 The jurisprudence of the SCJ after World War II

The SCJ touched the issue of motive error for the first time in its decision on 26 November 1954 (Case 5-J3).[445] In this case, X contracted to purchase the house of Y believing that he could obtain the permit for cohabitation from the current tenant of the house while in fact the tenant was not ready to give such permit. X was unable to use the house as expected, he then sued for nullity of the contract. The SCJ ruled for Y holding that 'the motive of a manifestation of intent cannot be viewed as the element of the juristic act so long as it was not expressed to the opposite party as the content of the manifestation', in the present case, X said nothing about his expectation to obtain the permit for cohabitation, his manifestation was therefore fully binding.

By requiring the motive to be disclosed to the opponent, the SCJ seemed to have adopted the formula of Wagatsuma,[446] and have stayed away from the unitary theories that emphasized more on the recognizability of the mistake or its significance. However, we must keep in mind that the above decision of the SCJ is a negative example for the relief of error in motive, from which one can only draw the conclusion that a motive is definitely not an element of the juristic act if it is not expressed. The question, whether the motive will automatically become a part of the manifestation once expressed (as was submitted by Wagatsuma) or must meet further requirements, was left open in this decision.[447]

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[443] See Kawajima, *General Provisions of Civil Law*, 288 and below; Toyohiro Nomura, "Mistake in Manifestations of Intent (6)," *Journal of the Jurisprudence Association* 93, no. 5 (1976), 75 and below.
[444] See Takeyoshi Kawajima, Hirai Toshio, ed. *Japanese Civil Law Annotated (Revised Version)*, vol. 3 (Tokyo: Yuhikaku Publishing, 2003), 412.
[445] SCJR 8 (11), 2087.
[446] See Hiroki Morita, "Section 95 Civil Law (Focusing on Motive Errors)", in *One Hundred Years of Japanese Civil Code (2)*, Hironaka Yoshio, Hoshino Eiichi, ed. (Tokyo: Yuhikaku Publishing, 1998), 184.
[447] See also SCJC 64, 377; 65, 275.

This gap was not filled until another decision made by the SCJ on 25 December 1962 (Case 5-J4).[448] The court wrote in its judgment that

> *'generally, if the motive error is to cause the nullity of the juristic act, such motive must have been explicitly or implicitly included into the content of the juristic act, and it could be considered that the addresser would not have made such manifestation if there was no mistake. Therefore, even if the motive was expressed, if according to the interpretation of the manifestation it cannot be admitted to have become the content of the juristic act, a mistake in it will not lead to the nullity of the act.'*

Therefore, the SCJ had not fully accepted the traditional bifurcated theory. When deciding whether the motive error would fall within the scope of §95 JCC, the SCJ focused mainly on whether the motive has become part of the content of the juristic act. This is to be judged by the interpretation of the manifestation of intent, it is not adequate even if the motive was brought to light by the mistaken party in his manifestation. The expression of the motive is only a sign of it being made the content of the manifestation rather than a sufficient condition for it. Its function, therefore, is to provide an indication for the court to further examine, from the perspective of contractual interpretation, whether the motive has actually become the content of the juristic act.[449] In cases where the motive was not in any form 'expressed', such examination could be omitted (as in Case 5-J3).[450]

The SCJ's tendency of treating the expression of motive simply as a preliminary indication for the legal relevancy of the motive error will inevitably lead to the decline in the importance of the consideration of the publicity of motive in the legal reasoning of the courts. In fact, in many subsequent decisions of the SCJ, the question whether the motive was expressed or not was not specifically brought up. The court focused solely on whether it has become the content of the juristic act.[451]

The significance of the expression of motive was further weakened in a decision of the SCJ on 11 July 2002 (Case 5-J5).[452] In this case, X contracted to provide joint

[448] SCJC 63, 953.
[449] See Naoko Kano, "Mistakes of the Guarantor: The Significance of Contractual Type in Occasions of Motive Error", in *Studies in Property Law (Essays in Honor of Doctor Kobayashi Kazutoshi for His 70th Birthday)* (Saitama: Sakai Syoten, 2004), 148.
[450] See also SCJR 70 (1), 1.
[451] See for example SCJC 29, 403; SCJR 13 (5), 584; SCJC 66, 85.
[452] SCJC 206, 707.

and several guarantee for the principal obligation between Y and Z. X believed that the principal obligation was based on a normal financing contract according to which Z will pay the price for Y's purchase of certain goods from a third party, whilst Y was obliged to repay him in installments. Later, it was found out by X that the sales contracts entered by Y and the third party was a false transaction made to obtain the fund from Z. X then refused to be bound by the guarantee contract on the basis of his misconception as to the principal obligation. The SCJ gave judgment for X, stating that

> *'since the guarantee contract is a contract entered to secure a specific principal debt, what kind of obligation the principal debt is, is therefore an important content of such contract. In cases where the principal debt comes from a payment contract according to which a purchaser is obliged to refund in installments the price of the purchase paid by another person entrusted by him, since the existence of the commodity sale constituted the premise of the payment contract, it is generally proper to say that whether the sales contract existed or not is an important content of the guarantee contract.'*

In the present case, X was in mistake about an important content of the juristic act (whether there was a commodity sale), so the contract was void under §95 JCC.

The above analysis of the SCJ said nothing at all about whether the motive was expressed or not. It allowed certain factual relations to become part of the important content of a juristic act solely on the basis of the typical characteristic of the guarantee contracts. In this way, the SCJ had stayed away from the position of the traditional bifurcated theory which sees the 'expression' as the only path to incorporate the motive into the content of a juristic act. The factor of 'expression' is now downgraded to be just one of the many circumstances that must be considered comprehensively in order to decide the legal relevancy of the error in motive.

Nonetheless, although the SCJ had recognized multiple factors that may lead to the incorporation of the motive into the content of the juristic act, until now it provided no general explanation as to how such incorporation is to be achieved. The criteria for the incorporation seem to have contradicted with each other in different cases.

For example, in Case 5-J6 of 14 June 1993,[453] X brought up a lawsuit against Y for Y's default on his debt. In the course of the proceeding, X and Y reached a settlement

[453] SCJR 12 (9), 1492.

in which X agreed to accept 150 boxes of berry jam as replacement of part of the debt. The boxes of berry jam were believed to be of high quality and worth 450,000 yen on the market, but later it was discovered that they were of poor quality and were much cheaper than expected. X therefore claimed nullity of the settlement. The SCJ ruled for X on the ground that there was a mistake in the important part of his manifestation of intent.

In Case 5-J7 of 14 September 1989,[454] X, the husband, transferred all his real estate to Y, the wife, when he was divorcing Y. X believed at that time that the income tax generated from the transfer of property should be borne by Y, and evidences shown that Y was of the same opinion. In fact, X himself was obliged to pay the tax. The SCJ in this case upheld X's claim for nullity of the transfer agreement, stating that his motive has been implicitly included into the content of the contract.

In the recent Case 5-J8 of 12 January 2016,[455] X was entrusted by Y to provide joint and several guarantee for Y's debt to Z. X later found that Y was in fact an antisocial organization who should not be given any financial support, it then refused to perform its guarantee liability to Z. The SCJ refused to confirm the nullity of the contract, holding that guarantee contracts do not contain automatically the content that prohibits the principal debtor to be an antisocial organization, if X wants to be exempted from its obligation under such circumstance, it should have negotiated for a contractual clause beforehand, since X failed to do so in the present case, its motive was not a part of the juristic act.

It is not difficult to see that the threshold for the incorporation of motive in Case 5-J7 is significantly lower than those of J6 and J8. In that case, the court allowed relief of the error in motive only because the parties shared the mistaken conception as to the motivational fact. In Case 5-J6, on the other hand, the parties had agreed to determine the price of the boxes of berry jam according to the market price of those with high qualities, thus the motive of manifesting party (the jam is of high quality) has been converted into a provision of the contract (the jam should be of high quality). Case 5-J8 has adopted an even stricter requirement for the incorporation of motives, in this case, it was said to be insufficient if the contract contains only the provision stating that the principal debtor should not be antisocial organizations, the parties must make it clear that the contract is not binding when their factual assumption turns out to be false.

[454] SCJC 157, 555.
[455] SCJR 70 (1), 1.

Therefore, the case law of the SCJ shared the ambiguity as to the criterion of the 'incorporation' of motive with the jurisprudence of the GCJ. Nonetheless, it differed from the latter in the way that it no longer considers the incorporation of motive purely from the perspective of the one-sided manifestation of intent, rather, it requires a global evaluation of all factors on both side of the parties to see whether the motive has become part of the whole juristic act. This change of perspective in the judicial practice after World War II needs to be explained by a new theoretical framework. To this end, the consensus theory soon came into being.

5.2.3 The understanding of the case law rule under the consensus theory

Contrary to the reliance theory that denies the independent binding force of a manifestation of intent suffering under a motive error, the consensus theory still admits its qualification as an autonomous act because, unlike the situation of error in expression where the word of the manifestation fails to reflect the will of the addresser, 'even if there is a mistake in motive, it is still impossible to rule out the direct existence of the subjective intent',[456] therefore, the self-determination underlying the binding force of the manifestation is not impaired, and the manifesting party generally must bear the risk of his own misconception.[457] Such risk can only be transferred to the opponent when both parties has re-allocated it in advance through another agreement, a unilateral 'expression' of the motive can in no way cause such an effect.[458] The case law rule, which requires the motive be incorporated into the content of the juristic act before obtain legal relevancy, does not mean the incorporation of the motivational factual assumption *per se*, rather, it refers to the incorporation of a contractual provision agreed upon by the parties concerning the passing of cognitive risks. Whether there is such an agreement must be determined by contractual interpretation.[459] In practice, it usually appears in the following forms: a) conditions, which are imported into juristic acts for the allocation of cognitive risks concerning future facts; b) premises, which aim to allocate cognitive risks as to certain facts in the present or in the past; c) quality assurances, for the allocation of cognitive risks concerning the actual quality of the

[456] Masao Miyake, "Warranty Liability of the Seller and Mistakes", in *Contract Law Series (No.2)* (Tokyo: Yuhikaku Publishing, 1962), 124.
[457] See Hachishirou Takamori, "The Expression of Motive and Elementary Mistakes", in *Studies in the Law of Juristic Act* (Osaka: Kansai University Publishing, 1991), 243; Ryouhei, Masaaki, *Civil Law I General Provisions & Property Law*, 41; Keizo, *Lectures on Civil Law I General Provisions*, 193.
[458] See Hachishirou Takamori, *Lectures on Civil Law (1): General Provisions* (Kyoto: Horitsu Bunka Sya, 1996), 94.
[459] See "Premise Consensus in Private Settlements and Mistakes ", 173.

subject matters.[460]

But the problem is, if we are able to identify from the content of the juristic act any of the above agreements, the legal effect of the motive error could be decided accordingly. Under these circumstances, whether it is necessary to still let the law of mistake play a role, is doubtful. On top of this, part of the consensus theorists are of the opinion that §95 JCC should not assume the function of providing relief for errors in motive, the scope of this article must be limited to cases of error in expression as was expected by the legislator.[461] The formula of the SCJ jurisprudence, although contains the requirement of consensus for the relief of motive errors, must be further amended so as to exclude the application of the law of mistake. In contrast, there are also many scholars who are in favor of extending the scope of §95 JCC to cases of error in motive on the basis of the consensus theory. According to them, except for conditions that should apply §127 JCC, agreements on premise or quality assurance may also lead to invalidity of the contract under §95 JCC.[462] As a result, the function of the law of mistake is, on the one hand, similar to that of §127 JCC and can act as a confirmation of the legal effect of the agreement of premise; one the other hand, in the event of a violation of quality assurance, it will introduce the legal effect of invalidity into the contract beside the existing liability of non-performance. Compared with the idea of excluding motive errors from the scope of §95 JCC, this line of thinking is obviously closer to the judicial practice of the SCJ, it has thus become an important guidance for the understanding of the case law rules.

5.2.4 The involvements of the opposite party in the mistake

There are still a number of cases in Japanese judicial practice that cannot be explained even by the consensus theory. In fact, many lower courts, when deciding whether to grant relief for the motive error, relied not on the incorporation of the motive into the content of the contract but on the involvement of the opposite party in the mistake.[463] In these cases, the opposite party either induced the erroneous assumption of the manifesting party by his false or misleading representation, or had dishonestly exploited the mistake of others to get a better bargain for himself.

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460 See Keizo, *Lectures on Civil Law I General Provisions*, 199; Hachishirou Takamori, "Mistake and the Theory of 'Premise'", in *In-Depth Studies on Aspects of the Theory of Juristic Act (Essays in Honor of Professor Takamori Hachishirou for His 70th Birthday)* (Kyoto: Horitsu Bunka Sya, 2013), 9.

461 See Takamori, *Lectures on Civil Law (1): General Provisions*, 94.

462 See Keizo, *Lectures on Civil Law I General Provisions*, 201.

463 See "Case Law on 'Motive Errors' and the Direction of Civil Law Amendment (2)," *NBL* 1025 (2014), 37 and below.

For example, in Case 5-J9 decided by the District Court of Osaka on 30 March 2010,[464] the employee of a securities company told his client that certain bond was like a stock 'with an annual return of 15% and a total return of 150% in a decade', the client then decided to buy the bond mistakenly believing that it did not have the risk of losing the principal. He claimed invalidity of the contract after finding the truth. The court upheld his request.

