

Legal Reasoning in Chinese and Swiss Appellate Judgments - Exploring China's Path Toward Rule of Law

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Amid heated debates over uncurbed corruption in the judiciary, over professionalization or popularization of the people's judge, lack of transparency in the judgment making process, independence of the judiciary, and so on, a new round of judicial reform was launched in March 2009 with the release of "Third five-Year Agenda for the Reform of People's Courts" by the Supreme Court of People's Republic of China. Few in-depth studies have been done however, to reveal the relationship between these controversies and legal reasoning as a basic skill of legal practice and research. This paper compares and analyzes how the allied Swiss and Chinese legal systems facilitate justice through reasoned judgment, and concludes that legal reasoning is a structural weakness in the Chinese judicature, legal education, and legal scholarship, a deficiency which is the root of various problems fuelling current debates. The purpose of this paper is to give recommendations to China's legislature, judiciary, and legal education policy makers for how to strengthen legal reasoning

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and thereby rule of law within the on-going legal reform.

I. INTRODUCTION

Legal reasoning is defined in this essay as “the arguments that judges give, frequently in written form, in support of the decisions they render. These arguments consist of the reasons for the decisions, and these reasons are intended as *justifications* for the decisions.”¹

Judicial decision-making is a process of rule application: the court applies certain *rules* to the *facts* of a case involving *issues* which come before it, and it must reason through all stages of this process to justify its conclusions; if applying law to facts is the principal purpose of every system of modern civil justice, such purpose can only be reached through legal reasoning. Such legal reasoning needs to be tight without leak in order to sustain the questions of the parties involved and the scrutiny of the general public. Legal reasoning which occurs haphazardly in a judgment is neither likely to justify nor to convince. In fact, an unsystematic approach will in most cases lead to the wrong conclusions of law. A well-developed legal system usually has a well-developed intrinsic reasoning method in place to guarantee efficient decision making and just legal solutions.

Systematic and disciplined legal reasoning is the best way of self-monitoring for the judge in search of justice. It is the basis for an effective judicial review, because the duty of the appellate instance is, to a large extent, the reexamination of the legal reasoning by the lower instance. The parties in a case need to be able to read the legal reasoning as a check on the judiciary and for purposes of appeal. Parties can see through the legal reasoning whether the decision took account of biased, irrelevant considerations, or excluded relevant considerations. Rule of law requires that a case be decided based on a judge's reason and not a judge's whim, primarily because a decision based in reason is one that can be respected and accepted by a winning party and losing party alike.

When the legal reasoning in a judgment is published, particularly for a leading case, it serves moreover as a basis for the public monitoring of judiciary generally. People evaluate the judges on the quality of their legal reasoning - flawed reasoning points to a lack of professionalism, bias or corruption. Conversely, published case

¹ MARTIN P. GOLDING, LEGAL REASONING 1 (2001).

reports with convincing legal reasoning demonstrate to the public how laws are applied by the courts, disseminate current legal information and enhance legal certainty. Should people become involved in disputes, a well-reasoned judgment can provide a guideline for parties to settle their disputes before bringing suits. As a result, the case load of courts can be significantly reduced.

In summary, if a judgment is the narrative of proceedings, the legal reasoning tells how fair the proceeding was. Legal reasoning makes plain the formal and material correctness (or incorrectness) of the judgment, and as such is irreplaceable at both the individual and public level.

Over the last thirty years, China has experienced a significant improvement in the reconstruction and development of its legal system.² However, a lack of legal reasoning is still a common phenomenon among Chinese court decisions³, of which even the People's Supreme Court judgments are no exceptions. The purpose of this essay is to examine the mechanisms in the Swiss and Chinese legal systems which facilitate justice through reasoned judgment, and discuss how Chinese courts can, in the course of further reform, improve legal reasoning by learning from the Swiss practice.

The examination and discussion in this essay follow basically the *functional method* of comparative law described by Konrad Zweigert and Hein Kötz.⁴ According to this method, comparative legal study begins with (1) the definition of a problem; (2) selection of legal systems for comparison; (3) and selection of the respective materials for purpose of comparison. The comparison is not merely a characterization of this law in the first half of the paper and that law in the other half; rather, the comparison should be (4) focused on how the problem is approached in the two legal systems, and the different approaches are to be described neutrally according to a scheme created to fit in both legal systems. Only after the neutral presentation of the differences and commonalities can (5) the analysis and evaluation be performed.

The subtitle of Zweigert & Kötz's standard reference shows that the functional method is first and foremost developed for the comparison of private law. The authors recognize from the very beginning that the *right* method for the specific case will always

² See generally RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

³ 马宏俊, 法律文书制作 46 (2008), MA HONGJUN, Fa lu wen shu zhi zuo [THE PROCESSING OF LEGAL DOCUMENTS] 46 (2008).

⁴ KONRAD ZWIEGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG: AUF DEM GEBIETE DES PRIVATRECHTS [AN INTRODUCTION TO COMPARATIVE LAW: IN THE REALM OF PRIVATE LAW] 31-47 (3d ed. 1996).

have to be sought out by the comparator itself.⁵ Since the comparison of legal reasoning involves public law (especially procedural law), I allow myself to be additionally inspired by the Swiss Professor Axel Tschentscher, who propagates a *dialectical method* for comparison of public law.⁶

Professor Tschentscher criticizes the functional method for its puristic separation of Step 4 and 5. For in the context of public law, as opposed to private law, a neutral perspective is little more than a fiction. Also technically, it is neither natural nor necessary to separate neutral presentation and judgmental comparison.⁷ The dialectical method of Professor Tschentscher therefore, merges Step 4 and 5 of the functional method into one. Personally, I found it difficult even at the stage of creating the frame of reference for the comparison not to be influenced by the Swiss perspective, the point of view of the country where I enjoyed my legal education and practiced as a lawyer. It is hardly possible not to approach another legal system without any previous knowledge of your “own.”

Combining the traditional functional method with the dialectical method, Part I of this essay justifies the comparability of Chinese and Swiss legal systems and representativeness of the selected cases as the basis for comparative analysis; Part II presents the scheme, the frame of reference for the comparative study; Part III describes legal reasoning in the Swiss legal system, putting emphasis on the style and reasoning of Tribunal Federal appellate judgments; Part IV describes, analyzes and comments on legal reasoning in the Chinese legal system, with emphasis laid on the style and reasoning of Supreme Court appellate judgments; Part V concludes the foregoing and makes recommendations on how to improve Chinese courts’ legal reasoning by learning from the Swiss practice.

II. OBJECT OF COMPARISON

This essay compares a Swiss Tribunal Federal civil appellate judgment with a Chinese Supreme Court civil appellate judgment, regarding their styles and their legal reasoning.

⁵ *Id.* at 32 (“Die richtige Methode muss auch heute noch weiterhin selbst erst durch versuchsweises Herantasten in jedem Einzelfall herausgefunden werden.” [“Even today, the correct method must still be found in each case through a cautious, trial-by-step approach.”]).

⁶ Axel Tschentscher, *Dialektische Rechtsvergleichung: Zur Methode der Komparistik im öffentlichen Recht* [Dialectical Method of Comparative Law: On the Method of Comparison in Public Law], 17 JURISTEN ZEITUNG [JZ], 807-816 (2007).

⁷ *Id.* at 812.

A. Swiss Law as a Reference System

The purpose of this essay is to provide China's legal reformers with ideas on how to achieve more justice through integration of legal reasoning in court judgments. For this purpose, the ideas obtained from the comparative analysis have to be transferrable to the Chinese reality. Such transfer is more likely to succeed when the ideas fit systematically with Chinese law when the reference system and the Chinese legal system are cognate.

This is the case with the Swiss and Chinese legal systems. In a recent and authoritative publication, the authors Guohua Sun and Yujun Feng, after a careful analysis of its historical origin, legal tradition, legislative technique, and judgment style, arrive at the conclusion that the contemporary Chinese legal system belongs to the Germanic law family (*Deutscher Rechtskreis*/日耳曼法系).⁸ As one of the representative laws or "mother systems" (*Mutterordnung*)⁹ of the Germanic law family, the Swiss legal system is closely allied to the Chinese legal system.

The statute is the fundamental concept of both Swiss and Chinese law. A complete rule in the statute, which provides for cause of action (*Anspruchsgrundlage*/请求权基础), takes the form of a syllogistic norm: the major premise (大前提) is that a legal consequence prescribed by a statute applies when a generally described state of facts is present. The minor premise (小前提) is that a particular state of facts fulfills the statutorily prescribed state of facts. Since the method of legal reasoning is very much determined by this fundamental concept common to both legal systems, transferring the method used in the Swiss system to the Chinese system should be seamless.

Using Swiss law as a reference system is not only feasible but also promising, since it is, at least with respect to legal reasoning, an evidently more elaborate, more explicit, and more extensive law than the Chinese law, so that enriching and practicable ideas are most likely to generate from the comparison of both. Gap filling and legislative aid, two of the most important functions of comparative law¹⁰ can thus be fulfilled through this comparative study.

⁸ 孙国华 & 冯玉军, 中国特色社会主义法律体系研究: 概念, 理论, 结构 (2009), SUN GUOHUA & FEN YUJUN, *Zhongguo te se she hui zhu yi fa lu ti xi yan jiu: gai nian, li lun, jie gou* [A STUDY OF A SOCIALIST LEGAL SYSTEM WITH CHINESE CHARACTERISTICS: CONCEPTS, THEORIES, STRUCTURES] (2009).

⁹ "*Rechtskreis*" and "*Mutterordnung*" are both notions applied by ZWEIGERT & KÖTZ, *supra* note 4.

¹⁰ For a comprehensive discussion of comparative law functions, *see id.* at 12-31.

B. Selection of Judgments

The specific judgments selected for comparison purposes are appellate judgments from the highest court of the respective legal system. Compared to the trial instance, where fact finding is the primary job, the work of the appellate court concerns primarily the application of rules and therefore legal reasoning. Moreover, the legal reasoning of the highest court wields authority, if not in substance then at least in the way legal reasoning is performed. In other words, the reasoning in appellate judgments is more representative of the whole legal system. Finally, in both legal systems, the judgments of the highest courts are more available.

The Chinese judgment chosen for this analysis is the “*Appeal regarding the lawsuit of WEI Fengjiao vs. WU Xiaoyue et al about share transfer*,” accessible at the website of the Supreme People’s Court of the People’s Republic of China in the column “Judicial documents.”¹¹ To ensure the representativeness, the judgment was *not* selected on account of its quality of legal reasoning. The criteria for selection was rather the nature of dispute and area of law. The judgment involves the validity of a sale and purchase agreement, a legal problem that should be familiar to all jurists with basic training. It will be referred to as the “Chinese Judgment” hereinafter, an English translation of which can be found in Annex A.