In Case 5-J10 decided by the District Court of Hakodate on 19 July 1972,[465] X was arrested for participating in an anti-war assembly. X's father, mistakenly believing that X would be punitively dismissed if not voluntarily resign, persuaded his son to submit a resignation to the employer, who accepted X's resignation despite knowing the mistake. The court held for invalidity of the resignation.

In the above two cases, it is hard to say that the opposite parties had shown any consent to the passing of cognitive risks to their side. Therefore, the consensus theory is unable to cover these circumstances.

5.2.5 The choice of the Modification Act

From the above discussion, we could see that with regard to the preconditions for the relief of motive error, the highest jurisprudence of Japan has gone through a change from the requirement of the 'incorporation of the motive into the content of the manifestation' to the requirement of the 'incorporation of the motive into the juristic act', and the academic understanding of the judicial practice was also divided into the reliance theory and the consensus theory. What remains to be clarified it thus the final decision of the Modification Act, which aims to codify the existing case law rules.

The amendment made to the old §95 JCC has completely followed the Proposed Outline for the Modification of Civil Law submitted by the CROL. Therefore, in order to grasp the purpose of the new article, we must first turn to the reviewing process of the Proposed Outline.

The work of the CROL could generally be divided into three stages. The first stage was from November 2009 to April 2011, it was the stage for the sorting of issues and viewpoints for the amendment. Its result, namely the Intermediate Organization of Argumentations for the Modification of Civil Law, was opened for public comments in May 2011. The second stage, aimed to form a trial proposal for the amendment, was

[464] See *Financial legal affairs*, no.1914, 77.
[465] See *Hanrei Times*, no.282, 263.

from July 2011 to February 2013; its result, the Intermediate Trial Proposal for the Modification of Civil Law, was published for comments in March 2013. The last stage of the work of the CROL lasted from July 2013 to February 2015, during which the Proposed Outline was finally completed and was submitted to the Minister of Justice.[466]

(1) Discussion in the first two stages. The codification of the rule for the relief of error in motive was included into the agenda of the amendment at the first stage of the reviewing process.[467] As soon as this topic was put forward, it immediately led to fierce controversy among members of the CROL influenced either the reliance theory or the consensus theory.[468] The Intermediate Organization of Argumentations did not decide on this issue, it provided two alternatives for the new legislation, one on the basis of the reliance theory which emphasized the 'recognizability' of the mistake; the other in favour of the consensus theory and required the 'incorporation' of the motive into the content of the juristic act.[469] After entering the second stage of the reviewing process, the proposal in the consensus approach gradually gained the upper hand. The reliance theory was criticized from the following two aspects: firstly, it failed to stay in concord with the judicial practice;[470] secondly, it did not provide a reasonable solution for the allocation of the cognitive risks as to motivational facts.[471]

In the end, the Intermediate Trial Proposal adopted the opinion of the consensus theory, it submitted that

> *'§95 JCC shall be amended as follows:*
>
> *(1) ...*
>
> *(2) when a mistake occurred as to the nature or state of the subject matter, or to any other issue that has been made the premise of the manifestation of intent, such manifestation can be voided by the addresser under either of the following circumstances if he would not have made such manifestation had there been no mistake and it could be considered that any normal person would not have make it either.*
>
> *a) when the conception of the addresser as to the issue that has become premise of the manifestation of intent was made the content of the juristic act;*

[466] See Hiroyasu Nakata et al., *Lectures on the Amendment of the Law of Obligation* (Tokyo: Shojihomu, 2017), 11.
[467] See CROL Materials no.12-2, 30.
[468] See CROL Records no.10, 33 and below.
[469] See in detail CROL, "Supplementary Elucidations on the Intermediate Organization of Argumentations for the Modification of Civil Law", 224 and below.
[470] See CROL Materials no.27, 35 and below; Records no.31, 29.
[471] See CROL Records no 31, 27.

or

b) … '[472]

(2) Discussion in the early period of the third stage. Although the general idea of the consensus theory was adopted by the Trial Proposal, it did not take any further step to eliminate the ambiguity of the case law rule with respect to its requirement of the 'incorporation' of the motive into the juristic act. The proposed article contained no indication as to the concrete form of the consensus that may justify the passing of the risk of motive errors. In view of this, from the beginning of the third stage of the reviewing process, how to make the provision easier to understand became the focus of the discussion.[473]

At the 88th meeting of the CROL, the above-mentioned article in the Trial Proposal was modified as follows

'*…*

(2) if a mistake occurred as to the existence of certain issue or to its contents, in cases where the addresser would not have made the manifestation of intent had there been no such mistake, he may void the manifestation under either of the following circumstances if the mistake will normally influence people's decision on whether or not to make the manifestation.

a) when the intention of the addresser to link the validity of the juristic act to the existence of such issue or to its contents has been expressed; or

b) … '[474]

At first glance, the new proposal seems to have deviated from the position of the consensus theory because literally it mentioned only the unilateral expression of the manifesting party 'to link the validity of the juristic act' to the correctness of certain motivational conception. But in fact, the CROL chose this wording not to remove the consensus basis for the relief of error in motive but only to alleviate the burden of proof on the side of the person in mistake.[475] Theoretically, the opposite party can still deny the mistaken party's right for avoidance by proving that he had not agreed to establish

[472] CROL, "Supplementary Elucidations on the Intermediate Trial Proposal for the Modification of Civil Law", http://www.moj.go.jp/content/000112247.pdf., 13.
[473] See CROL Materials no.66B, 2.
[474] CROL Materials no.78A, 1.
[475] See CROL Material no 79B, 3.

any of the said linkage, but in practice such plea would hardly be seen because even when it is successful, the contract would still loss its binding force for the lack of mutual consent.[476] As a result, it would be adequate for the mistaken party to invoke avoidance for mistake if he could show to the court that his manifestation contained the intention to establish such a linkage, as long as the opposite party admits that the juristic act was successfully concluded. In this way, the CROL had restated the case law requirement of incorporation as an agreed linkage between the validity of the juristic act and the correctness of certain motivational conception of the manifesting party. In other word, a motive error is only excusable when the parties have reached an agreement on the cancellation of the transaction upon non-existence of a specific fact, or when such fact differed from the assumption of the manifesting person.

The above agreement to link the validity to the correctness of certain factual assumption is very similar to a condition, which is nothing more than a linkage between the validity and the future existence or content of a specific fact, both of them could be seen as subsidiaries of a juristic act.[477] Nonetheless, it must be noted that while the condition is a conscious arrangement between the parties after they actually anticipated the uncertainty of the future, in the situation of error in motive, the manifesting party was already in mistake as to certain fact, he was convinced that such fact did exist in the state he expected and had based his transactional decision thereupon. Under this circumstance, it would be impossible for him to come up with the idea to seek re-allocation of the risk of factual uncertainties through a contractual clause. Only when the manifesting party was suspicious of the existence or current state of a particular fact would he be motivated to try to make a special arrangement for it, however, in such an occasion, logically we will no longer be able to say that he has **misunderstand** anything because he did not actually make any final judgment on the state of the reality, therefore the rule for mistake cannot be applied. In a word, the new proposal of CROL, which required an agreement to bind the validity of the juristic act to the correctness of certain factual conception, was overly strict for the relief of error in motive, so that it is hard to imagine any space for its application.

(3) Discussion in the late period of the third stage and the meaning of the current provision. Realizing the above problem of the earlier proposal, the CROL had to adjust the threshold for the legal relevancy of motive error one more time at the final

[476] See Material no 79B, 3; Akio Yamanome, *Understanding the New Law of Obligation* (Tokyo: Shojihomu, 2017), 47.
[477] See Takamori, "Mistake and the Theory of 'Premise'", 18.

stage of the reviewing process. At the 96th meeting of the CROL, a new draft for the amendment of §95 JCC was adopted, which later became part of the Proposed Outline and eventually the Modification Act. In this draft, the special requirement for the relief of motive error is that the motive must have been specified as the basis of the juristic act. It provided that

> *'the provision of §95 JCC shall be amended as follows:*
>
> *(1) a manifestation of intent made on the basis of any of the following mistake is voidable if the mistake is significant according to the purpose of the juristic act and the common sense of the society,*
>
> *a) …*
>
> *b) mistake that occurs when the manifesting party's conception as to circumstances that have been made the basis of the juristic act is inconsistent with the reality.*
>
> *(2) the avoidance of a manifestation of intent under (1), b) is allowed only to the extent when it has been expressed that such circumstances were treated as basis of the juristic act.*
>
> …'[478]

The CROL abandoned the requirement of an agreement of premise and replaced it with the test whether the motive has become the expressed basis of the transaction. In this way, the CROL made it clear that the 'basis' *per se* is not a part of the juristic act but its external foundation.[479] This is a big step back from the strict position that askes for an internal consensus to bind the validity of the contract to the correctness of certain factual conception. Such modification extended the scope of excusable error in motive since now the parties no longer need to import through the process of offer and acceptance into the contract a detailed agreement as to the effect of such mistakes.

Under the final draft, the motivation conception must become the basis of the juristic act, it is therefore not adequate if it was only the one-sided premise of the mistaken party's own manifestation, importance must be attached also to factors on the side of the counterparty as was commonly seen in the practice of the SCJ.[480] According to Yamamoto Keizo, one of the members of the CROL, such factors are reflected in the

[478] CROL Materials no.83-2, 1.
[479] See CROL Records no.96, 6.
[480] See CROL Material no.83-2, 2 and below.

counterparty's recognition of the basic assumptions of the manifesting party. He said,

> *'...it would be odd if the manifesting person is allowed to void for his unilateral expression, however, if, upon expression, the opposite party has not brought up any objections, to treat [the expressed matter] as the basis of the juristic act was then agreed upon by him and therefore cannot be cancelled; and if the opposite party was caught in the same mistake, the erroneous conception would become the shared basis for both parties and therefore cannot be cancelled. For me, this explanation is understandable. In addition, if we have a look at the judicially created doctrine heretofore, we could find that it allowed nullity [for mistake] also from such perspective. And this is also the consideration when the earlier drafts set up the requirement for the incorporation [of the motive] into the content of the manifestation.'*[481]

As can be seen from the above analysis, Yamamoto's explanation for the 'basis of the juristic act' is very similar to Oertmann's formula of 'transactional basis'.[482] The reason for the legal relevancy of motive errors, according to both theories, is a quasi-agreement outside the contract aiming to treat certain motivational assumption as the premise of the binding force of the juristic act. However, although Yamamoto opined otherwise, this understanding had in fact deviated from the consensus theory and the formula developed by the SCJ which requires such agreement to be incorporated **into** the juristic act during the process of contract formation. It remains to be observed whether and to what extent the future judicial practice in Japan will implement the above understanding of at least part of the preparators of the new law.

(4) Discussion concerning the rule of induced mistakes. The CROL had also attempted to introduce an independent provision for cases of error in mistake that is caused by the opposite party. In the Intermediate Trial Proposal, it was provided that

> *'§95 JCC shall be amended as follows:*
> *(1) ...*
> *(2) when a mistake occurred as to the nature or state of the subject matter, or to any other issue that has been made the premise of the manifestation of*

[481] CROL Records no.96, 4.
[482] Different opinion, see Kouji Oumi, *Lectures on Civil Law I: General Provisions* (Tokyo: Seibundo Publishing, 2018), 213-214.

intent, such manifestation can be voided by the addresser under either of the following circumstances if he would not have made such manifestation had there been no mistake and it could be considered that any normal person would not have make it either.

a) ...

b) the mistake of the addresser occurred because the opposite party has stated something that was inconsistent with the fact.'[483]

Later, at the 86th meeting of the CROL, the wording of the proposal was adjusted as follows,

'...

b) the error in motive was induced by the opposite party.'[484]

The new proposal no longer requires a positive statement of the opposite party, it is also adequate when that party induced the mistake passively by silencing on certain issue which he had the duty to disclose (e.g. Case 5-J10).

At the 88th commission meeting, this provision was once again modified,

'...

(2) if a mistake occurred as to the existence of certain issue or to its contents, in cases where the addresser would not have made the manifestation of intent had there been no such mistake, he may avoid the manifestation under either of the following circumstances if the mistake will normally influence people's decision on whether or not to make the manifestation.

a) ...

b) the mistake as to the existence of such issue or to its contents occurred because of the conduct of the opposite party.'[485]

Despite some differences in details with the previous draft, the general idea of the CROL to provide relief for motive errors that are induced by the conduct (either his misrepresentation or his non-disclosure of certain information) of the opposite party

[483] CROL, "Supplementary Elucidations on the Intermediate Trial Proposal", 13.
[484] CROL Materials no.76A, 2.
[485] CROL Materials no.78A, 1.

remained unchanged in the new proposal.

Nonetheless, the sound against the codification of the provision of induced error in motive was continuously heard during the entire process of the amendment. Many members of the CROL were worried that small and medium enterprises would have to face significant higher risks of their contracts being voided by larger companies if such a provision were to be imported into the JCC. Eventually, at the 96th meeting of the CROL, the proposed rule of induced mistakes was completely deleted.[486] As a result, this type of mistakes can still only be dealt with under the general law of motive error,[487] which could generate a hidden danger that the court may incline to adopt a more abstract interpretation to the new §95 JCC at the cost of legal certainty, in order to extend the scope this provision to cover more situations. The goal of the Modification Act, which is to 'make the Civil Code easier for ordinary citizens to understand', would so be seriously harmed.

5.2.6 Summary and comments

§95 JCC before the Modification Act was a product of mixed legal reception. The legislator of JCC, on the one hand, introduced from the first and second draft of the German BGB the will dogma of Savigny, and defined the mistake as 'the inconsistence between what was wanted and what was expressed by the manifesting person'; on the other hand, for the sake of 'preserving the security and convenience of transactions', it selected from the 1890 old draft of the Civil Code, which was largely influenced by French law, several types of important mistakes, such as the mistake as to the nature of the agreement, the subject matter, the causa and the law, and combined them with the concept of 'mistakes in the element of the juristic act', so as to further limit the scope of excusable mistakes.[488] Cases of error in motive was completely excluded from this provision.

The original plan of the legislator was not fully implemented in the subsequent judicial practice. Confronted with the urgent need of reality, the highest court of Japan soon had to expand the range of §95 to cover certain situations of error in motive. Starting from the 1914 Case 5-J1 of the GCJ, the formula of 'incorporation of motive' was gradually established as the primary precondition for the legal relevancy of such type of mistakes. However, although the above formula was so important in the entire

[486] CROL Materials no.83-2, 1.
[487] See Oumi, *Lectures on Civil Law I: General Provisions*, 215.
[488] See Takashi Nakatani, "Creation of the Law of Mistake in Japan," *Surugadai Hogaku* 25, no. 2 (2011), 68.

system of the law of mistake, both the decisions of the GCJ and the SCJ were unable to provide a clear indication as to how the motives could be incorporated into the content of the manifestation or the juristic act.

The reason behind this situation is that the formula of 'incorporation of motive' contains within itself an inherent paradox that is logically impossible to bridge. Lying in between the motivational assumption and the normative contents of the manifestation of intent or the juristic act is always a giant gap between what '**ought to be**' and what '**is**'. If we want to adhere to the original meaning of the concept of 'motive' and the 'content of the manifestation or juristic act', there would be no way for us to 'incorporate' the formal into the latter.

In order to solve the internal contradiction of the case law doctrine, Japanese scholars had to alter the meaning of one of the above two concepts. The traditional bifurcated theory took the approach of expanding the content of the manifestation of intent. According to Wagatsuma, such content includes not only the terms on the legal effects of the juristic act, but also descriptions about the factual results intended by the manifesting party. In this way, the concept of content was converted into a mixture of both deontic and descriptive propositions, and the logical obstacle for the incorporation of the motive into the content was therefore eliminated. However, the price paid for this success was heavy. Under the traditional bifurcated theory, it is possible for the manifesting party to transfer the risk of factual misunderstandings to the opposite party by simply disclose his decision-making basis to the latter, which will seriously harm the security of the transaction.

The consensus theory, on the other hand, has chosen to modify the concept of 'motive' in the formula of case law. Under this theory, what is incorporated into the content of the juristic act is not the motivational conception *per se*, but an agreed term according to which 'the validity of the juristic act **shall** depend on the correctness of the said conception'. Thus, the consensus theory has greatly raised the threshold for the legal relevancy of motive errors. To obtain relief, the mistaken party must prove not only the existence of an error but also the fact that the parties had agreed to not be bound by the juristic act in the event of mistake. This is almost an impossible task in practice.

In the end, the amended §95 JCC did not follow any of the above approaches. It seemed to have turned to an Oertmann-styled theory of transactional basis. For the relief of mistake, there must be a quasi-agreement external to the juristic act which aims to treat certain motivational assumption as the premise of the binding force. As a result,

the new law of mistake has undeniably deviated from the jurisprudence of the SCJ, although the CROL stated otherwise.

On the other hand, in regard to the systematic arrangement of the rule for the relief of motive error, the Modification Act of JCC has taken a completely different approach in contrast to the decentralized mode in German law. The CROL rejected the proposal of some consensus theorists to confine the scope of the law of mistake to the cases of error in expression and let the problem of error in motive to be dealt with outside this institution. Instead, it established a **concentrated mode** to provide solutions for all types of mistake within the range of §95 JCC. This concentrated mode is consistent with the judicial practice in Japan. Nonetheless, due to the deletion of the provision for induced mistakes, the concentrated mode may contain within it the risk of not being able to cover all cases of excusable motive errors, resulting in unwanted vagueness in the application of the new law.

5.3 What could be learned from the comparative study?

5.3.1 On the systematic structure of the law of mistake

With respect to the relief of errors in motive, the legislator of the BGB and the JCC both adopted a very conservative attitude. §119 II BGB only allows avoidance for the misidentification of the nature of a person or thing which is considered fundamental in transaction, whilst the old version of §95 JCC simply excluded the motive errors from the scope of relievable mistakes. But then, under the pressure of transactional reality, the judicial practice in the two countries were both forced to embark on the path of modifying the legislative plan. The German courts, after abandoning the attempt to extend the applicable scope of the rule for the relief of error in expression, relied on the doctrine of disrupted transactional basis, the damages for precontractual fault, and the prohibition of the abuse of rights to solve the problem of motive error outside the law of mistake. In contrast to this decentralized approach, the case law of Japan adopted a concentrated system which allows relief for certain types of error in motive within the old §95 JCC. The latest amendment of JCC continued the concentrated approach in the judicial practice.

The reason why courts in Germany and Japan have chosen completely different directions could be seen in the following aspects: First of all, the language of §119 BGB is more explicit than that of the old §95 JCC, there is not much room to incorporate a

unified rule to treat different types of motive errors. Secondly, §119 BGB was originally only designed for unilateral mistakes, therefore the right to void of the erroring party is accompanied by a very short time limit and a strict liability to pay damages for the reliance interests of the opposite party. These provisions will lead to undue consequences if applied to cases where the error in motive is shared or caused by the opposite party. As a result, the optimal solution is not to extend the scope of §119 BGB but to construct new rules outside this provision. In contrast, the old §95 JCC has set the legal effect of mistake to be the nullity of the juristic act, and the compensation liability of the erroring party only exists when that party is guilt of fault as to his mistake, thus the expansion of §95 JCC to cases of error in motive will not cause similar problems as in German law. Lastly, Japanese law lacks adequate means to deal with cases of motive error beside the law of mistake. For example, the case law in Japan admits the doctrine of *clausula rebus sic stantibus*, which is similar to the rule for the disruption of objective transactional basis in German law (§313 I BGB). This doctrine allows adaptation or termination of a contract only when an unforeseeable change in the basic circumstances of the contract has rendered its performance overly harsh for one of the parties.[489] Cases involving shared mistake as to an existing fact (i.e. the disruption of subjective transactional basis in German law) are not included. Also, in Japanese law, damages for precontractual fault must be paid in money if not otherwise agreed by the parties (§417 JCC), thus even when the error in motive is caused by the misrepresentation or non-disclosure of the opposite party, the manifesting party normally will not be able to seek cancellation of the contract by requesting natural restoration from the former as in German law. Therefore, resorting to §95 JCC is the only available choice for Japanese courts.

The situation in Chinese law is similar with that in Japan. On the one hand, the wording of §147 GP does not confine its application to pure unilateral mistakes; on the other hand, since the CL and relevant judicial interpretations of the SPC admits no rule of the disrupted subjective transactional basis, and damages for precontractual fault must generally be paid in money, there is also little space for Chinese courts to seek solutions for the problem of error in motive outside the law of mistake. In the above context, it is more appropriate to adopt the concentrated mode in Chinese law. For this purpose, the concretization of §147 GP must enable this provision to accommodate a broader scale of relievable motive errors. §119 BGB, which only plays a subordinate

[489] See Yamamoto Keizo, *Lectures on Civil Law IV-1 Contract* (Tokyo: Yuhikaku Publishing, 2005), 102 and below.

role in the four-tracked system of German law, although long being the subject of theory reception in China,[490] is not suitable as the model rule for the concretization of §147 GP.

5.3.2 On the arguments justifying the relief of motive errors

Despite their different systematic arrangements, the scope of excusable errors in motive in the legislation and case law in both Germany and Japan are quite similar to each other. Legal relevancy is attached mainly to the following situations: a) the motive error is shared by the parties, e.g. Case 5-G8, G9, G10, G12; Case 5-J6, J7; b) the fact that certain factual assumption has led to the decision of the mistaken party was knowable to the opposite party and was not objected by him, e.g. Case 5-G5, G6; Case 5-J2; and the new §95 II JCC; c) the motive error of the manifesting party was induced by the misrepresentation of the opposite party, e.g. Case 5-G17; Case 5-J9; d) the opposite party was aware of the motive error but silenced on it or attempted to take advantage of it in other ways, e.g. Case 5-G18, G19; Case 5-J10.

It is not difficult to see that the types of error in motive that are legally relevant in German and Japanese law correspond to the four main case groups of relievable factual misconception in Chinese judicial practice to a great extent.[491] Therefore, the various theories proposed by the courts or scholars in the above two legal systems justifying the relief of these types of error in motive can also provide some references for the formation of case group norms in Chinese law. I will move to this topic in the next chapter, here it is adequate to first list out these theories so as to provide a basis for further discussions.

(1) **The Japanese reliance theory** is applicable to all types of mistakes (including errors in expression). According to this theory, a manifestation of intent labouring under a mistake is no longer a private autonomous behaviour that is binding for itself, its validity is stipulated by law for the purpose of protecting the reasonable reliance of the opposite party. As a result, the relief of mistake is legitimate only when there is no such protectable reliance on the side of the opposite party.

(2) **Oertmann's theory of disrupted transactional basis** justifies the relief of error in motive by a quasi-agreement of transactional basis parallel to the juristic act (contract). An assumption of fact is voluntarily accepted by the parties as the basis of

[490] See *supra* Section 1.3.5.
[491] See *supra* Section 4.9.

the transaction when both of the parties built their intention to trade on it, or when the significance of the factual assumption of one party was known and not objected by the other party at the time the contract was concluded. The amended §95 II JCC seems to have adopted a similar approach.

(3) **Larenz's modified theory of disrupted transactional basis** introduced a distinction between subjective and objective transactional bases. The problem of motive error is dealt with under the concept of subjective transaction basis. Excused is only the motivational misconception that is shared by the parties. Since both parties have based their trading decisions on the same factual assumption, they both recognized that this factual assumption was the proper valuation standard in trade, none of them will be allowed to make demands on an excessive profit by referring to the true state of affairs, which will contradict their previous behaviours: *venire contra factum proprium*.

(4) German courts relied on the function expansion of the **precontractual liability** to solve the problem of motive error caused by the opposite party of the manifestation of intent. When the opposite party negligently made misrepresentation to the manifesting party or breached his duty to disclose, the manifesting party may request that party to exempt him from his obligation as a way of paying damages.

(5) **The prohibition of the abuse of rights** was cited by the BGH for the solution of a special type of motive error. According to the BGH, an inadmissible exercise of right may be identified if the recipient of an offer with mistake simultaneously knows the mistake and its significant influence on the interest of the offeror but still accepts the offer and insists on performing the contract.

(6) **The idea of risk allocation** may be used to explain the scope of excusable error in motive in various ways. The consensus theory in Japan opined that the manifesting party must generally bear the risk of his own mistake, such risk can be transferred to the opposite party only when it is so agreed by the parties. Flume, on the other hand, admitted the possibility for legal theories to construct default rules for risk allocation according to concrete types of the contract.

Chapter 6 Preconditions for the Relief of Error in Motive

In the previous two chapters, I have made it clear that the excusable situations of error in motive in Chinese judicial practice and that of Germany and Japan are quite similar with each other. As a result, the arguments brought up by German and Japanese courts and scholars justifying the legal relevancy of these specific types of motive error may play a role as sources of reference for the construction of the rule of major misunderstanding in China. Keeping this in mind, in this chapter, I will turn to the internal value order of Chinese civil law to see if any of the above arguments is compatible with the legislator's value preference reflected in other provisions of law. Then, based on the above theoretical justification, I will try to generalize from the existing case groups several (proposed) case group norms concerning the relief of motive errors.

6.1 'Motive' incorporated into the content of the juristic act

Before moving on to the discussion of the preconditions for the legal relevancy of motive errors, we should first clarify the relationship between the law of mistake and the remedies for breach of contract in situations where the motivational conception of the manifesting party has become a part of the agreement between the parties. This is the case when the opposite party has assumed a contractual obligation to put the other party in the position he should have been in if his factual assumption was true (i.e. [Situation 1] in Chapter 4). In this occasion, the remedy for non-performance, especially the rule concerning termination of contracts, should take priority over the right to void for mistake. The reason is as follows.

The contract law of China has adopted the principle of 'encouraging transactions', i.e. *favor contractus*, which requires strict limit be imposed to remedies that will harm the maintenance of the original contract.[492] In cases where the subject matter lacks agreed nature, if the aggrieved party intends to pursue termination of the contract, he must have first notified the opposite party of the nonconformity of goods within a contractual agreed inspection period, or, in the absence of such agreed period, within a reasonable period after he discovered or should have discovered the nonconformity;

[492] See Limin Wang, "The Aim of Contract Law and Encouraging Transaction," *Chinese Journal of Law*, no. 3 (1996), 99

otherwise the subject matter will be deemed as conforming to the contract (§§157, 158 CL). After the nonconformity is established, the aggrieved party must further grant the opponent an additional period to cure the non-performance (§94.3 CL), or prove that the breach has rendered it impossible for the aggrieved party to achieve his contractual purpose (§94.4 CL). If, however, the aggrieved party is allowed to invoke avoidance for major misunderstanding under the same circumstance, the special limit imported by the CL for the purpose of sustaining the contract will be easily evaded. To avoid this result, the rule for the termination of contract must be seen as the *lex specialis* in contrast to the law of mistake, thus should be applied exclusively when the subject matter lacks agreed nature.