The Swiss appellate judgment “BGE 98 II 96” is available at the Swiss Tribunal Federal’s website in the column “leading cases” (*Leitentscheide*)¹² and is selected in view of dispute nature and area of law as well; like the Chinese judgment, it is about the validity of a share purchase, and in both cases it is essential to interpret the parties’ conduct or agreement. The fact that the specific legal questions are different does not matter here, because the comparison regards legal reasoning and not substantive law. The Swiss judgment selected for analysis will be referred to as the

¹¹ 魏凤娇与吴笑月等股份转让纠纷上诉案 (最高人民法院, 法公布13号 (2003)), Wei Fengjiao v. Wu Xiaoyue (Sup. People’s Ct., No. 13 (2003)), reprinted in 最高人民法院办公厅, 最高人民法院公布裁判文书 (2003), at 164 (人民法院出版社 2004), Zui gao ren min fa yuan ban gong ting [GENERAL OFFICE OF THE SUPREME PEOPLE’S COURT], Zui gao ren min fa yuan gong bu cai pan wen shu (2003) [JUDGMENTS AND DECISIONS ANNOUNCED BY THE SUPREME PEOPLE’S COURT (2003)], at 164 (Ren min fa yuan chu ban she [Court Press] 2004), available at http://www.law-lib.com/cpws/cpws_view.asp?id=200400653578.

¹² Bundesgericht [BGer], Tribunal Fédéral [TF] [Federal Court] May 24, 1972, 98 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 96, 98 Arrêts du Tribunal Fédéral Suisse [ATF] II 96 (Switz), available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm> (follow “Index BGE ab 80” hyperlink; then select “II” hyperlink under “1972 (98)”).

“Swiss Judgment” hereinafter, an English version of which can be found in Annex B.

III. SCHEME OF COMPARISON

Legal reasoning is not an isolated function but the core of a *complex of functions* that collaborate to further justice. This essay will touch on several important aspects of this complex to put judicial legal reasoning into perspective while focusing on the legal reasoning in Chinese and Swiss appellate judgments.

The first of such aspects is the *regulation of legal reasoning*. Comparison will be made regarding whether legal reasoning is constituted as a right or claim in the respective legal system and to which extent it is enforceable.

Legal reasoning can be enforced by law and if made transparent, it provides public control of judicial decision-making with the necessary basis. Such control is twofold: the academic or expert control, which links legal science more closely with judicial practice; and the control by public opinion, which is, contrary to the academic discussion, primarily concerned with the social implications of judicial decisions. The *judiciary and the control of it* is the second aspect to be mentioned.

Legal reasoning is a demanding skill, which can only be acquired through years of training. On the other hand, actually writing a court judgment is an indispensable course material in the instruction of legal reasoning as a skill. The third important aspect of the functional complex is thus the *interaction of legal reasoning and legal education*.

In the center is the legal reasoning of the appellate judgments itself. As the process of reasoning is reflected in the style of judgment, there is no avoiding analyzing the respective styles, preset by templates in both systems. In fact, the substantial reasoning is so interwoven with the style of judgment that they must be studied as a whole.

IV. LEGAL REASONING IN SWISS LEGAL SYSTEM

A. Regulation of Legal Reasoning

Article 29(2) of the Constitution of Swiss Confederation guarantees the litigant's *right to be heard*, and in a recent

judgment,¹³ the Swiss Tribunal Federal (“TF”) affirms that the obligation of the court to use reason is an essential component of such constitutional right.

In that judgment, the TF was asked to decide, *inter alia*, whether the lower instance has fulfilled its obligation of legal reasoning. The purpose of legal reasoning is, according to the TF, to prevent the officials from being led by biased motives and to give the involved parties the right to appeal, which is only possible when the latter and the appellate instance can get an idea of the scope of the challenged decision. The lower instance should therefore *at least* briefly state the considerations upon which its decision is based.

Where this minimum requirement for legal reasoning is not fulfilled, the ordinary appellate instance may send the decision back to the lower instance to provide a statement of reason; or, where a party is entitled to an extraordinary remedy such as the constitutional complaint (*Verfassungsbeschwerde*) because his or her constitutional right to be heard was violated,¹⁴ the flawed judgment may be repealed or amended.¹⁵ Of note, a lack of sufficient reasoning and wrong reasoning are not one and the same. It is the regular task of the higher instance to examine the legal reasoning in the challenged judgment alleged to be wrong. It is the purpose of judicial review that such mistakes be corrected.

B. Legal Reasoning and Public Control

Any public control is based on readily accessible information and transparency. Pursuant to Article 30(3) Constitution of Swiss Confederation, judicial proceedings and pronouncement of judgments are public (if no exception is made by law), and Article 27 Federal Act on TF states more precisely: 1) The TF informs the public about its jurisdiction; 2) The published judgments are made anonymous; 3) The TF regulates the *principles of information* in a regulation;¹⁶ and 4) The TF may provide for accreditation for media reporting.

Article 57 Regulation for TF specifies the four *principles (or means) of information*: a) Official Collection of Swiss TF Judgments (hereinafter referred to as “Official Collection”, “BGE”); b) Internet; c) public display of the judgment; d) Communication to the media.

¹³ BGer, TF [Federal Court] Jan. 22, 2008, docket no. 1B 297/2007 § 4.2, <http://www.bger.ch/> (citing BGer, Sept. 14, 2007, docket no. 1B 154/2007 §3.1).

¹⁴ Bundesgesetz über das Bundesgericht [BGG], Loi sur le Tribunal Fédéral [LTF] [Law on the Federal Court], June 17, 2005, Amtliche Sammlung des Bundesrechts [AS] 1205 (2006), Recueil systématique du droit fédéral [RO] 1205 (2006), art. 116.

¹⁵ *Id.* art. 115(b).

¹⁶ *Id.* art. 27 (emphasis added).

Included in the Official Collection are BGEs of fundamental prominence (leading cases).¹⁷ All of TF's judgments are published and freely available on the internet, including the leading cases (with all due respect to the parties' privacy).¹⁸ The *rubrum* (a caption that identifies the parties and the lawsuit) and the *dispositive* (a statement of the decision and of the relief ordered) of all judgments are moreover available at the domicile of TF for thirty days without being made anonymous, unless laws demand otherwise.¹⁹

If public control is based on readily accessible information, any effective control is based on *correct* information. Therefore, journalists have to apply for accreditation in order to report on TF judgments. Press communications about judgments and other decisions are drafted jointly by the journalist and the court reporter. They are approved by the court together with the judgment itself.²⁰

The reporting on the case is to be distinguished from the discussions which follow it. Whereas reporting has to be faithful and accurate, the discussion based on it is free. The TF judgments are published and commented in the media, because they provide guidance to the law's application, especially in cases where the law or regulation leaves room for interpretation, or where new issues are not yet regulated by law. These are also cases where legal reasoning is strongly demanded and possibly controversial. However, controversial judgments foster political debates, which could finally lead to the amendment of old laws or promulgation of new laws.

A special group of commentators are the legal specialists (academics or attorneys), who scrutinize and criticize the judgments and particularly the legal reasoning in them. Criticism is from the viewpoint of an expert and usually via professional periodicals, or research on topics which arise from debatable judgments. Such legal scholarship is already one aspect of the interaction between legal science and judicature in Switzerland.

C. Legal Reasoning and Legal Education in Switzerland

Professor Hongju Ma is perhaps right in his observation that in civil law countries, legal writing and legal drafting are taught more in

¹⁷ Reglement für das Bundesgericht [BGerR], R èglement du Tribunal F é d é r a l [RTF] [Regulation on the Federal Court], Nov. 20, 2006, AS 5635, RO 5635, art. 58, ¶1. The Official Collection is available in all larger public libraries of the country, the volumes since 1954 are moreover available on the website of the TF <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954-direct.htm> (last visited 7 June 2009).

¹⁸ *Id.* art. 59.

¹⁹ *Id.* art. 60.

²⁰ *Id.* art. 61.

practice than at the college.²¹ However, the core of any kind of legal writing or drafting - legal reasoning - is a skill that is intensively trained in the Swiss law schools.

Among the various courses designed to teach and train the skill of legal reasoning is the *Review of BGEs*, usually taught by the chair of the respective legal area. The emphasis of such lectures is strongly laid on the deployment of legal reasoning in the BGEs. Students are also encouraged to read BGE collections compiled for purpose of study, and such collections exist for each major area of law.²² No doubt, BGEs are part of the most important learning materials in Swiss law schools, which is only possible because the appellate judges of TF are some of the best-qualified jurists of the land. BGEs not only serve as learning material, but they are also an important source of proof or evidence in the legal research. As such they are quoted by students, researchers, and professors alike for the reasoning of their causes.

On the other hand, court judgments also quote works of scholars, the legally permissible according to the famous Article 1(3) Swiss Code Civil, which purports: in default of law or custom, the judge is to fill the gap following the *established teachings* and case law. The relationship between judicature and legal scholarship in Switzerland is therefore a close and interactive one.

The TF is fully aware of the importance of its jurisdiction for legal research and legal education, its efforts to facilitate the latter will become evident in the ensuing analysis.

D. Legal Reasoning in Swiss TF Judgments

The Swiss TF judgments follow a consistent format which is comprised of up to five parts:

1. Head of the judgment (*Urteilskopf*)
2. Indexes (*Regeste*)²³
3. Statement of Affairs (*Sachverhalt*)
4. Considerations (*Erwägungen*)
5. Decision (*Entscheidung*)²⁴

All five parts are subject to strict rules as to style, outlined as follows.²⁵

²¹ MA, *supra* note 3 at 17.

²² Here, the compilers are scholars, not the TF.

²³ A TF judgment is only furnished with *Regeste* after it has been chosen for publication as a leading case in the Official Collection. See *infra* Part III.D.2.

²⁴ The Decision part can sometimes be omitted. See *infra* Part III.D.5.

²⁵ For purpose of this comparative analysis, the Swiss TF has made available to me its general directions, guideline for judgment editing, and guidance for publication in the Official Collection. Since these documents are strictly internal, direct quotation and citation will be avoided.

1. Head of the Judgment

(a) Case Designation

The leading cases collected in the Official Collection are smartly encoded to convey bibliographical information, facilitate searches and simplify for reference. For example, consider the case name BGE 98 II 96; “98” stands for the *volume* of the Official Collection,²⁶ “II” stands simultaneously for the *book*, the area of law of the case as well as the department of TF which has decided the case,²⁷ and “96”, indicates the *initial page* of the leading case within the particular book.