Things will be different if the subject matter, although does not possess an agreed nature, is of better quality than expected. For example, in Case 4-A1 the apartment tendered by the seller was actually bigger than was agreed in the contract, the seller was not liable for non-performance, therefore his right to invoke avoidance for mistake is not influenced by the rule for the remedy of breach of contract.[493]

6.2 Unilateral motive errors

More complicated is the problem of unilateral error in motive. As could be seen in chapter 4, Chinese courts tend to allow relief for only two situations: one is when the opposite party involved in the occurrence of the mistake either by his misrepresentation or by his non-disclosure of certain information (i.e. [Situation 3]), the other is when the motive of the mistaken party was known or ought to have been known to the opposite party when the juristic act was formed (i.e. [Situation 4]). Chinese courts didn't say much about the reason why these situations of motive error should be excusable, in comparative law, there are some theories that may be referred to as sources of obtaining general justifications. These theories, however, must be examined carefully in the context of Chinese civil law.

6.2.1 The problem of the Japanese reliance theory

Among all the foreign legal doctrines concerning the treatment of motive errors, the reliance theory originated from Japan has the deepest impact on Chinese scholars. It formed the basis of most unitary mistake theories in China.[494] The starting point of

[493] See Werner Flume, *Eigenschaftsirrtum und Kauf* (Münster: Verlag Regensberg, 1975), 146 and below.
[494] See *infra* Section 1.3.6.

the reliance theory is the assumption that any juristic act labouring under a mistake is not binding for itself as a private autonomous behaviour, it is valid *ipso iure* for the purpose of protecting the reasonable reliance of the counterparty. Therefore, the relief of mistake is legitimate only when there is no such protectable reliance. As was pointed out in the previous chapter, the opinions of Japanese reliance theorists diverge on when the recipient of an erroneous manifestation of intent may not be allowed to rely on its validity.

The traditional bifurcated theory developed by Wagatsuma Sakae submitted that the opposite party must bear the risk of an error in motive as long as such motive was expressed to him along with the manifestation of intent. The consideration behind this proposal is that, upon its expression, the motivational assumption of the manifesting party is no longer an internal psychological fact that is inaccessible to the opponent, thus it will not result in unpredictable harm to the latter if the manifesting party is to be excused for his mistake.[495] This explanation becomes questionable if we consider the fact that even if the motive of the manifesting party is actually known to the opposite party, it does not mean that this party will automatically become aware of the existence of an error in motive. If the relief of mistake is allowed simply when the motive is disclosed to the opposite party, the whole legal transaction will remain insecure and unreliable until that party acquires full information for determining the correctness of the manifesting person's motivational conception. The manifesting person, on the other hand, is exempted from any burden of investigation. All he needs to do is to provide a detailed list of all factual assumptions related to his final decision, if these assumptions are in accord with the reality, he will get a good bargain; if some of them are false, he can always redo the trade basing on the correct information by invoke avoidance for mistake. Under this circumstance, neither party to a contract will have the incentive to adopt measures beforehand to acquire necessary information for their decisions. Instead, they both will seek to secure their position by reveal their decision-making bases to the opposite side. The validity of the contract will remain an aerial castle until both parties finally verify the correctness of all the factual assumptions they informed each other. The result is that all dealers in the market will have no need to invest in the capability of intelligence for their own business but must irregularly spare additional resources on obtaining information for the benefit of their opponents in areas unfamiliar to them. Such an arrangement is obviously inefficient. In fact, it is common sense that market

[495] See Wagatsuma, *General Provisions of Civil Law (Revised Edtion)*, 297.

participants normally are not expected to pay attention to the decision-making process of others. A supplier of raw materials does not care whether the products to be manufactured with the materials he provides are profitable or not; a gift shop owner does not need to know whether the wedding ceremony the gift is bought for is sticking to the schedule. If the law would impose such a burden on them, the operating cost of the two business will rise to an unsustainable level.

A recipient of a manifestation of intent is exceptionally required to collect and provide certain information to the manifesting party only when he is so obliged under the principle of good faith. Whether there is such a duty must be determined through a comprehensive evaluation of all the following elements: a) the objective importance of the information, i.e. whether and to what extent it influences the decision-making process and the contractual purpose of the manifesting party; b) the possibility of disclosure, i.e. whether the recipient already possesses relevant information; c) the reasonableness of expectation, i.e. whether and to what extent the manifesting party could be expected to collect the information by himself; and d) the degree of reliance, i.e. whether and to what extent can the manifesting person trust the expertise and competence of the recipient to provide certain information.[496] In cases where the recipient is aware of the manifesting party's motive but not the error in motive, he obviously does not possess the information needed to avoid the mistake, hence the possibility of disclosure cannot be established. The recipient, therefore, shall not be obliged to obtain such information for the benefit of the manifesting party, unless the importance of the information is known to him and he can expect that the manifesting party would rely on his expertise and competence to provide the information, which is reasonable because the manifesting party is not in a better position of finding the truth. If these conditions are not fulfilled, the recipient will not be liable of acting against good faith during contractual negotiation even if he didn't take any measure to verify the correctness of the motivational conceptions of the manifesting party.[497] The law will fall into self-contradiction if it imposes no such pre-contractual duty to disclose certain information on the recipient on the one hand, but allows avoidance for mistake when the recipient fails to do so on the other, given that the cancellation of contract is usually an even more burdensome result to that party.

The same paradox emerges if we accept the version of reliance theory advoked by

[496] See Lianjie Shang, "The Duty to Disclose During Contractual Negotiation Viewed as a Flexible System," *Chinese Journal of Law*, no. 3 (2016), 113 and below.
[497] Ibid., 114.

Nomura Toyohiro. He opined that the risk of an error in motive should shift to the side of the opposite party if, upon arrival of the manifestation of intent, that party knows or ought to know that certain factual assumption of the manifesting party, although later turns out to be false, is of importance in his decision-making process.[498] This, however, will also impose a burden of investigation on the opposite party that may contradict the rule concerning his pre-contractual duty to disclose. As was mentioned earlier, whether there is such a duty must be decided relying not only the importance of the information but also other factors.

The tension between the reliance theory and the rule on the pre-contractual duty to disclose may be alleviated by adopting Kawajima Takeyoshi's formula of relievable mistakes. According to him, an error in a manifestation of intent is operative only when it is known or ought to be known by the recipient upon arrival of the manifestation.[499] It is possible to view the error as was ought to be known by the recipient only when he is obliged to obtain and disclose the information concerning the motive of the mistaken party. In this way, the rule of mistake will result in no additional investigation burden on the side of the recipient, thus will no longer contradicts the requirement of good faith in contractual negotiation.

Nonetheless, the above understanding of the reliance theory can still not cure all its problems. In fact, under certain circumstances, even if the recipient actually knows the error in motive, he may still remain silence on this issue without being accused of breaching any obligation. A female employee does not need to disclose her plan of pregnancy to the employer despite her knowledge of the fact that the employer hired her only because it believed that she has no such plan, the law must protect her privacy and her constitutional right to equal employment. Also, a buyer who purchased shares of a company after investigated and discovered certain fact that would lead to the increase in value of the shares should not be required to share such information with the seller for free, the buyer must not be denied the opportunity to benefit from his own intelligent competence that costed him time and efforts to build, or else no one in the society will have the incentive to produce any useful information.[500] The reliance theory, however, will deprive the recipient of his informational advantages the law allowed him to keep under other special considerations.

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[498] See Nomura, "Mistake in Manifestations of Intent (7)", 84.
[499] See Kawajima, *General Provisions of Civil Law*, 289 and below.
[500] See A. T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts," *The Journal of Legal Studies* 7, no.1 (1978), 14.

At this point, we must make a detailed inquire into the reasonableness of the basic assumption of the reliance theorists: Can we actually say that a manifestation of intent suffering under an error in motive (or any other types of mistake) is not an autonomous behaviour and is binding *ipso iure* as a way of protecting the opposite party's reliance? Some Japanese scholars gave affirmative answer to this question on the ground that a decision to enter a legal relation based on false conceptions of surrounding fact fails to stay in concord with the manifesting party's '**true intention**'.[501] In this regard, an error in motive seems to have made no difference with an error in expression: in both cases the mistaken person would not have made such a decision had he known the real state of affairs. However, the problem is, the so called 'true intention' in cases of error in motive is not of the same nature with that in cases of error in expression, there when we refer to the manifesting party's 'true intention', we mean something that actually exists in the mind of that party. This is not the case when the manifesting party is mistaken about certain motivational facts, the 'true intention' under this occasion is not a psychological event, it is nothing else but a fictional '**ideal bargain**' the manifesting party would have asked for if fully informed. The self-determination of the manifesting party is not impaired when he fails to obtain an ideal bargain, his private autonomy, i.e. the authority to 'shape his legal relationship according to his own will (a psychological intention!)'[502], remains intact, as long as the manifestation of intent was made spontaneously.[503] The principle of private autonomy is not intended to guarantee the manifesting party an ideal bargain, otherwise the whole institution of juristic act will lose its credibility, since no bargain could ever be made if the parties are allowed to go back on their own word when the contract turns out to be less beneficial than expected. Therefore, it is sufficient to view the manifestation of intent as an autonomous conduct if the manifesting party is granted the **possibility** to shape his own legal relationship voluntarily, whether that party can achieve his social or economic purpose through shaping this legal relationship, is not an indispensable element.[504] In other words, as was pointed out in previous chapter,[505] the legal protection of a person's self-determination is generally formal, the lack of material self-determination in cases of error in motive can by no means deprive the manifestation of intent of its private

[501] See Junichi Funebashi, "Mistakes in Manifestation of Intent", in *Essays for the Celebration of the 10th Anniversary of Kyushu University* (1937), 609.
[502] Flume, *Das Rechtsgeschäft*, 1.
[503] See Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen*, 207.
[504] See Köhler, *BGB Allgemeiner Teil*, 66.
[505] See *supra* Section 2.2.2.

autonomous nature and degrade it to a pure 'appearance of right'. The reliance theories of mistake, therefore, have gone on the wrong direction at the very beginning.

6.2.2 The agreed allocation of risks?

If, as a principle, the law only provides formal protection to the self-determination of the manifesting party, that party will have to bear the risk of obtaining a bad bargain due to defected information. Based on this idea, some scholars opined that such risk may be transferred to the side of the recipient only when it is so agreed by the parties in one way or another.

According to the consensus theory of mistake in Japan, an error in motive is excusable when there is an agreement between the parties to treat the correctness of certain assumption of fact as the 'premise' of the transaction. The Intermediate Trail Proposal for the amendment of JCC was influenced by this opinion, it required the motive of the manifesting person to be made the content of the juristic act before a mistake involving this motive could be granted any relief.[506] Since generally no content could be added to the juristic act without the consent of the opposite party, the transfer of the risk of mistake under this provision is based on the agreement of the parties. The tendency toward the consensus theory was further strengthened at the 88th meeting of the CROL. It was submitted during this meeting that a motive error is only operative when the parties agreed to link the validity of the juristic act to the correctness of the motivational assumption.[507] Nonetheless, the Modification Act of JCC had eventually rejected the approach of consensus theory. The drafter of the act was worried that requiring the mistaken party to prove the existence of an agreement would be overly harsh him.

The concern of the drafter of the Modification Act is not unfounded. In fact, parties to a juristic act will seek to re-allocate the risk of defected information through an agreement only when they are uncertain about the existence of certain fact. However, under this circumstance, neither party is actually mistaken about any fact because they both have made no final judgment on the real state of affairs. In cases where an error in motive does occur, the manifesting party normally is convinced of the correctness of his factual assumption, he would never come up with the idea to prepare in advance for the falsehood of such assumption, either. As a result, the scope of relievable motive

[506] See CROL, "Supplementary Elucidations on the Intermediate Trial Proposal", 13.
[507] See CROL Materials no.78A, 1.

errors under the consensus theory is extremely narrow, it is nearly impossible for the mistaken party to successfully establish the existence of a premise agreement.

Unlike the consensus theory in Japan, Oertmann, although also acknowledged the possibility for one party to transfer the risk of his factual misconception to the opposite party on the ground of that party's consent, did not require the juristic act to contain within itself a specific clause to link the validity of the contract to the correctness of certain factual assumption. It is sufficient if the opposite party actually knew such assumption and has impliedly accepted it as the 'basis of the transaction' by remaining silence on it or by building his own manifestation of intent thereon.[508] The new rule of motive error in the Modification Act of JCC may also be understood in this manner.[509] However, if we rethink Oertmann's formula of transactional basis from the perspective of the interpretation of manifestations of intent (and analogically also other voluntary statements or conducts of a person), we will find it hard to equate the silence of the recipient on the basic assumption of the manifesting party with an acceptance of him to treat such assumption as the basis of the whole transaction. In fact, as was said repeatedly in previous chapters, the recipient of a manifestation of intent generally has no duty to care about the decision-making process of the manifesting person, he cannot be expected to give any comment to the basic assumption of the manifesting person even if he is fully aware of the decisive character of such assumption. Under this circumstance, any reasonable person in the position of the manifesting party would have understood the silence of the recipient as a reflection of his **indifference** to the decision-making process of the other party, not the acceptance thereof.[510] Nonetheless, by interpreting the silence of the recipient as an acceptance of the unilateral motive of the manifesting party, Oertmann's theory has established a **fictitious** quasi-agreement of transaction basis between the parties and then transfers the risk of factual misconception of the manifesting party to the recipient on the ground of a 'consent' the recipient did not show and was never intended to show. In a word, although Oertmann relied on the implied consent of the opposite party to justify the relief of the unilateral motive error, such 'implied consent' is essentially nothing else but a normative fiction, the substantive reason for the law to allow such fiction, however, remained unclear.

6.2.3 The involvement of the opposite party in the mistake

[508] See Oertmann, *Die Geschäftsgrundlage*, 37.
[509] See CROL Records no.96, 4 (Yamamoto).
[510] See Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 8.

The above discussion has revealed the limit of the voluntary arrangement of the parties concerning the risk of potential factual misconceptions. Such an arrangement is hardly possible since the parties without complete information normally cannot fully understand and evaluate this kind of risk, not to mention being prepared for it in advance. It is therefore a better solution if, as a supplement to the parties' defected autonomous will, the law could clearly stipulate the situations where the recipient of a manifestation of intent must exceptionally bear the risk of motive errors of the manifesting party. The reasons for the transfer of risk are to be found with reference to the internal value order of the civil law. It is submitted here that only the involvement of the opposite party in the unilateral motive error of the manifesting party can lead to the legal relevancy of the mistake. In practice, the involvement of the opposite party may be seen in the following forms.

(1) The opposite party caused the mistake by breaching his duty to disclose. Chinese civil law generally provides protection only for the formal self-determination of a person. Therefore, participants to a juristic act normally should not be granted any relief simply by alleging informational defect in his decision-making process. However, there are also circumstances in which the parties, after entering a contractual negotiation, initiate a social interaction much closer than that between two strangers. This special social interaction will often result in a legal duty of a party under the principle of good faith to provide the counterparty with certain information, so as to prevent the latter from making substantially unintended decisions.[511] According to §42 CL, if a party fails to fulfill his duty to inform, a pre-contractual liability to pay damages to the other party will arise, and the aggrieved party will eventually be awarded the position he should have been in had he made the right decision with sufficient information.

Unlike the German BGB which requires damages be paid first by providing natural restoration (§249 I BGB), in China law, the aggrieved party is compensated generally only by a monetary amount equals to his financial loss caused by the lack of material self-determination. If the law would allow the restitution of the manifesting party's material self-determination via monetary compensation when it was impaired by the non-disclosure of the opposite party, there is no reason to deny the mistaken party the opportunity to recover his private autonomy in a natural way by avoid the contract and redo the trade with full information.

The above conclusion can be confirmed with reference to §149 GP. In cases where

[511] See Han, *The Law of Contrat*, 172 and below.

a third party committed fraud to a party making a manifestation of intent, this provision allows the manifesting party to avoid the juristic act based on the third-party fraud only when the recipient of the manifestation 'knew or ought to have known the fraudulent act'. Why the recipient, who neither committed the fraud nor let the fraud be committed by others, must bear the consequence of the informational defect originated on the side of the manifesting party? The answer can only be found in the recipient's breach of his duty to disclose. Under the principle of good faith, if the recipient of a manifestation of intent is aware of the fact that the manifesting party only made the decision because he was deliberately fed the false information by others, the recipient must timely reveal such fact to the manifesting party instead of attempting to take advantage of that party's mistake. Similarly, if the recipient is able to find the fraudulent act of the third party by paying necessary attention but failed to do so, he also will not be allowed to insist on the juristic act because he is at fault for the maintenance of the erroneous factual conception of the manifesting party. In a word, the value judgment underlying §149 GP has shown the possibility of allowing restoration of the manifesting party's material self-determination by voiding the juristic act in cases where the impairment of that party's self-determination is the result of the non-disclosure of the opposite party regarding certain decisive information. This value judgement could also be applied to the rule of mistake in §147 GP.

Nonetheless, the natural restitution of the material self-determination of the manifesting party through avoidance for mistake must be subject to stricter requirements than that of the liability of monetary damages. This is the result of the principle of *favor contractus* as is reflected in §94 CL, according to which remedies that will lead to the abolishment of the contract must not be allowed if sustaining the transaction, accompanied by monetary damages, can provide sufficient protection for the interest of the aggrieved party. The above consideration is still valid when it comes to the relationship between the avoidance of the juristic act for mistake and the pre-contractual liability to pay monetary damages in cases where the lack of correct information on the side of the manifesting party was caused by the culpable non-disclosure of the opposite party. It is submitted here that an induced motive error is legally relevant only when the mistaken party successfully proves, *inter alia*, that the manifestation of intent made on the basis of defected information has rendered it impossible for him to achieve his contractual purpose, so that maintaining the contract is meaningless to him. Otherwise he is entitled only the right to monetary damages under §42 CL for the pre-contractual culpa of the

opposite party. The mistaken party will be put in the position he should have been in had there is no breach of the duty to disclose, and the contract will remain binding with its disadvantages to that party be removed by the monetary compensation.

(2) The opposite party induced the mistake by misrepresentation. In addition to the cases where the recipient of a manifestation of intent only passively silenced on certain issue, sometimes that party may also positively provide untrue information to the manifesting party when he is not obliged to make any statement. If such a misrepresentation was carried out intentionally by the opposite party of the manifestation of intent, §148 GP will undisputedly apply, and the juristic act will become voidable for fraud. The question is, whether or not in situations where the misrepresentation was not fraudulent but was made under the unawareness of the fact, the manifesting party is still allowed to invoke avoidance of the juristic act on the ground of his error in motive. As was shown in Chapter 4, many Chinese courts tend to give affirmative answer to this question.[512] The court's opinion may be justified from the following two aspects.

First of all, Chinese civil law has confirmed in multiple occasions the possibility of letting the negative consequences of a realized risk be assumed by the person who has significantly increased such risk by his previous behavior. For example, §143 CL provides that in cases where the seller fails to deliver the good within the agreed time limit due to reasons attributable to the buyer, the risk of damage to or loss of the subject matter will transfer to the buyer regardless of the general rule that the seller must bear such risk until delivery of the good. The reason behind this provision is that, by delaying the time of delivery, the buyer adds extra risk on the side of the seller, such extra risk must eventually be borne by the seller himself. Similarly, according to §78 TL, the keeper or manager of domesticated animals, who is in a better position to control the typical risk of the animal, must generally bear such risk. However, if the damages caused by the animal was deliberately or negligently incurred by the victim, the liability of the animal keeper or manager may be mitigated or exempted. This exceptional rule is introduced into the law also because the victim has significantly raised the risk of the animal, hence must bear the relevant consequences. The above value judgment can also be applied to cases of induced error in motive. Here, the opposite party has also severely increased the possibility of the occurrence of mistake, it is therefore justified to let him bear the additional risk by allowing avoidance of the juristic act.

The legitimacy of the transfer of risk in cases of misrepresentation will be further

[512] See for example Case 4-B1, 4-B2; Case 4-F6, 4-F7.

strengthened considering the fact that the representor, upon making the untrue statement, is normally expecting the representee to rely on the statement and base the transaction thereupon, that party, therefore, is also the sole beneficiary of the raised risk of mistake. The principle of good faith will not allow a person to take advantages of others by positively putting them into an unfavorable position. For example, §41 CL provides that in cases where a dispute over the understanding of standard terms occurs, if there are two or more kinds of interpretation to such terms, an interpretation unfavorable to the party supplying the standard terms shall prevail. This is because this party increased the risk of miscommunication during transaction for his own convenience by bringing in standard terms, hence must bear the additional risk resulted therefrom.

On the basis of the above reasons, we can say that it is not contrary to the internal value order of the Chinese civil law if the manifesting party is granted relief for his error in motive when such an error was induced by the misrepresentation of the opposite party. The voidability of the juristic act in this occasion will not be harmed even if the representor sincerely believed that his statement was true after paying due attention to its correctness. This is so because the innocent representor is still the creator and beneficiary of the increased risk of factual misconception of the representee.

Nonetheless, the result will be different if the representee is guilty of negligent in relying on the statement of the representor, i.e. he should have paid due attention to the correctness of the statement made by others and would have been able to clear up the mistake by himself. Under this circumstance, the representor, despite his false statement, did not increase the odd of motive error of the representee, given that the representee is required to hold an inquiry into the state of affairs by himself instead of directly relying on the statement of others. Since the failure of investigation of the representee is the origin of his own mistake, he must bear the consequences of it. The representee's duty to investigate exists especially when that party is in a better position than the representor to obtain certain information due to his expertise, or when the correctness of the representation is *prima facie* doubtful and therefore needs verification. The above conclusion is compatible with the judicial practice in China. For example, in Case 4-B1 involving induced motive error, the SPC overturned the decision of the lower court favouring avoidance of the contract on the ground, *inter alia*, that it failed to ascertain the fact whether the mistaken party, as a commercial company with sufficient professional knowledge, judgment ability and risk expectations, should have found the mistake in

the statement of the opposite party.[513] Similarly, in Case 4-H2 where the auction seller made incorrect representation as to the nature of the subject matter, the SPC also negated the legal relevancy of the buyer's mistake, considering the fact that the seller had simultaneously made it clear in the 'Auction Notice' that the subject matter was to be sold in its current condition and the bidders should inspect and examine the lot by themselves. With this being said, the buyer should not have simply relied on the seller's statement concerning the nature of the subject matter and then invoke avoidance for mistake when it turned out to be false.[514]

In addition, just as in cases of non-disclosure, if the error in motive is induced by the misrepresentation of the opposite party, the mistaken party should not be granted a right to avoid the contract regardless of the severity of the mistake. Otherwise the principle of *favor contractus* will be seriously impaired. If a manifesting person did not simply take it as the basis of his transactional decision when receiving a misrepresentation, but put in more effort or paid higher price and turned the stated matter into the content of the contractual obligation of the counterparty, making the misrepresentation simultaneously a breach of contract of the latter, he will still need to allow the counterparty an additional period to cure the non-performance or establish the existence of a fundamental breach if he wants to terminate the contract (§94 CL). It is therefore self-contradictory if a representee, who has not paid such extra effort or higher price, is allowed to obtain a right to cancel the contract in an even easier way. In order to bridge the above contradiction, the most appropriate approach is to incorporate the (stricter) requirements for termination into the threshold for the right to avoid the contract for induced mistake. In other words, only when the misrepresentation caused the frustration of the manifesting party's contractual purpose is the relief under §147 GP available for him, otherwise the representee can only seek damages from the representor for his pre-contractual culpa according to §42 CL.

(3) The opposite party dishonestly exploited the mistake. Case 5-G19 decided by the German BGH shows another possible type of the counterparty's involvement in the motive error of the manifesting person. In this case, the offeror realized the error in his offer and notified the offeree, but the offeree ignored the notice and accepted the offer anyway.[515] At this point, the offeree was not in breach of a duty to disclose, nor had he made any misrepresentation inducing the mistake, nonetheless, the BGH still

[513] See SPC, 2017, CLI.C.11525197.
[514] See SPC, 2012, CLI.C.2432479.
[515] See BGH JZ 1999, 365; *supra* Section 5.1.5.

denied his request for performance by referring to the prohibition of the abuse of right. The court held that an inadmissible exercise of right may be identified if the recipient of a miscalculated offer **simultaneously knows the mistake and its significant influence on the interest of the offeror** but still accepts the offer and insists on performing the contract.

The principle of good faith in §7 GP contains also the requirement of prohibiting abuse of rights, which can support the appropriate protection for the erroring party from the exploitation of the opponent. However, in regard to the concrete standards of an inadmissible exploitation, the 'double knowing' criterion proposed by the German BGH should not be imported into Chinese law. The reason is that if the offeree, instead of being notified by the offeror, finds the motive error in the offer by himself before making an acceptance, he generally must clarify the mistake to the offeror and is not allowed to capitalize on it (because otherwise the contract will be voidable for non-disclosure). When the offeree is not granted the opportunity to benefit from other person's mistake even in cases where he has paid due attentions and discovered the error by himself, there will be no reason to allow such an opportunity when the offeree only accidentally learned the mistake through the notice of the offeror. The approach adopted by BGH, which only prohibits the exploitation of the offeror's mistake when the offeree simultaneously knows the error and its significance, will lead to conflicting evaluations within the law, therefore is not desirable for the concretization of the rule of major misunderstanding in China. With reference to the requirements for the right to avoidance in cases of non-disclosure, it is submitted here that the following rule should be incorporated into §147 GP: If, prior to the formation of a contract, the offeree was informed by the offeror of a motive error in the offer, the offeree generally should not accept the offer and request performance, otherwise the offeror may invoke avoidance of the contract for mistake under §147 GP basing on the idea of prohibiting the abuse of right (§7 GP).

6.2.4 Motive error in gratuitous acts

The requirement of the involvement of the opposite party for the relief of unilateral motive errors may allow some exceptions in gratuitous acts such as will, gift contract, assumption of debt, etc. This is because the binding force of a gratuitous act is relatively weaker than a promise with valuable consideration, as is reflected in §186 CL.

In many cases decided by Chinese courts, the avoidance for unilateral motive error

was acknowledged without considering facts on the side of the opponent. For example, in Case 4-A31 cited before,[516] a husband gave up his share on the family house upon divorce for the benefit of his daughter, mistakenly believing himself to be her biological father; Similarly, in Case 4-A32,[517] the sellers sold their house to the buyer at a price much lower than usual thinking the buyer was their grandson which he wasn't; in Case 4-C3,[518] the creditor released the debtor from part of the obligation for the purpose of alleviating his criminal responsibility but was later found to be not guilty. In all these cases, the mistaken party are giving benefit to the opposite party for free, their requests to avoid the juristic act were all admitted by the court even though there was no sign of involvement of the opposite party in the mistake. The above rule should be incorporated into §147 GP.