(b) Judgment Title

The case designation is followed by the title of the judgment which encompasses such elements as the date of judgment, parties to the dispute before the TF, the ruling department, and the kind of legal remedy.²⁸ If a judgment is published online before it is collected as leading case, its internet case number will also be stated in the judgment title to assist those who wish to read the complete judgment.

However, the previous instances and the rolls of parties before them are *not* mentioned in the title.²⁹ These data are fed into the TF’s internal information system and kept in the electronic archive.

For an example of case head see Annex B.

2. Indexes

Only leading cases, i.e. cases selected for publication in the Official Collection, are furnished with *Indexes*.³⁰ They describe the determinative facts of the case in a few keywords, followed by an executive summary of the court’s considerations (as selected for

²⁶ As the first volume of the Official Collection was published in 1875, one year after the 1874 complete revision of the Swiss Federal Constitution, an adept researcher would identify the year of publication upon seeing the case designation.

²⁷ The other Roman numeral designations dividing books by subject and department are (I) constitutional law, administrative law and public international law, by the first and second public law departments; (II) civil law, by the first and second private law departments; (III) debt enforcement and bankruptcy law, by the second private law department; (IV) criminal Law, by the criminal law department; and (V) social security law, by the first and second social security law departments.

²⁸ Such as appeal, revision, or complaint.

²⁹ In certain appeals, a lower court(in its function as the decreeing authority) can be the opposing party before the TF. In such cases the previous court will be denoted as a party in the title of the judgment.

³⁰ From the Latin *res gestae*, meaning “things done.”

publication).³¹ Hence they are the court's core deliberations - often the interpretation of the rule in application - or conclusions of law that add novelty to doctrine or jurisprudence.

The sentences of *Indexes* are highly condensed. They usually give an account of the essential legal problem, with reference (in brackets) to the consideration, where the topic is extensively discussed.³² When an important question is left open, the sentence can be formulated in question form.³³ Prior to the sentence(s) cited in official abbreviation (in bold) the statutory rule pertinent to the issue in dispute, on the basis of which the court has made its respective considerations.³⁴ The *Indexes* are published in three official languages of the Swiss Confederation: German, French, and Italian. For an example of *Indexes* see Annex B.

The *Indexes* bring with it several benefits. First, its styling simplifies the indexation of the leading case in the register and thereby facilitates the search. A researcher only needs to type in the rule according to official abbreviation and all leading cases concerning this article will be presented as search results, each displayed with the case designation and *Indexes* to help make the choice. The *Indexes* are highly *searcher friendly*. Second, the *Indexes* provides a valuable clue to the court's conclusions of law. If the conclusion is first mentioned after the analysis that supports it, the reasoning (in Part 4) would seem pointless to the reader who does not yet know what it is supposed to prove. The reader will become increasingly frustrated or annoyed while struggling through the text, and there will be heightened risk that the text be misunderstood. Stating the conclusions of law ahead is therefore extremely *reader friendly*.

Third, the *Indexes* presents attorneys and judges with readily formulated rules. Leading cases are important to practice because they provide guidance to attorneys and judges when they prepare for litigation or adjudication. Usually, practitioners read precedents to formulate rules from them in order to apply the rules to their cases at

³¹ Considerations that do not contribute in making the decision a "leading case" are omitted for purpose of publication in the Official Collection. See discussion *infra* Part III.D.4.

³² The considerations of the court are individually numbered; for example, "(Erw. 3)" in the *Regeste* of BGE 98 II 96 shows that the foregoing sentence ("Genehmigung eines Kaufvertrages nach erfolgter Anfechtung? Frage offen gelassen" ["The approval of a sell and purchase agreement after it has been contested? Question left open"]) is a summary of the 3rd consideration in the judgment. BGE [Federal Court] May 24, 1972, 98 BGE II 96, regeste.

³³ For example in the 3rd consideration of BGE 98 II 96, the corresponding *Regeste* entry thus reads: "Genehmigung eines Kaufvertrages nach erfolgter Anfechtung? Frage offen gelassen (Erw. 3)." ["The approval of a sell and purchase agreement after it has been contested? Question left open (Sec. 3)."] *Id.*

³⁴ For example in the *Regeste* of BGE 98 II 96, "Art. 31 OR" or "Art. 2 ZGB". *Id.*

hand. The *Indexes* assists in this process with its formulation of the rules, and thus proves to be highly *user friendly*.

As mentioned before, the *Indexes* of a leading case are formulated in German, French as well as in Italian. The multilingualism is yet another user friendly feature: an Italian speaking researcher, for instance, can rely on the *Indexes* to decide whether he wants the leading case be translated into his language from German or French.

In sum, it can be concluded that the functionalities of *Indexes* are specially designed for legal experts in order to facilitate their research.

3. Statement of Affairs

The Statement of Affairs (*Sachverhalt*) presents the *findings of facts*, that is, established legal facts and not the assertions of fact by the parties. It usually consists of three components. The first component describes the incident, including the background of the dispute. It is followed by the procedural history and the actual request(s) of the parties.

(a) Factual Background

The description of factual background is not just an accumulation of factual material. Basically, only facts that are considered to be *determinative* (i.e. facts that, if proven, would entitle the party to the relief sought)³⁵ deserve their place in the Statement of Affairs. Occasionally, it is necessary to mention *explanatory* facts, i.e. facts that help make sense out of a situation which would otherwise seem disjointed. Facts that make up an incident but are neither relevant nor useful to the solution (the so-called *coincidental* facts) must be cleared out of the Statement of Affairs.

The factual background of the case is to be described neutrally in brief. Appreciation of facts or fact inferences are incongruent here because they are elements of the consideration and belong thus within Part 4.

(b) Procedural History

Clarity and concision is a stylistic imperative to the composition of procedural history as well. The essential contents of this section are the requests or applications of the parties before the former instance(s) and the latter's verdict(s). They should not be, for the

³⁵ RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 186 (4th ed. 2001).

sake of convenience, barely copy-pasted from the parties' submissions or challenged judgment. In the majority of cases the requests or applications of the parties can be easily summarized without losing meaning, or narrowed down to those issues that are still litigious. Repetition and verbosity are to be avoided in the whole judgment text.

It is not necessary to provide in-depth submissions of the parties or the reasoning of former instance(s), because the TF will involve and deal with them in its own reasoning in Part 4.

(c) Requests of the Parties

The requests of the parties demonstrate what divides them, i.e. what actually constitutes the subject matter before the TF. Without such information the subsequent text would easily seem pointless to the reader.

When selected for publication in the Official Collection, the Statement of Affairs can be published in full, in extracts³⁶, or in summarized form.³⁷ However, the modifications should not affect the comprehensibility of the considerations.

4. Considerations

In this part of the judgment, the Swiss TF gives written arguments in support of the conclusions of law it draws and the decision(s) it renders. "Considerations" consist of the grounds for the decisions, organized in such a way as to justify the decisions to the parties as well as the public.

In its internal guideline for the judgment editing, the TF emphasizes the integration of the decision and legal reasoning and their combined significance. A judgment is given meaning, scope, and importance from the strength (or lack thereof) of its reasoning. The weight the TF attaches to legal reasoning is reflected in the high standard it sets for it. The reasoning must be simple, clear, substantial, and coherent; it is expected from the court reporter that he thinks according to the rules of logic, reasons consistently,

³⁶ If the Statement of Affairs is published in extracts, some passages of it may be omitted; however, no editorial changes are allowed, the omitted parts are to be indicated by ellipsis, and at the end of the Statement, it is to be labeled as an extract ("*Auszug/extrait/estratto*"). See Internal guideline of the Publikationsdienst of the Bundesgericht [Federal Court Publication Service], *Wegleitung zur Publikation von Urteilen in der Amtlichen Sammlung* [For Publication of Judgments in the Official Collection] 10 (Mar. 24, 2009) (on file with author).

³⁷ In this case the Statement of Affairs is fully revised and must be labeled as a summary ("*Zusammengefasst/resume/riassunto*"). *Id.* at 10.

confines himself to evident legal grounds, and expounds such legal grounds in an orderly and lucid manner.

The TF's internal guidelines also provide for hierarchic reasoning structure:

- The issues should be handled separately and in a logical order. The proper sequence of treatment is determined by the nature of the issues and their co-relations;
- Procedural (e.g. jurisdiction, other conditions precedent to admission) or preliminary substantial issues (e.g. standing of the parties, applicable law), should be treated beforehand;
- The treatment and consideration of each issue follows the general scheme of 1) statement of issue, 2) pertinent rules to resolving the issue, and 3) the application of rule to facts;
- Subsidiary considerations are not allowed unless under the following circumstances: 1) when the chief argument is not contending, 2) where there is cause for reinforcement, or 3) in exceptional occasions when it is justified to deal with a principle legal question thoroughly, and the elaboration has no bearing on the outcome of the process.

As far as the individual considerations are concerned, the TF's internal guidelines emphasize the necessity of keeping general and special contemplations apart for the benefit of clarity, especially in questions that are at once fundamental and difficult. General considerations, such as interpretation of the pertinent rule, should come first; they are the actual adjudication and should therefore be formulated to allow application to similar cases without further ado. Special considerations (e.g. application of the interpreted rule to the case at hand) come as second, and thoughts on these two different levels should not intertwine.

Disagreement on the interpretation of rules is one of the major reasons why disputes cannot be resolved bilaterally. In such cases, but also in cases where the parties are divided in respect of the applicable rule, the court has to interpret the rule(s) based on the methods that are recognized by law and doctrine,³⁸ e.g., utilizing an authoritative interpretation of the rule to decide on which law is to be applied. Another major reason for disputes is the difference in the interpretation of the facts of the case. Again, the court must

³⁸ The court should apply the so-called interpretation canons: text-based interpretation (grammatikalische Auslegung); context-based interpretation (systematische Auslegung); historical interpretation (historische Auslegung); and teleological interpretation (teleologische Auslegung). See KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* [METHODOLOGY OF LAW] 312-60 (1991). Swiss courts often use comparative law as a method of interpretation as well. See *id.* at 312-60. In international law, other interpretation methods apply. See Vienna Convention on the Law of Treaties arts. 31-33, adopted May 22, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

establish legal facts through fact inference before drawing its conclusions.³⁹

During interpretation or reasoning in general, it is essential that the author of the judgment base his statements on authorities. However, citations are to be used economically; they should be limited to the quintessential and should quote the gist rather than exact wordings - verbatim quotation is only allowed where the meaning is identical. The economy of citation is also reflected in the restriction of sources: leading cases to principal questions, if they do exist, are to be cited in the first instance, and shall be the exclusive citation - if they have not been challenged from any side. Citations from literature and doctrine are only indicated when a problem is controversial, or if they are both important and difficult, and if the TF is dealing with it for the first time, or if it has to deal with it again on account of the criticism on its former adjudication.