6.2.5 Comments on existing case groups

In this section, I have examined several possible approaches to theoretically justify the legal relevancy of unilateral motive errors. It has been argued that the internal value order of Chinese civil law generally can only support the relief of this type of mistake when the opposite party of the manifestation of intent has involved himself in the error by breaching his duty to disclose, making a misrepresentation or attempting to exploit the mistake. This means that at least a part of [Situation 3] where the Chinese courts tend to allow the application of §147 GP is justifiable by the law. Nonetheless, despite the support of some court decisions and legal theories, it is not adequate to identify a major misunderstanding when a case is only proved to be an example of [Situation 4]. Even if the opposite party knows or ought to know the importance of certain factual assumption to the manifesting party, there is still no reason to transfer the risk of mistake to the former. Therefore, the judicial practice in China must be partly amended.

6.3 Common mistakes

In addition to cases of unilateral mistake, another commonly recognized situation of major misunderstanding among Chinese courts is the motive error shared by the parties (i.e. [Situation 2]).

According to Larenz's theory of disrupted transactional basis, the reason for this

[516] See IPC Jinzhong, Shanxi, 2017, CLI.C.9283206; *supra* Section 4.3.6.
[517] See BPC Zhejiang, 2016, CLI.C.34342499; *supra* Section 4.3.6
[518] See SPC, 2014, CLI.C.2973973; *supra* Section 4.4.2.

type of shared motive error to obtain relief is the idea of 'prohibiting contradictory behaviours' (*venire contra factum proprium*) under the principle of good faith. Since both parties have built the entire juristic act on the same factual conception, they both believed that it is appropriate to make a trading decision according to such conception. Under this circumstance, any honest person would not and should not attempt to make demands on a much higher profit even though the words of the contract appeared to have entitled him such a right.[519] This conclusion is compatible with the internal value order of Chinese civil law. §7 GP requires parties engaged in civil activities to 'uphold honesty and abide by their commitments', thus no one should be allowed to contradict themselves in word and in deed. In view of this, it is submitted here that the principle of good faith with its specific requirement of prohibiting contradictory behaviors, can be referred to as the basis of the legal relevancy of common motive errors under §147 GP.

Nonetheless, it should be noted that in some cases, one of the erroring parties may be considered to have assumed or should assume the risk of possible misconceptions as to a particular fact. If the above situation exists, the party not bearing the risk is not acting dishonestly when requesting the other party to strictly abide by the terms of the contract after the mistake is discovered. There are variety reasons that may lead to the risk of shared factual misconceptions be allocated to one of the parties:

(1) Terms of the contract. For example, in cases where, unknown to both parties, the purchased item lacks agreed nature, since the seller has assumed the obligation to deliver conforming goods, he cannot be allowed to avoid the contract on the ground of the shared mistake.

(2) Transactional practice and usage. For example, in Case 4-H5 cited earlier, a buyer of fake antique was denied the right to avoid the purchase because the court held that 'in the occasion of antique sales, it is transactional custom that the buyer must rely on his own technique and professional knowledge to evaluate the subject matter, and bear relevant risks'.[520]

(3) Default rules concerning specific contracts. In the absence of an agreed term on the assumption of the risk of mistake, some default rules of the specific contract law which predetermined the problem of risk allocation in certain typical transactions may be referred to as supplements to the private autonomy of the parties. For example, in

[519] See Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 164.
[520] See HPC Shanghai, 2008, CLI.C.179852; *supra* Section 4.8.

sales contract, the seller generally must bear the risk that the expense for performance is higher than expected since he has assumed the obligation to make delivery (§135 CL; exception: §110 CL); the buyer, on the other hand, bears the risk that the subject matter is not suitable for his expected use (§130 CL). In lease contract, on the other hand, the same risk is borne by the leaser, who is obliged to keep the lease item fit for the agreed purpose during the term of the contract (§216 CL). In guaranty contract, the risk that the principal debtor does not have the ability to pay off the debt must be assigned to the guarantor, given that this party has promised to provide payment to the creditor when the principal debtor failed to without any reservation.

(4) The principle of fairness. In some situations, one of the mistaken parties may possess overwhelming information advantage over the other party due to his economic status, professional knowledges, or other concrete circumstances of the case, this party, therefore, must be required to pay more attention to the correctness of certain common factual conception. If he failed to do so, the risk of mistake will be borne by him under the principle of fairness.

6.4 Summary

An error in motive is legally relevant only when one of the following special requirements is fulfilled:

a) The parties to a juristic act were caught in the same misconception of fact, and they both decided to enter the juristic act with its current contents based on this false conception. However, if, according to terms of the contract, transactional practice and usages, default rules concerning specific contracts, or the principle of fairness, the risk of the occurrence of shared motive errors must be borne by one of the parties, that party will not be allowed to invoke avoidance against the other party.

b) The factual misconception of the manifesting party was caused by the opposite party's violation of the duty to disclose, which eventually resulted in the frustration of the transactional purpose of the party in error.

c) The motive error of the manifesting party was induced by the misrepresentation of the opposite party, and the transactional purpose of the mistaken party was frustrated due to the influence of the misrepresentation. However, if the representee should have paid due attention to the correctness of the statement of the representor and would have discovered the mistake by himself, he will not be granted any relief.

d) The offeree was informed by the offeror of the mistake in the offer but still made

acceptance and insisted on performing the contract.

e) The motive error occurred to someone who was unilaterally granting benefits to the opposite party in gratuitous acts.

In addition, in cases where the motivational assumption of the manifesting party has become the content of the juristic act, i.e. the opposite party was obliged to put the manifesting party in the position he should have been in if his factual assumption was true, the provisions concerning termination of the contract for non-performance shall apply as the *lex specialis* prior to the law of mistake.

Conclusions

(1) Traditional methodology of norm interpretation is no longer effective when being confronted with vague standards in law such as the general clause of major misunderstanding in §147 GP. Such general clause must first be concretized before being applicable to individual cases. The task of concretization in the field of private law is assumed mainly by the judiciary. However, if the judicial interpretation of the SPC and the reasoning of the courts in individual cases failed to provide clear references, legal doctrine must play a role in order to come up with a set of proposed solutions.

(2) The aim of the concretization work of the legal doctrine is to form several (proposed) case group norms that may be referred to in subsequent cases with common factual element, so that the burden of reasoning of the court could be alleviated and the seemingly endless discretionary space of the judges could be restrained. Such case group norms are gained by the construction of case groups on the one hand, and the value infusion with references to legal principles from the 'internal system' of law on the other. The two aspects of the work cannot be separated from each other.

(3) With regard to the concretization of the rule of major misunderstanding in §147 GP, two primary case groups must first be distinguished, namely the error in expression and the error in motive. These two types of mistake must be treated in separate ways because of the different states of principle collision behind them (the bifurcated theory). The relief of error in expression aims to provide a fairness review on the normative interpretation of a manifestation of intent, hence the scope of mistake to be examined should not be narrowed, whilst the remedy for errors in motive has to pre-determine the range of its application because it is a mechanism providing exceptional protection for the material freedom of self-determination on the part of the mistaken party. The two remedies, therefore, cannot be combined into one.

(4) A comparative legal study reveals different tendencies on the issue of the scope of excusable error in expression. The relief-friendly approach in German law and the relief-conservative approach in English law are both resulted from the historical and theoretical traditions of the two countries. They are not compatible with the social reality in China. Against the background of a prosperous but regional-imbalanced market system, it is a more reasonable choice for Chinese law from the perspective of legal policy to construct the rule for the relief of error in expression as a mechanism to

restore fairness of a trade which is seriously harmed by a mistake.

(5) The prerequisite for the relief of error in expression is that the interpretation of manifestation of intent ends up in attributing unintended meanings to the words used therein. However, In Chinese judicial practice, there are many courts that tend to confuse the functional distinction between the two set of rules, resulting in improper extension of the right for avoidance. The unitary theories in China also failed to pay adequate attention to the systematic relationship between interpretation and the law of mistake. Their 'unified treatment' can *de facto* never be applied to cases of error in expression, which means that they are all essentially bifurcated theories, but they provided no argumentation for their position. The above two tendencies should be rejected.

(6) In order to avoid the juristic act for error in expression, either of the following two requirements must be met: a) as the result of mistake, the manifesting party has promised a performance of substantially larger scale or had let to be promised to him a performance of substantially smaller scale, as he intended to, causing gross disparity between the obligations of the parties. b) the error in expression rendered it impossible for the manifesting party to achieve his typical contractual purpose.

(7) The above rule of fairness review does not apply when: a) the juristic act involves no exchange of performances; b) the weight of transactional safety increases and surpasses the importance of commutative fairness; c) the erroring party is required to pay due attention in order to avoid his own mistake but failed to do so; and d) the manifesting party, due to some special reasons, lacks the ability to fully understand the nature of a document to which he appended his signature.

(8) Judicial practice in China generally allows relief for the error in motive in the following types of cases: a) the motive of the manifesting party is no longer a factual assumption. Rather, the opposite party assumed an obligation, either by his promise or by the construction of the contract, to put the first party in the position he should have been in when the factual assumption was true; b) the parties are caught in the same erroneous factual assumption, they both entered the juristic act on the basis of this false assumption, but neither of them assumed an obligation to put the other in the position as if such assumption was true; c) the motive error is caused by the misrepresentation or non-disclosure of certain information of the opposite party; d) the mistake is neither known or shared by the opposite party, but the opposite party knew or ought to know at the time the juristic act was formed that the manifesting party made his decision on

the basis of certain factual assumption.

(9) The scope of relievable motive error in Chinese judicial practice is similar with that in German and Japanese law. Therefore, the various theories proposed by the courts or scholars in the two countries justifying the legal relevancy of certain types of error in motive can also provide some references for the formation of case group norms in Chinese law.

(10) In cases where the motivational assumption of the mistaken party has become the content of the juristic act, i.e. the counterparty has assumed an obligation to put the manifesting party in the position he should have been in if his factual assumption was true, the provisions concerning termination of the contract for non-performance shall apply as the *lex specialis* prior to the law of mistake.

(11) An error in motive should be excusable when one of the following special requirements is fulfilled: a) Parties to a juristic act were caught in the same factual misconception, and they both decided to enter the juristic act with its current contents based on this misconception. Nonetheless, if, according to terms of the contract, transactional practice and usages, default rules concerning specific contracts, or the principle of fairness, the risk of the occurrence of a common motive error must be borne by one of the parties, that party will not be allowed to invoke avoidance against the other party; b) The factual misconception of the manifesting party was caused by the opposite party's violation of the duty to disclose, which eventually resulted in the frustration of the transactional purpose of the party in error; c) The motive error was induced by the misrepresentation of the opposite party, and the transactional purpose of the party in error was frustrated due to the influence of the misrepresentation. However, if the representee should have paid due attention to the correctness of the statement of the representor and would have discovered the mistake by himself, he will not be granted any relief; d) The offeree was informed by the offeror of a mistake in the offer but still made acceptance and insisted on performing the contract; e) The motive error occurred to someone who was unilaterally granting benefits to the opposite party in gratuitous acts.

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Appendix I Chinese Cases

Error in expression

Name of Court	Type of Instrument*	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC II, Shanghai	SJ	2003	CLI.C.151466	Case 3-1
BPC Lanshan, Shandong	FJ	2016	CLI.C.37458406	Case 3-2
HPC Heilongjiang	RJ	2017	CLI.C.10040123	Case 3-3
IPC Xiaogan, Hubei	SJ	2017	CLI.C.10702056	Case 3-4
IPC Changji, Xinjiang	SJ	2014	CLI.C.6333907	Case 3-5
BPC Yunyan, Guizhou	FJ	2017	CLI.C.48443482	Case 3-6
BPC Shangcheng, Zhejiang	FJ	2016	CLI.C.42327224	
BPC Hightech Zone Changchun, Jilin	FJ	2015	CLI.C.42075727	
IPC Urumchi, Xinjiang	SJ	2015	CLI.C.8269108	Case 3-7
BPC Wuyi, Hebei	FJ	2017	CLI.C.56899421	
IPC Fuzhou, Fujian	SJ	2015	CLI.C.7826038	
IPC II, Beijing	SJ	2017	CLI.C.10632668	Case 3-8
IPC Luoyang, Henan	SJ	2013	CLI.C.2020335	Case 3-9
IPC III, Shanghai	SJ	2017	CLI.C.10602515	Case 3-10

* In this section, FJ stands for judgment of first instance, SJ stands for judgment of second instance, RJ stands for judgment of retrial, RR stands for court ruling dismissing or allowing a petition for retrial.

BPC Pudong, Shanghai	FJ	2002	CLI.C.225975	Case 3-11
IPC Shantou, Guangdong	SJ	2016	CLI.C.8469084	Case 3-12
BPC Zhuji, Zhejiang	FJ	2013	CLI.C.2859149	Case 3-13
IPC Tacheng, Xinjiang	SJ	2017	CLI.C.10864633	Case 3-14
IPC I, Beijing	SJ	2016	CLI.C.9530343	Case 3-15
IPC Jiayu, Gansu	SJ	2015	CLI.C.8223445	Case 3-16
BPC Pudong, Shanghai	FJ	2008	CLI.C.1998399	Case 3-17
IPC Changsha, Hunan	SJ	2015	CLI.C.7826294	Case 3-18
BPC Longkou, Shandong	FJ	2012	CLI.C.16917022	Case 3-19
IPC Luoyang, Henan	SJ	2013	CLI.C.2020335	
BPC Baoan, Guangdong	FJ	2017	CLI.C.48352601	
IPC Chaoyang, Liaonin	SJ	2014	CLI.C.5263737	Case 3-20
BPC Mulei, Xinjiang	FJ	2016	CLI.C.46747162	Case 3-21
IPC Guangzhou, Guangdong	SJ	2014	CLI.C.4075874	Case 3-22
HPC Hainan	SJ	2012	CLI.C.1436500	
IPC Nanning, Guangxi	SJ	2012	CLI.C.1197688	
BPC Chancheng, Guangzhou	FJ	2015	CLI.C.35470510	
IPC Nantong, Jiangsu	SJ	2017	CLI.C.9261907	Case 3-23

IPC I, Chongqing	SJ	2017	CLI.C.10521335	Case 3-24
BPC Laixi, Shandong	FJ	2017	CLI.C.47288154	Case 3-25
IPC III, Beijing	SJ	2014	CLI.C.11545827	
BPC Lubei, Heibei	FJ	2016	CLI.C.38237478	
BPC Pudong, Shanghai	FJ	2008	CLI.C.1998399	
SPC	SJ	2013	CLI.C.2227487	
SPC	RR	2013	CLI.C.2227570	
IPC Lianyungang, Jiangsu	SJ	2016	CLI.C.8920323	Case 3-26
BPC Huixian, Henan	FJ	2016	CLI.C.39602398	Case 3-27

Error in motive

Case Group A

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC V, Chongqing	SJ	2014	CLI.C.5770721	Case 4-A1
IPC Nanjing, Jiangsu	SJ	2017	CLI.C.10992256	Case 4-A2
BPC Tiedong, Liaoning	FJ	2009	CLI.C.49062675	
IPC II, Beijing	SJ	2017	CLI.C.9255485	
BPC Economic Zone Weihai, Shandong	FJ	2014	CLI.C.20817416	
BPC Gaoming, Guangdong	FJ	2014	CLI.C.16965613	
IPC Guangzhou, Guangdong	SJ	2012	CLI.C.2217489	

IPC Ganzhou, Jiangxi	SJ	2016	CLI.C.10713054	Case 4-A3
BPC Gulou, Jiangsu	FJ	2014	CLI.C.19219538	Case 4-A4
MPC Qingdao	FJ	2006	CLI.C.73318	
IPC Yueyang, Hunan	SJ	2013	CLI.C.2530088	
IPC Changzhou, Jiangsu	SJ	2017	CLI.C.9665890	Case 4-A5
IPC Changchun, Jilin	SJ	2018	CLI.C.10922589	Case 4-A6
BPC Gangzha, Jiangsu	FJ	2014	CLI.C.5207442	
BPC Guangan, Sichuan	FJ	2017	CLI.C.54532299	Case 4-A7
BPC Quanshan, Jiangsu	FJ	2010	CLI.C.1927430	Case 4-A8
IPC Meizhou, Sichuan	SJ	2016	CLI.C.8930165	Case 4-A9
BPC Anxi, Jilin	FJ	2017	CLI.C.48869291	
IPC Meizhou, Sichuan	SJ	2014	CLI.C.5889137	
BPC Yuhang, Zhejiang	FJ	2017	CLI.C.52957020	Case 4-A10
BPC Kecheng, Zhejiang	FJ	2017	CLI.C.43747451	
IPC Nanchong, Sichuan	SJ	2015	CLI.C.15909030	
IPC Zhongshan, Guangdong	SJ	2014	CLI.C.6378843	
BPC Nanzheng, Shaanxi	FJ	2017	CLI.C.48525423	
BPC Jianhu, Jiangsu	FJ	2017	CLI.C.54193308	

IPC Jiujiang, Jiangxi	SJ	2017	CLI.C.9210006	Case 4-A11
BPC Qingshan, Hubei	FJ	2014	CLI.C.6919597	
BPC Jiaojiang, Zhejiang	FJ	2014	CLI.C.4107061	
IPC Zhuhai, Guangdong	SJ	2016	CLI.C.9487011	Case 4-A12
BPC Kunshan, Jiangsu	FJ	2014	CLI.C.51845097	Case 4-A13
IPC Taiyuan, Shanxi	SJ	2015	CLI.C.8679935	Case 4-A14
IPC Changsha, Hunan	SJ	2015	CLI.C.15569709	Case 4-A15
IPC Shenzhen, Guangdong	SJ	2016	CLI.C.9819944	Case 4-A16
BPC Kunshan, Jiangsu	FJ	2016	CLI.C.42476707	
IPC Rizhao, Shandong	SJ	2017	CLI.C.9964640	Case 4-A17
BPC Lianshui, Jiangsu	FJ	2015	CLI.C.51880515	Case 4-A18
BPC Fukang, Xinjiang	FJ	2016	CLI.C.36337313	
BPC Yanbian, Jilin	SJ	2017	CLI.C.9892099	Case 4-A19
HPC Jilin	RR	2014	CLI.C.3985530	
BPC Huli, Fujian	FJ	2015	CLI.C.41533070	
SPC	SJ	1999	CLI.C.47930	Case 4-A20
HPC Jilin	RR	2016	CLI.C.9880381	Case 4-A21
BPC Dengkou, Inner Mongolia	FJ	2014	CLI.C.4017396	Case 4-A22
HPC Tibet	SJ	1997	CLI.C.85385	Case 4-A23
IPC Xuzhou, Jiangsu	SJ	2016	CLI.C.9109934	Case 4-A24

IPC Zhengzhou, Henan	SJ	2013	CLI.C.2203544	Case 4-A25
IPC Changsha, Hunan	SJ	2009	CLI.C.1303361	Case 4-A26
IPC Maanshan, Anhui	RR	2018	CLI.C.11134948	Case 4-A27
BPC Longchuan, Yunnan	FJ	2015	CLI.C.34028425	
SPC	RR	2015	CLI.C.10090161	Case 4-A28
HPC Chongqing	RR	2016	CLI.C.15716795	Case 4-A29
IPC Shenyang, Liaoning	SJ	2017	CLI.C.10886093	
IPC II, Shanghai	SJ	2017	CLI.C.9978210	
IPC I, Beijing	SJ	2015	CLI.C.6728497	
IPC Xiangtan, Hunan	SJ	2015	CLI.C.8661997	
BPC Kunshan, Jiangsu	FJ	2016	CLI.C.53951756	
BPC Huairou, Beijing	FJ	2014	CLI.C.83139088	
BPC Pudong, Shanghai	FJ	2009	CLI.C.497327	
HPC Chongqing	SJ	2017	CLI.C.10550755	Case 4-A30
IPC Jinzhong, Shanxi	SJ	2017	CLI.C.9283206	Case 4-A31
BPC Xihu, Zhejiang	FJ	2016	CLI.C.34342499	Case 4-A32
BPC Huangpu, Guangdong	FJ	2015	CLI.C.26764936	

Case Group B

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper

IPC Forest Zone Yanbian, Jilin	SJ	2015	CLI.C.9110950	
SPC	SJ	2017	CLI.C.11525197	Case 4-B1
HPC Shanghai	SJ	2005	CLI.C.77862	Case 4-B2
IPC Xi'an, Shaanxi	SJ	2017	CLI.C.10158228	
IPC Nanjing, Jiangsu	SJ	2017	CLI.C.9707484	
IPC Anyang, Henan	SJ	2017	CLI.C.10184479	
IPC Luzhou, Sichuan	SJ	2016	CLI.C.8778015	
IPC II, Tianjing	SJ	2016	CLI.C.8414862	
IPC Nanchong, Sichuan	SJ	2016	CLI.C.8897643	
IPC Changzhou, Hebei	SJ	2015	CLI.C.8245217	
IPC Nanning, Guangxi	SJ	2013	CLI.C.2664112	
BPC Jiawang, Jiangsu	FJ	2017	CLI.C.52230816	
BPC Longquanyi, Sichuan	FJ	2015	CLI.C.35838690	
BPC Beichen, Tianjing	FJ	2015	CLI.C.18241818	
BPC Longhua, Hainan	FJ	2014	CLI.C.16924129	
BPC Jiahe, Hunan	FJ	2013	CLI.C.2986814	
BPC Dongcheng, Beijing	FJ	2000	CLI.C.6854	
HPC Jiangsu	RR	2013	CLI.C.2520489	Case 4-B3
BPC Jianggan, Zhejiang	FJ	2016	CLI.C.38151366	
HPC Fujian	RR	2017	CLI.C.10683706	Case 4-B4

HPC Hunan	RJ	2016	CLI.C.9392534	Case 4-B5
SPC	RR	2015	CLI.C.81326786	Case 4-B6
IPC Yanbian, Jilin	SJ	2018	CLI.C.11133397	
IPC 8th division of Xinjiang Production and Construction Corps	SJ	2018	CLI.C.10808683	
IPC Guangzhou, Guangdong	SJ	2017	CLI.C.10919693	
IPC Guangzhou, Guangdong	SJ	2017	CLI.C.10030489	
IPC Guangzhou, Guangdong	SJ	2016	CLI.C.9475886	
IPC 12th division of Xinjiang Production and Construction Corps	SJ	2016	CLI.C.15658600	
IPC Foshan, Guangdong	SJ	2015	CLI.C.8407565	
IPC Weinan, Shaanxi	SJ	2015	CLI.C.7484085	
IPC Hangzhou, Zhejiang	SJ	2014	CLI.C.6664608	
IPC Quzhou, Zhejiang	SJ	2014	CLI.C.6255483	
IPC Guangzhou, Guangdong	SJ	2005	CLI.C.109545	
BPC Zhunhua, Hebei	FJ	2017	CLI.C.51684455	
BPC Changshu, Jiangsu	FJ	2017	CLI.C.43114802	
BPC Luohu, Guangdong	FJ	2016	CLI.C.37886141	
BPC Xiaodian,	FJ	2016	CLI.C.44677622	

Shanxi				
BPC Canghai, Fujian	FJ	2016	CLI.C.52206631	
BPC Jiangnan, Guangxi	FJ	2016	CLI.C.37319750	
BPC Pingxiang, Hebei	FJ	2016	CLI.C.26810205	
BPC Quzhou, Zhejiang	FJ	2015	CLI.C.20286276	
BPC Nanan, Chongqing	FJ	2014	CLI.C.5780749	
BPC Tongzhou, Jiangsu	FJ	2014	CLI.C.5209058	

Case Group C

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC Shaoxing, Zhejiang	SJ	2013	CLI.C.2540463	Case 4-C1
BPC I Zhongshan, Guangdong	FJ	2016	CLI.C.46865817	Case 4-C2
BPC Zhongyuan, Henan	FJ	2016	CLI.C.45200171	
BPC Xinbei, Jiangsu	FJ	2017	CLI.C.47583238	
BPC Haidian, Beijing	FJ	2014	CLI.C.3866996	
BPC Xiacheng, Zhejiang	FJ	2009	CLI.C.2716757	
SPC	RJ	2014	CLI.C.2973973	Case 4-C3
IPC Jinan, Shandong	RJ	2017	CLI.C.10701365	
IPC Bijie, Guizhou	SJ	2015	CLI.C.7357215	

IPC Chengdu, Sichuan	SJ	2014	CLI.C.5796373	

Case Group D

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC Shangluo, Shaanxi	SJ	2017	CLI.C.10594271	Case 4-D1
BPC Xishui, Guizhou	FJ	2017	CLI.C.47625153	Case 4-D2
HPC Guizhou	RR	2017	CLI.C.10646140	Case 4-D3
BPC Qinyang, Henan	FJ	2015	CLI.C.45363257	Case 4-D4
IPC Lianyungang, Jiangsu	SJ	2015	CLI.C.7641570	
HPC Sichuan	RR	2016	CLI.C.10083278	Case 4-D5
BPC Xuyi, Jiangsu	FJ	2015	CLI.C.33917517	
BPC Yanta, Shaanxi	FJ	2013	CLI.C.3601023	

Case Group E

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
HPC Jiangsu	RR	2015	CLI.C.9532067	Case 4-E1
IPC Yancheng, Jiangsu	SJ	2017	CLI.C.10344148	Case 4-E2
IPC Nanjing, Jiangsu	SJ	2016	CLI.C.15764929	Case 4-E3
IPC Chaoyang, Liaoning	SJ	2018	CLI.C.11331656	
IPC Tianshui, Ganshu	SJ	2017	CLI.C.9419149	