The above citation rule not only incorporates the standard of simplicity and clarity of legal reasoning, but also demonstrates the different degree of depth of the legal reasoning required for different levels of intricacy in the problems. Easy cases without new fundamental questions are to be reasoned briefly, with reference to the pertinent rule(s) and the existing practice. However, even in these cases, the court has to substantiate its reasoning. Bare assertions and references are not arguments for the decision, and with them alone the obligation of legal reasoning can never be fulfilled.

5. *Decision*

The final part of the judgment is the court's disposition of the process outcome, it encompasses the court's decision as to whether the judgment is annulled, or to what extent it is revised, and the court's order regarding costs and communication.

When a case is published as a leading one in the Official Collection, the orders regarding costs and communication are omitted. Short dispositions can be transferred to the end of the Statement of Affairs, in which case the Decision part may also be entirely left out.

³⁹ The interpretation of facts is left to the judge, who according to Swiss procedural law, has the discretion to consider evidence presented to him. Bundesgesetz über das Bundeszivilprozess [BZP], Loi fédérale de procédure civile fédérale [PCF] [Federal Law on Federal Civil Procedure], Dec. 4, 1947, Systematische Sammlung des Bundesrechts [SR] 273, Recueil systématique du droit fédéral [RS] 273, art. 40. The Swiss Judgment in Annex B shows how the TF interprets facts in detail.

V. LEGAL REASONING IN THE CHINESE LEGAL SYSTEM

A. Regulation of Legal Reasoning in China

Any effort to find an article in the Constitution of People's Republic of China which even alludes to the right to be heard, to fair hearing, or the right to a reasoned judgment will prove to be futile. There is no such entitlement as a constitutional right to reasoned judgment in China.

What about a statutory right to the same. A survey of three procedure codes of the People's Republic of China, namely the codes of civil, criminal and administrative procedure, shows that the respective court is obliged to "base its decision on facts and judge with the law as a yardstick (以事实为根据, 以法律为准绳)."⁴⁰ Where there is a mistake in the *application of law* (适用法律有错误) but no simultaneous mistake in the fact finding the appellate instance shall amend the challenged judgment.⁴¹ In civil matters, where there is "indeed a mistake in the application of law (适用法律确有错误的)," the judgment may be subject to revision, or in the case of arbitration, the enforcement of an arbitration award may be refused.⁴²

"Application of law" (适用法律, 法律的适用), however, is an equivocal term in the Chinese legal language defined as which rule or law to apply (whether *rule* or *law* is meant turns out only in the context). This term is used both *with or without* the implication of how to apply the law or rule (应用法律, 法律的应用).⁴³ A mistake in the application of law would used in the broader sense indicates that the court applied the wrong source of law or an impertinent rule, *or* it was wrong in its legal reasoning; conversely,

⁴⁰ 民事诉讼法, Min shi su song fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008), art. 7, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 702; 行政诉讼法, Xing zheng su song fa [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 4, 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 70; 刑事诉讼法, Xing shi su song fa [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 6, 1979 FAGUI HUI BIAN 89.

⁴¹ Civil Procedure Law art. 153(2); Administrative Procedure Law art. 54(2)(2); Criminal Procedure Law art. 189(2).

⁴² Civil Procedure Law arts. 179(6), 213(5).

⁴³ 法理学教科书 172 (刘金国 & 舒国滢 主编 1999), Fa li xue jiao ke shu [TEXTBOOK ON LEGAL THEORY] 172 (Lui Jinguo & Shu Guoying eds., 1999) ("法律适用, 是指国家司法机关依据法职权和法定程序, 具体应用法律处理案件的专门活动。" ["The application of law is a special activity of state judicial organs which, within the competence given by law and according to legal procedures, utilizes the law to resolve cases."]). According to this definition, the application of law embraces both choosing the source of law and choosing the applicable rule from that source. However Ma states, "法律文书制作中的法律适用是... 针对具体的案件, 如何选择作为评判标准的法律规范的方法。" ["The application of law in legal document processing refers to... how to select the rules which are pertinent to the finding and treatment of facts of a specific case."]. MA, *supra* note 3 at 35.

in the narrow sense a mistake in the application of law indicates only the wrong choice of law or rule.

Provided that the broader interpretation of the term “application of law” in the three procedure codes can be established by the Supreme People’s Court (“SPC”) or by the Standing Committee of National People’s Congress,⁴⁴ three cases could then be subsumed under the principle of “mistake in application of law”: either the lower instance 1) did not apply the right source of law or did not use the pertinent rule(s); 2) used the pertinent rule(s) but due to wrong reasoning arrived at a wrong decision; or 3) used the pertinent rule(s) but without any reasoning, so that the aggrieved party and the appellate court cannot get a picture of the meaning and scope of its decision.

In a more recent document, *The Several Opinions on the Reinforcement of Public Hearing Activities of People’s Courts*⁴⁵ (the “Opinions”), the SPC, *inter alia*, instructed the lower courts to improve the quality of their judgments. Article 25 of the document emphasizes legal reasoning as one of the essential elements of a judgment.⁴⁶ There are however no repercussion threatened against non-compliance, and in any case, internal directives do not extend to civil rights.

⁴⁴ The power to interpret the law is with the Standing Committee of National People’s Congress, “especially when it comes to the choice of law or rule” (“需要明确适用法律依据的”). 立法法, Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), art. 42, 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112. However, in a resolution to enhance the interpretation of law dated back to 1981, the Standing Committee delegated part of its right to interpret laws and regulations to the Supreme People’s Court, namely on matters concerning “the detailed application of laws and regulations within the scope of court’s adjudication activities” (“凡属于法院审判工作中具体应用法律、法令的问题, 由最高人民法院进行解释.”). 全国人民代表大会常务委员会关于加强法律解释工作的决议, Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu jia qiang fa lu jie shi gong zhou de jue yi [Standing Comm. Nat’l People’s Cong. Regulation on the Strengthening of Legal Interpretation] (promulgated June 10, 1981), art. 2, 1980 FA GUI HUI BIAN 27. The interpretation of law by the SC is referred to as judicial interpretation (司法解释), to be distinguished from the legislative interpretation of law by the Standing Committee (立法解释). Since the delegation norm in the resolution is not clearly delimited there is uncertainty regarding, for example, whether the term “application of law” shall be interpreted by the Standing Committee or by the SC.

⁴⁵ 关于加强人民法院审判公开工作的若干意见 (最高人民法院, 法发20号 (2007)), Guan yu jia qiang ren min fa yuan shen pan gong kai gong zhao de ruo gan yi jian [Several Opinions on the Reinforcement of Public Hearing Activities of People’s Courts] (promulgated by the Sup. People’s Ct., No. 20 (2007)), 2007 SUP. PEOPLE’S CT. GAZ. 12.

⁴⁶ “人民法院裁判文书是人民法院公开审判活动, 裁判理由, 裁判依据和裁判结果的重要载体。裁判文书的制作应当符合最高人民法院颁布的裁判文书样式要求, 包含裁判文书的必备要素, 并按照繁简得当, 易于理解的要求, 清楚地反映裁判过程, 事实, 理由和裁判依据。” [“The court decisions of a People’s Court incorporate its public trial activities, bases and reasons, and results. They must conform to the style templates issued by the Supreme Court, which encompass the essential elements of (different types of) court decisions. The court decisions must be concise and easily comprehensible, clearly reflecting the trial process, facts, reasons, and bases of the judgment.”]. *Id.* art. 25.

In summary, there is presently no minimum requirement for legal reasoning in China and it is uncertain whether the lack of reasoning, or some measure of incorrect reasoning can give rise to appeal in the Chinese legal system.⁴⁷

B. Legal Reasoning and Public Control in China

Pursuant to Article 125 of Constitution of the People's Republic of China, except otherwise specified by law, all cases in the People's Courts are to be heard in public. The principle of public hearing is reiterated by the three procedure codes.⁴⁸ In the *Several Provisions on the Strict Enforcement of Public Hearing System (1998)*,⁴⁹ the SPC makes clear that the pronouncement of a judgment is a part of court hearing and therefore is open to public as well.⁵⁰ Furthermore, *all* judgments shall be published.⁵¹

In 2007, the SPC put its "Several Provisions" in concrete terms with its *Several Opinions on the Reinforcement of Public Hearing Activities of People's Courts*.⁵² It instructs the High People's Courts to develop detailed measures to publish those judgments that have entered into effect within their respective jurisdictions through communication such as the print media, local area network, or internet, in order to successively increase accessibility of court judgments.⁵³ It is an encouraging sign that some High People's Courts have since been publishing their cases on their homepages.⁵⁴

⁴⁷ For an overview of general problems within the Chinese judicial review system, see *infra* Part IV.D.3.

⁴⁸ 民事诉讼法, Min shi su song fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008), art. 10, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 702; 行政诉讼法, Xing zheng su song fa [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 6, 1989 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 70; 刑事诉讼法, Xing shi su song fa [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 11, 1979 FA GUIHUI BIAN 89.

⁴⁹ 关于严格执行公开审判制度的若干规定 (最高人民法院, 法发3号 (1999)), Guan yu yan ge zhi xing gong kai shen pan zhi du de ruo gan gui ding [Several Provisions on the Strict Enforcement of the Public Hearing System] (promulgated by the Sup. People's Ct., No. 3 (1999), 1999 SUP. PEOPLE'S CT. GAZ. 55.

⁵⁰ *Id.* art 1.

⁵¹ *Id.* art 1.

⁵² 关于加强人民法院审判公开工作的若干意见 (最高人民法院, 法发20号 (2007)), Guan yu jia qiang renmin fa yuan shen pan gong kai gong zhao de ruo gan yi jian [Several Opinions on the Reinforcement of Public Hearing Activities of People's Courts] (promulgated by the Sup. People's Ct., No. 20 (2007)), 2007 SUP. PEOPLE'S CT. GAZ. 12.

⁵³ *Several Provisions on the Strict Enforcement of the Public Hearing System*, art. 22.

⁵⁴ See 宣海林, 法律眉批的借鉴意义, 人民法院报 (周刊), Xuan Hailin, Fa lu mei pi de jie ian yi yi [Lessons from the Legal Headnote], Renmin fa yuan bao (Zhou kan) [PEOPLE'S CT. DAILY (LEGAL WKLY.)], May 31, 2009, at 7.

How is the SPC itself doing in this respect. Since 1985, the SPC has been publishing some of its judgments in the *Gazette of the Supreme People's Court of the People's Republic of China*⁵⁵ ("the Gazette"), which is published quarterly until 1998, bimonthly from 1999 to 2003, and in a monthly periodical of forty-eight pages from 2004 to date. However, there is not an exclusive media for publication of judgments. Those which are published are only partially from the SPC,⁵⁶ and the remainder are local court selected judgments which are approved for publication.⁵⁷ Whereby both categories of judgments are also made available on the homepage of the SPC in the columns "*Judicial Documents* (裁判文书)" and "*Typical Cases* (典型案例)."

The combination of inadequacy in case publication and blatant corruption in the judiciary urges the public to seek mechanisms in order to exercise control. However, there is no Swiss model professional court journalism in China. As a result, the border is easily blurred between illegal media intervention and public control. Media intervention is considered by the court to be a threat to judicial independence, a heated problem awaiting to be solved.⁵⁸ While the accreditation of a journalist may be a source of inspiration within the Chinese judiciary, the SPC should continue to recognize that the root of the problem is the lack of transparency in the judgment making process, i.e. the lack of reasoning. In fact, if the courts have a firm grasp of the legal reasoning methods, they may not even feel so easily disturbed by the "noise" from the public.

According to a survey conducted in 2008 by the SPC itself, only 2.28% of the Gazette readership consists of students, and 1.85% within legal education and research professionals.⁵⁹ These statistics evidence an alarming disconnection between jurisdiction and legal scholarship. In China, case review seems to be more of an internal exercise of the court system. In another periodical of the SPC, the case edition of the *People's Judicature*,⁶⁰ courts report and comment

⁵⁵ 中华人民共和国最高人民法院公报, *Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao* (Gazette of the Supreme People's Court of the People's Republic of China) SUP. PEOPLE'S CT. GAZ.

⁵⁶ Each contain about two SC judgments in the column "Judicial Documents" (裁判文书选登, *Cai pan wen shu xian deng*).

⁵⁷ Each contain about three judgments from local courts in the column "Selected Cases" (案例, *An li*).

⁵⁸ See 赵蕾, 最高法院向“干预司法”宣战, 南方周末, Zhao Lei, *Zhui gao fa yuan xiang "gan yu si fa" xuan zhan* [Supreme Court Declares War Against "Intervention in Adjudication"], *Nan fang zhou mo* [S. WEEKEND (P.R.C.)], Apr. 30, 2009, available at <http://nf.nfdaily.cn/nanfangdaily/nfzm/200904300096.asp>.

⁵⁹ 姚颖, 以案例宣传社会主义法制, 人民法院报, Yao Ying, *Yi an li xuan chuan she hui zhu yi fa zhi* [Promoting the Socialist Legal System Through Cases], J. PEOPLE'S CT., June 14, 2008, available at <http://rmfyb.chinacourt.org/public/detail.php?id=119973>.

⁶⁰ 人民司法(案例版), *Renmin si fa (An li ban)* [PEOPLE'S JUDICATURE (CASE ED.)].

on their own judgments. The same is true for the *Selected Cases of People's Court*.⁶¹ There are a few unofficial commented case collections compiled by former SPC judges or universities⁶², however, the commentaries are also written by the staff of the court from which the judgments are originated. Whereas these collections show SPC's growing concern for the legal education,⁶³ academic case review is still a much neglected area.

At the first "Prominent Jurist Forum" in Shanghai this April, Professor Zhenglai Deng insightfully concluded that in the past 30 years, the country's legal science has been concentrated on the philosophy of law but failed to study concrete problems of the present Chinese society.⁶⁴ The indifference with regard to court judgments can perhaps be seen as one symptom of the observed imbalance. Indeed, to comment and criticize on a judgment requires significant skill, and the lack of such skill may well have been one of the causes for the apparent disinterest in practical problems. It is on the other hand highly questionable how groundbreaking philosophical thoughts about law can be without a deep insight into the actual problem.

There are other scholars who complain that the Chinese legal science has been too Westernized in the last decades, and wish to add to it some more "Chinese notes (中国元素)."⁶⁵ Yet, to look for such "notes" in the Chinese classics would also be incorrect, because the Chinese culture and society have changed and are still changing, irrespective of our nostalgia or nationalist sentiments. Only by looking into the problem itself can we know how local or global, traditional or modern it is, and no matter what it is, the job of the jurist is to solve it with the law. If Westernization of China's legal science is truly a problem, the reason can only be that it has lost contact with reality.

The disconnection between legal scholarship and jurisdiction causes loss to both, namely the suffering of human and intellectual

⁶¹ 人民法院案例选, Renmin fa yuan an li xian [SELECTED CASES PEOPLE'S CT.].

⁶² E.g., 罗豪才 & 孙琬钟, 人民法院案例与评注 (2006), LUO HAOCAL & XUN WANZHONG, Renmin fa yuan an li yu ping zhu [CASES AND COMMENTARIES OF THE PEOPLE'S COURTS] (2006); 中国审判案例要览 (中国人民大学出版社, 2008), Zhongguo shen pan an li yao lan [COLLECTION OF IMPORTANT CHINESE JUDGMENTS] (Zhongguo renmin da xue chu ban she [People's University Press], 2008).

⁶³ The primary purpose of publication is to provide guidance to local courts regarding the correct and unified application of law.

⁶⁴ 中国法学的三十年河东三十年河西, 南方周末, Zhongguo fa xue de san shi nian he dong san shi nian he xi [The Rise and Fall of Chinese Legal Science], S. WEEKEND (P.R.C.), May 28, 2009, available at <http://nf.nfdaily.cn/epaper/nfzm/content/20090528/ArticleE31004FM.htm>.

⁶⁵ 潞甫等, 寻找法治的中国元素, 社会科学报, Lu Fu et al., Xun zhao fa zhi de zhongguo yuan su [Seeking Chinese Elements of the Rule of Law], She hui ke xue bao [SOC. SCI. WKLY. (P.R.C.)], Apr. 23, 2009 (No. 1162), at 3.

resources shortage and most pressing, the lack of expert control of judicature.

C. Legal Reasoning and Legal Education in China

Professor Hongju Ma observes correctly that the inadequacy of legal reasoning in judgments is not uncommon in China and is at least partially a function of the country's legal education system because it overly stresses knowledge and neglects skills.⁶⁶ Ma points to the fact that many law schools nor many internships after the bar exam include legal drafting as part of the curriculum.⁶⁷ However, in his textbook on legal drafting, there is hardly any devotion to the skill or method of legal reasoning.

Juristic thinking and Private Law Cases by the Taiwanese Professor Zejian Wang is one of the few books in the Chinese language, if not the only one, which systematically introduces the method of legal reasoning.⁶⁸ It is an acclaimed book, and yet while it should be recognized as the conveyer of *the* method of law application inherent to the civil law system, even the writer of the foreword mistakes this book for a messenger of yet another method of teaching theoretical knowledge.

China lacks not only a curriculum of legal reasoning, but more importantly, the awareness and teaching capacity in China. If the method of legal reasoning is system typical, and if the contemporary Chinese legal system is a German system, then the "technology" of operating the system must be fetched from the German tradition. In Germany as well as in Switzerland, juristic thinking and problem solving skills are regarded as "tools of the trade". They are taught and trained in bachelor and master courses. Most Chinese students go to these countries to study for a doctoral degree or an LL.M., where no corresponding courses are provided systematically. Furthermore in general, perhaps because of the more difficult German language, much fewer law students study at German speaking universities as compared to an English speaking universities in the USA, UK or Australia, all common law countries where the law operates differently on a technical level.

Another problem regarding teaching legal reasoning as a skill in China is the lack of exemplary judgments. In Switzerland, the appellate judges are some of the best jurists of the land, and their judgments are therefore part of the most important learning materials

⁶⁶ MA, *supra* note 3 at 46.

⁶⁷ *Id.* at 46-47.

⁶⁸ 王泽鉴, 法律思维与民法实例, WANG ZEJIAN, Fa lu si wei yu min fa shi li [LEGAL THINKING AND EXAMPLES OF CIVIL LAW] (2001).

for law students. Conversely, China is still caught in the discussion whether its legal reform should progress in the direction of professionalism or populism.⁶⁹ Under such circumstances, it is probably unrealistic to discuss whether scholarly teaching should be some form of legal authority in China. In fact, it is questionable whether legal scholarship progress at all without a basic method of legal reasoning.

It can be concluded that legal reasoning in both Chinese jurisdictions and legal education are kept at a minimum. If reasoning is the spirit of law, China still has to decide whether it wants this spirit to exist within its largely imported articles and paragraphs or not before the question of how to acquire the technique of reasoning is remedied.

D. Legal Reasoning in Chinese SPC Judgments

In persuasive writing, the structure of text reflects the reasoning strategy of the writer. However, the drafter of a judgment is not completely free in building up its arguments because the style is preset. In other words, substantial legal reasoning has to meet the formal conditions determined by the style. This part of the analysis, therefore, starts with the introduction of SPC judgment's style (IV D1), followed by a discussion about the fact statement (IV D2) and considerations (IV D3) in a Chinese Judgment.

1. Style of Chinese SPC Judgments

The first unfavorable impression of the Chinese SPC judgment is its lack of styling. For ease of reference, side notes ("SN", left to the text column) have to be given to the paragraphs; and to the right of the text column, line numbers ("LN") are added to measure the length of the individual text parts.

Table 1

Style Template ⁷⁰	Compare Annex A (SN)	Compare Annex A (LN)
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⁶⁹ See 苏永通, 不按“法理”出牌的高院院长, 南方周末, Su Tongyong, Bu an “fa li” chu pai de gao yuan yuan zhang [A President of the High People's Court Who Does Not Play the Card of “Legal Principles”], S. WEEKEND (P.R.C.), Feb. 19, 2009, available at <http://www.infzm.com/content/24067/>; 廖海青, 司法改革再出发, 南风窗, Liao Haiqing, Si fa gai ge zai chu fa [Judicial Reform Relunched], Nan feng chuang [WINDOW TO THE SOUTH (WINDOW S.) (P.R.C.)], Feb. 13, 2009, at 4, available at http://www.news365.com.cn/wxpd/wz/szjy/200902/t20090213_2201101.htm.

⁷⁰ MA, *supra* note 3 at 87-91.