IPC I Chongqing	SJ	2017	CLI.C.9943878	
IPC Taian, Shandong	SJ	2017	CLI.C.8908257	
IPC Xuzhou, Jiangsu	SJ	2017	CLI.C.10863051	
IPC Nanjing, Jiangsu	SJ	2016	CLI.C.15764929	
IPC Anqing, Anhui	SJ	2016	CLI.C.15784120 CLI.C.80539570	
IPC Quanzhou, Fujian	SJ	2016	CLI.C.10519688	
IPC Jiangmen, Guangdong	SJ	2015	CLI.C.7827149	
IPC Suzhou, Fujian	SJ	2015	CLI.C.8197887	
IPC Fuzhou, Fujian	RR	2015	CLI.C.6321245 CLI.C.69567530	
IPC Taian, Shandong	SJ	2015	CLI.C.15595485 CLI.C.80864651	
IPC Luohe, Henan	SJ	2015	CLI.C.7387592	
IPC Bozhou, Anhui	SJ	2015	CLI.C.6300150	
IPC II Shanghai	SJ	2015	CLI.C.8149265	
IPC Changzhou, Jiangsu	SJ	2014	CLI.C.16426637	
IPC Taizhou, Jiangsu	SJ	2014	CLI.C.2297562 CLI.C.81711321	
IPC Handan, Hebei	SJ	2014	CLI.C.3968353	
IPC Yulin, Guangxi	SJ	2014	CLI.C.15963699	
IPC Zhangye, Gansu	SJ	2013	CLI.C.2450165	
IPC Hechi, Guangxi	SJ	2013	CLI.C.5710599	
IPC Quanzhou, Fujian	SJ	2013	CLI.C.16473522 CLI.C.81244756	
IPC Yueyang,	SJ	2012	CLI.C.1339117	

Hebei			CLI.C.76577054	
IPC Jianghan, Hubei	SJ	2011	CLI.C.392501 CLI.C.10470859 CLI.C.76237113	
IPC Jinhua Zhejiang	SJ	2011	CLI.C.4114031	
IPC II Chongqing	SJ	2010	CLI.C.819105 CLI.C.81305227	
IPC Ganzhou, Jiangxi	SJ	2006	CLI.C.32069 CLI.C.81231121	
BPC Liuhe, Jiangsu	FJ	2018	CLI.C.54476658	
BPC Beilun, Zhejiang	FJ	2017	CLI.C.53714508	
BPC Mabian, Sichuan	FJ	2017	CLI.C.44442295	
BPC lLiuhe, Jiangsu	FJ	2017	CLI.C.53873901	
BPC Xuhui, Shanghai	FJ	2017	CLI.C.47290672	
BPC Shuncheng, Liaoning	FJ	2017	CLI.C.52093918	
BPC Suining, Jiangsu	FJ	2017	CLI.C.46701822	
BPC Qixian, Hebei	RJ	2016	CLI.C.10946676	
BPC Guanglin, Jiangsu	FJ	2016	CLI.C.51794500	
BPC Jiangdu, Jiangsu	FJ	2015	CLI.C.46143885 CLI.C.7988215	
BPC Hailar, Inner Mogolia	FJ	2015	CLI.C.51747078	
BPC Hebei, Tianjing	FJ	2015	CLI.C.7956580	
BPC Honghu,	FJ	2015	CLI.C.24574603	

Hubei				
BPC Huanggu, Shenyang	FJ	2015	CLI.C.7186809	
BPC Qixia, Jiangsu	FJ	2015	CLI.C.24868817	
BPC Luyang, Anhui	FJ	2014	CLI.C.6512574	
BPC Lianshui, Jiangsu	FJ	2014	CLI.C.3273435	
BPC Sheyang, Jiangsu	FJ	2014	CLI.C.5186771	
BPC Nanlin, Anhui	FJ	2014	CLI.C.5305649	
BPC Qidong, Jiangsu	FJ	2014	CLI.C.16879773	
BPC Shizhong, Shandong	FJ	2013	CLI.C.2353077	
BPC Jiangyan, Jiangsu	FJ	2013	CLI.C.2085404	
BPC Tianning, Jiangsu	FJ	2013	CLI.C.1875856	
BPC Hongkou, Shanghai	FJ	2012	CLI.C.2003292	
BPC Haining, Zhejiang	FJ	2011	CLI.C.2072013	
BPC Yinzhou, Zhejiang	FJ	2011	CLI.C.1934426	
BPC Songjiang, Shanghai	FJ	2010	CLI.C.577755	
BPC Wuyang, Henan	FJ	2009	CLI.C.712537	
BPC Nanshan, Guangdong	FJ	2009	CLI.C.845603	
IPC Bijie, Guizhou	SJ	2015	CLI.C.7357215	Case 4-E4
IPC Huaian, Jiangsu	SJ	2015	CLI.C.15576817	Case 4-E5

IPC II Chongqing	SJ	2017	CLI.C.11258276	
BPC Wengan, Guizhou	FJ	2015	CLI.C.6917497	
BPC Wolong, Henan	FJ	2015	CLI.C.25850578	
BPC Jintai, Shaanxi	FJ	2011	CLI.C.16859216	

Case Group F

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC Qinhuangdao, Hebei	SJ	2013	CLI.C.4243193	Case 4-F1
IPC I Chongqing	SJ	2014	CLI.C.8237085	Case 4-F2
BPC Mouding, Yunan	FJ	2016	CLI.C.40347690	Case 4-F3
BPC Longsha, Heilongjiang	FJ	2015	CLI.C.36555455	
BPC Luojiang, Fujing	FJ	2015	CLI.C.53513546	
HPC Heilongjiang	RR	2016	CLI.C.8724763	Case 4-F4
IPC III Beijing	SJ	2016	CLI.C.8369292	Case 4-F5
BPC Zhongyuan, Henan	FJ	2016	CLI.C.44745433	
BPC Xiashan, Guangdong	FJ	2015	CLI.C.26262692	
HPC Shaanxi	RR	2015	CLI.C.7379825	Case 4-F6
IPC Xuzhou, Jiangsu	SJ	2013	CLI.C.1791935	Case 4-F7
IPC Guangzhou, Guangdong	SJ	2017	CLI.C.10919693	
IPC Liuzhou, Guangxi	SJ	2017	CLI.C.10349762	

IPC Shaoyang, Hunan	SJ	2016	CLI.C.9542074	Case 4-F8
IPC Anyang, Henan	SJ	2014	CLI.C.6995258	Case 4-F9
BPC Jintai, Shaanxi	FJ	2017	CLI.C.45929130	Case 4-F10

Case Group G

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
IPC Xuzhou, Jiangsu	SJ	2012	CLI.C.868957	Case 4-G1
HPC Zhejiang	RR	2016	CLI.C.8707837	Case 4-G2
IPC Guiyang, Guizhou	SJ	2014	CLI.C.6484044	Case 4-G3
IPC Shenzhen, Guangdong	SJ	2011	CLI.C.837678	Case 4-G4
IPC Heze, Shandong	SJ	2017	CLI.C.9787901	
IPC III Beijing	SJ	2014	CLI.C.6283647	Case 4-G5
IPC II Beijing	SJ	2013	CLI.C.3806677	
IPC II Beijing	SJ			Case 4-G6
IPC Luoyang, Henan	SJ	2016	CLI.C.9408407	Case 4-G7
BPC Chaoyang, Beijing	FJ	2017	CLI.C.53431590	
BPC Gulin, Sichuan	FJ	2016	CLI.C.36751639	
BPC Chongchuan, Jiangsu	FJ	2015	CLI.C.40874267	
BPC Nanshan, Guangdong	FJ	2012	CLI.C.36926080	
BPC Songxi,	FJ	2014	CLI.C.5635529	Case 4-G8

Fujian				
BPC Yixing, Jiangsu	FJ	2014	CLI.C.7709788	
BPC Jinjiang, Fujian	FJ	2013	CLI.C.2225387	Case 4-G9
BPC Chishui, Guizhou	FJ	2016	CLI.C.26808168	Case 4-G10
IPC Heze, Shandong	SJ	2017	CLI.C.9798994	
IPC Anshun, Guizhou	SJ	2016	CLI.C.8554285	
IPC Shenzhen, Guangdong	SJ	2016	CLI.C.9534397	
IPC Foshan, Guangdong	SJ	2016	CLI.C.75437410	
IPC Jingmen, Hubei	SJ	2015	CLI.C.6903981	
IPC Liangshan, Sichuan	SJ	2015	CLI.C.15895843	
IPC Nantong, Jiangsu	SJ	2015	CLI.C.7768543	
IPC Shenzhen, Guangdong	SJ	2015	CLI.C.8051687	
IPC I Shanghai	SJ	2013	CLI.C.1348037	
IPC Guangzhou, Guangdong	SJ	2006	CLI.C.111169	
BPC Huaian, Jiangsu	FJ	2017	CLI.C.44327927	
BPC Longkou, Shandong	FJ	2017	CLI.C.54363797	
BPC Dali, Yunnan	FJ	2017	CLI.C.47916951	
BPC Hanyang, Hubei	FJ	2016	CLI.C.40019795	
BPC Dingcheng,	FJ	2016	CLI.C.42419379	

Hunan				
BPC Huidong, Guangdong	FJ	2016	CLI.C.39016843	
BPC Shizhong, Shandong	FJ	2016	CLI.C.42822052	
BPC Pudong, Shanghai	FJ	2014	CLI.C.4309925	
BPC Songjiang, Shanghai	FJ	2013	CLI.C.2006481	
BPC Tianhe, Guangdong	FJ	2013	CLI.C.17560678	

Case Group H

Name of Court	Type of Instruments	Year of Decision	PKULaw Citation Code	Citation in the Paper
BPC Jiangning, Jiangsu	FJ	2017	CLI.C.52743317	Case 4-H1
SPC	RJ	2012	CLI.C.2432479	Case 4-H2
IPC Chifeng, Inner Mogolia	SJ	2018	CLI.C.83039593	Case 4-H3
IPC Guilin, Guangxi	SJ	2013	CLI.C.60690443	Case 4-H4
IPC 5th division of Xinjiang Production and Construction Corps	SJ	2015	CLI.C.8215057	
IPC Shaoxing, Zhejiang	SJ	2013	CLI.C.1763526	
BPC Longkou, Shandong	FJ	2017	CLI.C.54363797	
BPC Nanhai, Guangdong	FJ	2017	CLI.C.51755668	

BPC Kaiping, Guangdong	FJ	2016	CLI.C.48496697	
BPC Gongshu, Zhejiang	FJ	2016	CLI.C.35517716	
BPC Yixing, Jiangsu	FJ	2014	CLI.C.7709788	
HPC Shanghai	RJ	2008	CLI.C.179852	Case 4-H5

Appendix II Foreign Cases

English law

Bell v Lever Brothers Ltd. [1932] A.C. 161, 217.

Destiny 1 Ltd v Lloyds TSB Bank Plc [2011] EWCA Civ 831.

Ove Arup v Mirant Asia Pacific Construction [2003] EWCA Civ 1729.

McCutcheon v David MacBrayne Ltd [1964] 1 W.L.R. 125.

Raffles v Wichelhaus [1864] 2 Hurl. & C. 906, 159 E.R. 375.

Hartog v Colin & Shields [1939] 3 All E.R. 566.

OT Africa Line Ltd v Vickers plc [1996] C.L.C. 722.

Saunders v Anglia Building Society [1971] A.C. 1004.

Trustees of Beardsley Theobalds Retirement Benefit Scheme v Joshua Yardley [2011] EWHC 1380 (QB).

United Dominions Trust Ltd. v Western [1976] Q.B. 513.

Carlisle and Cumberland Banking Company v Bragg [1911] 1 K.B. 489.

Scriven Brothers & Co v Hindley & Co [1913] 3 K.B. 564.

Deutsche Bank (Suisse) SA v Gulzar Ahmed Khan [2013] EWHC 482 (Comm).

Shogun Finance Ltd v Hudson [2004] 1 A.C. 919.

German law

RG

RGZ 64, 266.	Case 5-G1
RGZ 149, 235.	Case 5-G2
RG LZ 1931, 240.	Case 5-G3
RGZ 55, 367.	Case 5-G7
RGZ 90, 268.	Case 5-G8
RGZ 94, 65.	Case 5-G9
RGZ 97, 138.	Case 5-G10
RGZ 101, 107	Case 5-G11
RGZ 105, 406.	Case 5-G12
RGZ 88, 278.	Case 5-G13
RGZ 108, 105.	Case 5-G14

BGH

BGHZ 16, 54.	Case 5-G4
BGHZ 88, 240.	Case 5-G5
BGH NJW 2001, 226.	
BGH NJW 1979, 160.	Case 5-G6
BGH DB 1972, 481.	
BGH NJW 1958, 297.	Case 5-G15
BGH NJW 1970, 1313.	Case 5-G16
BGH NJW 1962, 1196.	Case 5-G17
BGH NJW 1968, 986.	
BGH NJW 1969, 1625.	
BGH NJW 1974, 849.	
BGH NJW 1978, 41.	
BGH NJW 1978, 2145.	
BGH NJW 1979, 1983.	
BGH NJW 1984, 2814.	
BGH NJW 1985, 1769.	
BGH NJW 1989, 1793.	
BGH NJW 1993, 2107.	
BGH NJW 1997, 254.	
BGH NJW 1980, 2408.	
BGH NJW 1998, 302.	
BGH NJW 1980, 180.	Case 5-G18
BGH JZ 1999, 365.	Case 5-G19

Japanese law

GCJ

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GCJC 24, 1852.	
GCJC 23, 284.	Case 5-J2

SCJ

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SCJC 64, 377.	
SCJC 65, 275.	
SCJC 63, 953.	Case 5-J4
SCJR 70 (1), 1	Case 5-J8
SCJC 29, 403.	

SCJR 13 (5), 584.
SCJC 66, 85.
SCJC 206, 707. Case 5-J5
SCJR 12 (9), 1492. Case 5-J6
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Osaka, *Financial legal affairs*, no.1914, 77. Case 5-J9
Hakodate, *Hanrei Times*, no.282, 263. Case 5-J10