<u>Part One: Case Head</u>		
1.1 Court name, document number, case number Name of the Court	I	1-10
1.2 Particularities of Parties	II	12-35
1.3 Identities of the attorneys	II	12-35
1.4 Dispute, court, constitution of court	III	36-41
<u>Parts Two: Judgment Body</u>		
2.1 Facts and evidences		
2.1.1 Facts and decisions of first trial	IV – IX	43-183
2.1.2 Requests and arguments of Appellant; Reply and arguments of Respondent	X – XII	185-258
2.1.3 Facts and evidences of second trial	XIII – XIV	260-292
2.2 Grounds	XVII – XVIII	294-334
2.3 Main text of judgment	XIX	336-339
<u>Part Three: Case End</u>		
3.1 Costs	XX	341-343
3.2 Finality	XXI	345
3.3 Signatures of court members	XXII	347-355

The style template introduced above and the text of Chinese Judgment in Annex A will serve as the basis for the following analysis.

2. Facts in a Chinese Judgment

In a Chinese Judgment, facts are not consolidated and presented as a coherent narrative. Rather, it is for the reader to put the pieces of jigsaw together. First, the reader must distinguish between *assertions of fact* and *legal facts*, because assertions of fact are recorded in the judgment,⁷¹ without the SPC ever confirming or rejecting them. Second, the reader must struggle through a panopoly of *determinative and coincidental facts*. Not knowing in advance which facts are relevant, the reader may be led astray by the coincidental facts so often registered in a Chinese Judgment.⁷² In addition, the reader must endure *repetitive statements of the same fact*, keeping the annoying question in mind: “or are they perhaps not

⁷¹ See, e.g., *infra* Annex A, ll. 235-40 (Wu’s assertion about the true ownership structure of the group).

⁷² See, e.g., *id.* sec. IV (ll. 45-49) (unnecessarily listing the names of the group’s member companies); *id.* sec. VI (ll. 81-84) (hopes of the shareholders). The whole statement by the third party is completely irrelevant to the appellate procedure. *Id.* sec. XII.

the same.”⁷³ One cannot help suspecting that the SPC is doing exactly what the Swiss TF wants to avoid - simply lumping together factual material and copy-pasting from the parties’ submissions and the challenged judgment.

If only the SPC did some minimal editing after copy-pasting, the comprehensibility of the judgment would be greatly improved. A lower court’s judgment, for example, is presented in *direct speech*, so that the reader may mistake it for the holding of the SPC’s mind. This mistake could be avoided if the holding of the lower instance is quoted in *indirect speech*. The same is true for the quotation of party submissions. Moreover, the confusion of the reader is perhaps even predestined because they are not informed at the outset of what the dispute is about. The request of the claimant before the lower instance appears as late as in SN XVI, and the appellate request, implicitly, some passages before it in SN X.

There are still other factors that contribute to the poor comprehensibility of the judgment text. The *inaccuracy* of description or word use, for example; a Chinese Judgment may state in one paragraph that the decedent’s shareholding in the Commercial Property is 96.62% (LN 52), whereas in the following paragraph the shareholding is indicated as 96% (LN 57). In LN 74, the notion “both parties” might be used; however, according to the previous sentence, there are three persons to two separate transactions. By adopting imprecise expression, the text which followed can be misunderstood as the description of a single instrument.

Another factor that makes the judgment text difficult to read is the inconsistency. the Chinese Judgment uses to denote the lower instance. The same judgment might be referred to as the “Liaoning High People’s Court (辽宁省高级人民法院)” (LN 124), the “Court of the original trial (原审法院)” (LN 43), the “civil judgment of the Liaoning High People’s Court” (辽宁省高级人民法院.....民事判决) (LN 36, 184), or the “first instance judgment (一审判决)” (LN 244). The inconsistency confuses the reader further due to the involvement of a third court, such as the Liaoning Province Shenyang Municipal Intermediate People’s Court (LN 111) and its civil judgment.

While some of the above deficiencies can be attributed to the general lack of writing proficiency, a topic which would go beyond the scope of this discussion,⁷⁴ others can be effectively corrected by

⁷³ Compare, e.g., *id.* secs. IV-VIII (findings of fact), with *id.* sec. IX (repetition).

⁷⁴ Nevertheless, it is notable that a Chinese native speaker must be trained to fulfill the requirements of legal writing even more rigorously than Western lawyers because *Chinese grammar compels less precise thinking* than does, for example, German, French, or English. Chinese lacks morphological changes; a Chinese noun has no plural form, nor gender or cases; a Chinese verb needs not be varied

a court's own narrative of facts if the Swiss model is followed.⁷⁵ The first beneficiary of such work would not be the reader but rather the court itself.

Narrative writing requires the drafter to think in a more disciplined fashion. The style of a Chinese Judgment not only confuses the reader, but also the drafter. The SPC states in SN XIV that the founding shareholders of the Group are its seven member companies, a finding that directly contradicts that of the first instance (in SN IV). According to court, Deceased Wu and Wu senior are the founding shareholders of the Group. The court finds that the Appellant WEI would have had no entitlement to the transferred shares at all, and the case would have been elegantly resolved. However, its considerations (in SN XVII-XVIII) are obviously based on the finding of the first instance. This mistake, perhaps the gravest mistake in question of fact (as opposed to mistake in question of law) in the Chinese Judgment exemplar, could have been avoided if the court had bothered to write a fact statement in its own words.

In short, because of the style and other weaknesses originating from the drafter's lack of professionalism, the Chinese Judgment is not fully comprehensible. Improvement can be made if the SPC takes the time to write a coherent fact statement of its own, presenting a standard narrative background with only a single account of events. Annex C contains a proposal of fact statement for the Chinese Judgment exemplar. As far as the ownership of the Group is concerned, it is based on the related finding of the lower instance.

3. Considerations in the Chinese Judgment

The statistics of Table 1 allows for the quick finding that the SPC, at great length relative to its own considerations (XVII – XVIII/40 lines), repeats the facts and decisions of the first trial (IV – IX/140 lines), which are very well known to the Parties. It remains to be seen whether the SPC relates its considerations to this lengthy repetition at all. Remarkable also is the contrast between the length of the SPC's own considerations (40 lines) and the requests and arguments of the Appellant Respondent (X – XII/173 lines), which suggests that the SPC probably has not taken a stance on all

based on tense, number, subject, or mood; pronouns do not have morphological changes when used in the nominative, generative, accusative or possessive cases. This is not to say that the Chinese language is inappropriate for legal writing, it is. The lack of variety on the morphological level can be compensated on the syntactic level, but for that, a heightened precision of thinking and expression is needed, which comes only through specialized training.

⁷⁵ See *supra* Part III.D.3.

arguments furthered by the Parties. The fact that there are only 40 lines of legal reasoning in the 355 line judgment is appallingly inadequate. It displays a complete lack of methodology, poor understanding of law, and illogical thinking.

The proper approach would have been: 1) identify the issue(s) in dispute; 2) identify the rules applicable to solve the issue(s) and decide the order of their application; 3) enlist each applicable rule's elements of the test; 4) establish the elements of the test (with legal facts in the fact statement); 5) draw conclusions of law with regard to each applicable rule; and 6) synthesize the conclusions of law into court's decision.

The SPC may have identified the issue in dispute, namely the validity of the STA, even though it failed to adequately demonstrate such. However, there is no reasoning as to why Article 12 should be applied (LN 296). In fact, for sale and purchase agreements, there is a more specific rule in the Contract Law of the People's Republic of China ("Contract Law"), namely Article 159, which must be applied first, and which leads to the application of Article 61 and 62(ii) of the Contract Law. In Part 2 of Annex D, which is a proposal of "Considerations" for the Chinese Judgment, I have shown how the proper reasoning for the choice of rule has to be.

If the SPC was right in choosing to apply Article 61 and 62(ii) of the Contract Law, their application is entirely erroneous. Both Article 61 and 62(ii) of the Contract Law speak of the price supplementation of a sale and purchase agreement *after it has taken effect*. This means 1) that an agreement failing price indication can not only legally exist but also take effect; and 2) it is for the parties or otherwise for the court to supplement the missing element in the agreement such as the price. SPC's conclusion is that "[s]ince no agreement has been reached as to the consideration, the STA cannot be performed, and because the agreement cannot be performed, it is inexistent ('无法履行而未成立')." Therefore, (LN 321-323) does not follow logically from Article 61 and 62(ii) of the Contract Law.⁷⁶

It is hard to understand how the SPC could possibly arrive at such a wrong conclusion in applying Article 61 and 62(ii) of the Contract Law. One possible explanation could be its reluctance to supplement the STA, because it does not know exactly how to do so. It is true the supplementation of contract requires the interpretation of the rule(s), the contract, the parties' conduct and all relevant surrounding circumstances as well as a great deal of reasoning on the part of the judge. Part 6 Annex D demonstrates how this may be done.

⁷⁶ For a better interpretation and application of the two articles, *see infra* Annex D (Part 2).

If the SPC recognized that the STA was existent and effective pursuant to Article 61 Contract Law, it would presumably examine whether the agreement were invalid due to other reasons alleged by the Appellant. Furthermore, if it considered the Appellant's entitlement to dispose of the shares, it might have recalled its finding in LN 265-268 - a serious mistake in question of fact can perhaps be avoided.⁷⁷

In several places of Part 6 Annex D, I have added "[Citation]." These are places where precedent or doctrine can usually be expected to exist, to which the court can adhere. They are also calls for transparency. It is public knowledge that the lower Chinese courts ask for the higher court's opinion regarding delicate questions of law in order to avoid making "mistakes,"⁷⁸ an established practice that undermines the meaning and purpose of the judicial review system. If this practice cannot be stopped within a short period of time (due to different reasons), it must be made transparent. The lower court should be able to and must *quote* the higher court (or an organ of it specialized in delivering legal opinions to lower courts), and in the appellant procedure, the persons at the higher court that have given their legal opinions should be disqualified from participating in the adjudication of the same case in the appellate procedure.

It is known to the author that the system of precedent has not yet been formally established in China,⁷⁹ nor is scholarly doctrine a source of law there. However, the Chinese Judgment is an example of how difficult or impossible adjudication can be without the existence of both. As evidence, consider that in the 40 lines of reasoning of the Chinese Judgment, steps 3), 4), 5) and 6) are completely missing.

According to the proposed approach, SPC would have had an obligation to further investigate the case in various aspects, which are *determinative* for the supplementation of STA. The determinative facts correspond to the test elements of an applicable rule. The court will only know which facts are determinative after determining which rule it shall apply, and only when it knows which

⁷⁷ My proposal of "considerations" in Annex D (Part 1) however, is based on the finding of the lower court (consistent with the proposed fact statement in Annex C), in order to show how the property right can be determined according to the so-called historical method (*Historische Methode*).

⁷⁸ See 赵蕾, 取消“案件请示”呼声再起, 南方周末, Zhao Lei, Qu xiao "an jian qing shi" hu sheng zai qi [Calls to Abolish "Case Consultation" Rise Again], S. WEEKEND (P.R.C.), May 21, 2009, available at <http://www.nanfangdaily.com.cn/nfzm/200905210120.asp>.

⁷⁹ See generally 章志远, 经由行政案例指导迈向行政判例法, 贵州警官职业学院学报, Zhang Zhiyuan, Jing you xing zheng an li zhi dao mai xian xing zheng pan li fa [From the Administrative Case Instruction to the Administrative Case Law], Guizhou jing guan zhi ye xue yuan xue bao [J. GUIZHOU POLICE OFFICER VOCATIONAL C. Issue 1, 2009, at 12 (examining the debate on whether China should establish a case law system)].

facts are determinative can it start to focus on collecting evidence. Not only reasoning is rule based, but fact finding as well.

Furthermore, the applicable rule cannot be identified intuitively. Instead, it is often necessary to search the statute(s) for the rule(s), to compare the rule(s) to the facts, to revisit the statute(s) in light of the facts, and to examine the facts again in light of the rules. That is what makes legal reasoning more complicated than many Chinese legal scholars believe it to be: simply the syllogism of major premise, minor premise and conclusion.⁸⁰

If law is the great game of competing interests, legal reasoning is the kung fu. A Chinese proverb states, “It is nothing in the end if you learn to box without training kung fu (‘练拳不练功, 到老一场空’).” Every Chinese knows that, without kung fu, one can only fight erratically. The application of law in China today is more or less in this embarrassing state.

VI. CONCLUSION AND RECOMMENDATIONS

The comparison of the Swiss Judgment and the Chinese Judgment shows that, despite the “genetic” resemblance between the Swiss and Chinese legal systems, there are considerable disparities in legal reasoning.

Legal reasoning is regulated at the constitutional level as a civil right in Switzerland while the topic has only recently come to the attention of SPC in China. Accordingly, there are sophisticated legal remedies for violations of such civil right in Switzerland, whereas in China legal reasoning has only recently become a general internal precept and still lacks clear standards and consequences.

The duty to provide sound legal reasoning is not only enforceable by law in Switzerland, but it is also monitored by the public opinion. This is made possible by the combination of transparency of judicial decision-making procedure, professional court journalism, active engagement of legal academia, and public discourse. The lack of legal reasoning in China, however, deprives the public surveillance from any effectual ground; instead, the floodgates are opened wide to arbitrariness and corruption.

If certain general presumptions of professionalism among judges exist, poorly reasoned judgments bring authors directly under

⁸⁰ See, e.g., 王洪, 司法判决与法律推理 11 (2002), WANG HONG, Si fa pan jue yu fa lu tui li [Judicial Decision and Legal Reasoning] 11 (2002). It would go beyond the scope of this essay to explain the proper method of rule identification in civil law system here in detail. See generally *id.* at 42-171 (introducing the *Anspruchsmethode* (“cause-of-action” or “claims” method)).

suspicion for irregularities. In Switzerland, universities supply knowledge and human resources to courts and the TF takes into account the need of legal research and education, allowing the judiciary and legal studies to interact in a virtuous circle. Comparatively, the Chinese legal academia and jurisdiction are largely segregated, the law schools do not have exemplary judgments to use as learning material for the acquisition of reasoning skills, and the courts do not have the necessary knowledge or theoretical basis to make reasoned judgments.

There are several steps China may take to remedy this situation. First, it is for the legislator to establish at a minimum a statutory right to reasoned judgment. Only through this can the court be required to include reason in its judgments and the law schools be motivated to take up legal reasoning as compulsory curriculum. As a stopgap solution, the Standing Committee of National People's Congress or the SPC can give the term "application of law" in the three procedure codes an official and authoritative interpretation as to encompass the way how rules are applied, i.e., demand that the courts employ legal reasoning.

Another important legislative agenda should be to establish a formal case law system and recognize precedent (judgments of SPC with fundamental prominence) as a source of law.⁸¹ The correct operation of this system would help to eliminate the exercise of "opinion seeking with the higher instance," and instead substantially facilitate legal reasoning, both by administering justice and by providing legal education with learning material.

However, precedent is not precedent without the component of legal reasoning. Therefore, the SPC has to set up minimal requirements of legal reasoning for its lower instances and a standard of legal reasoning for its own judgments. The *Third Five-Year Agenda for the Reform of People's Courts*⁸² (the "Agenda") released in March 2009 demonstrates the determination of the SPC to "increase the standard of legal reasoning" (§25 Agenda). The exact definition of the standard is crucial for this agenda item not to become idle talk. Moreover, legal reasoning must be trained as a basic skill, and respective training programs must be introduced as to "improve the professional training system of judges" (§15 Agenda).

The SPC also envisages to establish an online judgment publication system to enhance transparency of the judiciary (§25

⁸¹ The ranking of precedent relative to other authorities would then become an important question.

⁸² 人民法院第三个五年改革纲要 (2009-2013), (最高人民法院, 法发14号 (2009)), Renmin fa yuan di san ge wu nian gai ge gang yao [Third Five-Year Agenda for the Reform of People's Courts] (promulgated by the Sup. People's Ct., No. 14 (2009), 2009 SUP. PEOPLE'S CT. GAZ. 16, available at http://news.xinhuanet.com/legal/2009-03/26/content_11074127.htm.

Agenda), and to serve as a means to improve communication with the public. It also has the effect of guaranteeing the exercise of people's rights to information, participation, expression and supervision (§27 Agenda). While the people's democratic rights are certainly the ultimate concern, the SPC should in designing and constructing this system be aware of the function of its judgments in the legal education and research. In this way, the SPC may lay a good foundation for the positive interaction between judiciary and legal science, which is an important benchmark for the development of China's legal system. For that purpose, the technicalities of the Swiss case law publication system introduced in Part III of this essay may serve as references in various aspects.

The comparative analysis of the Swiss and Chinese appellate judgments provides not only the legislator and judiciary with valuable advice, but also the legal education policy maker. The education of jurists must move away memorization of case law to embrace the teaching and training of legal reasoning, a basic skill of both legal practice and research. Legal reasoning should become a compulsory curriculum of every law school. Research and discussion should be initiated as to how to model respective courses.

Legal scholars not only have the duty to teach the skill of legal reasoning, they must also take over the responsibility of monitoring the judicature. The legal science should deal with the judgments of the court, especially that of the SPC, in the form of case review (case evaluation and commentary). Specialized academic journals and websites should be created as platforms for such scholarly and social activity.⁸³ To root itself in the problems of the actual time and space is after all the only way for the Chinese jurisprudence to become modern and distinct.

Finally, it is worth mentioning that the discussions of judicial independence or rule of law in China have so far been concentrated on their external or political conditions. It is often neglected that the judiciary has a claim on independence *only when it confesses exclusively to law and reason*, because the law is democratically made and is applied according to reason. As long as the People's Court is incapable of legal reasoning or refuses to make its reasoning transparent, it is highly questionable whether the court is entitled to independence. And as long as the law cannot be applied according to reason, it is doubtful if it should rule at all. The importance of

⁸³ Cf. 季卫东, 以个案评价机制防止司法腐败, 财经, Ji Weidong, Yi ge an ping jia ji zhi fang zhi shi fa fu bai [Using the Mechanism of Case Review to Stop Corruption], Cai jing [FINANCE (P.R.C.)], Dec. 22, 2008, at 148, available at <http://www.gongfa.org/html/gongfapinglun/20081222/178.html>.

training and practice of legal reasoning, therefore, must be reassessed in this regard.

VII. ANNEX A

I	Appeal regarding the lawsuit of WEI Fengjiao vs. WU Xiaoyue et al about share transfer	1
	Publication (2003) No. 13.	5
	The Supreme Court of the People's Republic of China	
	Civil Law Judgment	
	(2002) Civil II Final No. 2	10
II	Appellant (Defendant at first instance) – WEI Fengjiao [hereinafter referred to as “WEI”], female, Han ethnicity, born 7 November 1957. Residing in [translation omitted].	15
	Represented by: WANG Enqun, Attorney at Law of Dalian Hengxin Law Firm.	
	Respondent (Claimant at first instance) – WU Xiaoyue [hereinafter referred to as “WU”], male, Han ethnicity, born 14 July 1963, sole trader. Residing in [translation omitted] .	20
	Represented by: LI Zhanguo, Attorney at Law of Shewai Law Firm of Liaoning Province.	
	Defendant at first instance – WU Jiyuan [hereinafter referred to as “WU senior”], [translation of particularities omitted].	25
	Third party at first instance – Shenyang Jiahao Commercial Property Co Ltd. [hereinafter referred to as “Commercial Property Co”], residing in [translation omitted].	30

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CHINESE AND SWISS APPELLATE JUDGMENTS

53

The Legal Representative: WEI, Chairman of the Board of the company.

Represented by: ZHANG Ting, Attorney at Law of Dalian Hengxin Law Firm.

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III This is an appeal against the judgment of the Liaoning High People's Court (Civil Law First Instance Judgment No. 3 of 2001) by the Appellant WEI regarding her dispute with the Respondent WU, the Defendant at first instance WU senior, and the Third Party at first instance Commercial Property Co. This Court is legally constituted by Judge ZHOU Fan with Assistant Judges GIA Wei and SHA Ling. The Court Reporter is YIN Jing. The case is closed.

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IV The Court of original trial finds: The Jiahao Group [hereinafter referred to as "the Group"] is formed on 12 April 1996. According to the records of incorporation, the Group has seven member companies, including Shenyang Jiahao Property Development Co Ltd, Shenyang Jiahao Decorative and Construction Co Ltd, Shenyang Jiahao Economic and Development Co Ltd, Shenyang Jiahao Souvenir Co Ltd, Jiahao Hawaiian Night Palace (Shenyang) Co Ltd, Commercial Property Co, and Shenyang Jiahao Hawaiian Entertainment City Co Ltd. The registered capital of the Group was RMB 413,980,000.00. The shareholders as at incorporation are WU Xiaonan [hereinafter referred to as "Deceased WU"] and his father WU senior, whose respective shareholdings are 96.62% and 3.38%.

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V Deceased WU deceased on 8 April 1999. On 25 April 1999, WU senior, WANG Yawen (mother of Deceased WU) [hereinafter referred to as "WANG"], WEI (wife of Deceased WU) signed a *Contract of Inheritance*, confirming thereby that the 96% shareholding of Deceased WU was his sole legacy, and pursuant to the *Inheritance Law of the People Republic of China*, it shall be distributed to the first class successors WU senior, WANG, WEI, WU Boxun (Deceased WU's son, born on 12 October 1983, going to school in the United States, [hereinafter referred to as "WU1"]), WU Bobing (Deceased WU's daughter, born on 28

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July 1990, going to school in the United States, [hereinafter referred to as “WU2”]): Half of Deceased WU’s 96% shares in the Group, that is, 48% shall belong to WEI and the remaining 48% shall be distributed to the first class successors named above. The successors and the legal administrators agreed to leave 18% to the management of WU senior, the remaining 30% shall be equally distributed to the first class successors so that each of them obtains 6%. All successors and legal administrators undertook to accord with and abide by the agreement after the execution and enter into force of the agreement, and refrain from any actions regarding the succession and distribution. The Contract of Inheritance shall take effect after notarization. It has, however, not been notarized subsequently.

- VI On the same day, WEI and WU senior each signed a separate “Share Transfer Agreement” [hereinafter referred to as “STA”] with WU. Both parties agreed that the shareholders of the Group WEI and WU senior transfer part of their respective shares, WEI 27.62% (from her 54.62%) and WU senior 0.38% (from his 9.38%), to WU on free will. On the same day, WEI, WU senior, WANG and WU held a shareholders’ meeting, confirming that the new shareholding as follows: WU senior 9%, WEI 27%, WANG 6%, WU 28%, WU1 6%, WU2 6%, and another 18% under the management of WU senior. It was unanimously agreed that shareholder WU should continue to be the Chairman of the Group. The shareholders hoped and requested Chairman WU to enhance and glorify the Jiahao spirit, united the Group from top to bottom and expand the Group in even more powerful and stable paces. WEI, WU senior, WANG and WU signed the resolution of that shareholders’ meeting. On 11 May of the same year, the Commercial Property Co’s Legal Representative was changed from Deceased WU to WU, who took on the responsibilities of launching and operating the commercial property. No change was made to the chairmanship of the Group. On 10 July 1999, the Vice Chairman of the Commercial Property Co MENG Qinglian, Director XU Xincheng, Director YONG Hongsang, and Director YANG Hongxing held a board meeting, agreeing to include WEI as Director

of the board and electing her Chairman of Commercial Property Co, while removing WU from the board as well as chairmanship. WU claims that he did not attend this meeting. On 2 August of the same year, Shenyang Municipal Foreign Economic and Trade Commission approved the change of [Commercial Property Co's] Legal Representative from WU to WEI. 95 On the 10th day of the same month, the [Shenyang Municipal] Administration for Industry and Commerce changed the registration of Legal Representative of Commercial Property Co from WU to WEI.

VII The STA between WU and WEI respectively WU 100 senior is silent on whether the share transfer is for a consideration or not. WU and WU senior allege that there is a consideration for such transfer, the condition is for WU to act as Chairman of Commercial Property Co, and to invest in that company in order to launch and operate the commercial property--WU has already invested RMB 4,881,093.92. WEI however, alleges 105 that the transfer should be against payment of RMB 20 Million.

VIII WU senior, WANG, and three extramarital sons of Deceased WU (being WU Boyu, WU Boyang, and WU Bozhi, [hereinafter referred to as "WU3, WU4, WU5"]) disputed over the inheritance before the Liaoning Province Shenyang Municipal Intermediate People's Court, which decided on 21 August 2000 that: 110 1) WEI inherited 54.62% of the shares in the Group from Deceased WU; 2) WU senior, WANG, WU3, WU4, WU5, WU1 and WU2 each inherited 6% of shares in the Group from Deceased WU. That judgment has since come into effect. During the course 115 of the current hearing, the Shenyang Municipal Intermediate People's Court issued Order No. 285 (dated 1 August 2001), admitting the revision of the above case concerning WU senior, WANG, WU3, WU4, WU5 vs WEI, WU1 and WU2. Pending revision, the enforcement of the challenged judgment shall be suspended. Since some of the key issues before this court (such as whether Commercial Property Co is a subsidiary of the Group) can be 120 directly affected by the outcome of the revision, WEI requests that this trial be stayed.

- IX The Liaoning Provincial High People's Court held: According to Article 35 of *Company Code of the People's Republic of China*, shareholders may transfer shares among themselves in whole or in part. When it comes to transferring shares from an shareholder to an outsider, the transaction must be approved by more than half of the shareholders. Those shareholders who do not agree to the transfer should purchase the shares on sale - if not, they are deemed to have agreed to the transfer. In this case, the Group is incorporated by obtaining an approval from the relevant authority in accordance with the *Company Code of the People's Republic of China*. Deceased WU and WU senior are shareholders of the company. The initial capital invested by Deceased WU is RMB 400 Million (making 96.62% of the shares in the Group), the initial capital invested by WU senior is \$13,980,000 (making 3.38% of the shares in the Group). Upon Deceased WU's death, his shares are to be treated as his legacy and distributed among his legal successors WEI, WU senior, WANG, WU1, WU2, WU3, WU4, and WU5. On 25 April 1999 WEI, WU senior and WANG signed a Contract of Inheritance; WEI, WU senior and WU signed a STA; WEI, WU senior, and WANG held a shareholders' meeting. Thereafter, a judgment of Shenyang Municipal Intermediate People's Court ruled over the distributive share of the successors. WEI is the Legal Representative and guardian for WU1 and WU2. The three extramarital sons of Deceased WU, WU3, WU4, and WU5 did not object to the share transfer. Therefore, the STA between WU and WEI respectively WU senior is based on free will of the parties and in accordance with the *Company Code of the People's Republic of China*, it is manifestation of their true intentions and therefore legal and effective. Upon Deceased WU's death, the process of succession starts. Even if the Contract of Inheritance is deemed null and void, prior to distribution, the shares would be in joint ownership [“共同共有”] of WEI, WU senior, WANG and the five children. In fact, according to the Shenyang Municipal Intermediate People's Court's decision regarding distribution, the amount of shares which was transferred by WEI and WU senior did not exceed what they are legally entitled to, and the other
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successors did not object. Hence, WEI is entitled to transfer those shares vested in her. WEI 's objection that at the time she signed the STA she has not legally obtained title to the shares and hence she did not have the legal right to dispose of the shares in the Group cannot be established. Another contention by WEI is that the STA was signed under duress. Since she is not able to provide sufficient evidence in support of this contention, it must also be rejected. It is agreed that the transfer is subject to a consideration, however, the parties dispute over the content of such consideration. According to WU, the terms of the consideration is for him to act as the Chairman of Commercial Property Co and Jiahao Hawaiian Palace (Shenyang) Co Ltd and that he is obliged to invest in Commercial Property Co in order to launch and set the commercial property into operation. In fact, after signing the STA, WU immediately took up the position as the Chairman of Commercial Property Co and invested a certain amount of funds in the company. From this we can conclude that the assertion of WU can be proved. Missing evidence, WEI 's claim that WU should pay her RMB 20 Million as remuneration for the share transfer cannot be supported. The fact that WU did not consistently participate in the operation of the Commercial Property Co, and that he has only injected part of [promised.] funds into the company, does not affect the validity of the STA. As to the amount of shares WU deserves to obtain, this can be determined on account of the actual performance of the STA. With regard to WEI 's request for stay of the present procedure: According to the Economic and Trade Commission's records, Commercial Property Co is a member company of the Group. Whether Commercial Property Co is a subsidiary of the Group is a separate legal relationship and falls neither within the scope of WEI 's request for revision nor within the subject matter of the current trial. The revision of the inheritance case has no bearing on this trial. Hence, WEI 's request to suspend this trial cannot be supported. In conclusion, in accordance with Article 55 *General Principles of the Civil Law of the People's Republic of China* and Article 35 *Company Code of the People's Republic of China*, it is decided that the STA between WU and WEI is valid. Legal costs in the

amount of RMB 260,015 shall be borne by WEI.

- X Dissatisfied by the civil judgment of Liaoning High People's Court, WEI appealed to this court. She contends that a STA has never been established. One of the prerequisites for the establishment of a contract is that expressions of minds of the contracting parties must meet, and the parties' consent must cover the essentialities of the contract. Since the share transfer is for a consideration, the remuneration is one of the essentialities. The STA, in this case, provides for the transfer of shares in the Group, while remaining silent on the issue of the share price. Clearly, the parties have not reached an agreement on this issue. WU's acting as Chairman of Commercial Property Co and his investment in that company cannot itself be a consideration for the transfer. This is a completely different legal relationship. Therefore, the decision of the Court of First Instance holding the transfer legally valid is erroneous both in fact and at law. Even if the STA can be confirmed and established, it cannot be effective because it infringes the law. When the Appellant signed the STA, the process of obtaining the status of a shareholder had not been completed, she was not yet entitled to dispose of the shares in the Group. Furthermore, the transfer violates the voting rights of shareholders in the Group, because pursuant to the related rules in the *Company Code*, the transfer of shares to outsiders must be expressly approved by the shareholders through a resolution of shareholders' meeting. Even if the agreement stands and is effective, it can still be cancelled or annulled. Firstly, the content of the agreement does not reflect what WEI truly meant. She was forced by WU senior to sign on the agreement, which had been readily prepared by WU. Secondly, no agreement has been reached as to how much money should be paid under the STA, which is extremely unfair to the Appellant. The agreement concerned the shares in the Group and not in Commercial Property Co. WU's acting as Chairman of Commercial Property Co and his investment in that company cannot be regarded as performing the STA. In summary, the Court of First Instance's decision that the agreement was legal and effective is wrong and should be repealed.
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- XI WU in answer said that the transfer is legal. Upon Deceased WU's death, universal succession takes place. The Appellant, at that point in time, owns the shares in the Group. The Contract of Inheritance is a further evidence for the entitlement of the Appellant to transfer her quota of the inheritance to others. The Appellant was by no means under duress when she signed the STA – no effective evidence was presented to prove her plea of coercion at the first and second trial. The content of the transfer is clear. In time of crisis, the company was in need of the respondent to inject RMB 5 Million as start capital and to personally manage the company. This as an equivalent to the share price is the expression of the true intention of Appellant as well as Respondent. The share transfer was a common understanding of all shareholders (including the legal representative of the three extramarital children). It is true that the process of inheritance has not been completed, but the question of succession falls outside of the scope of current dispute. The quota of distribution and its effectiveness does not affect the share transfer. As long as the amount of shares (that is, 27.62%) WEI transferred to the Respondent did not exceed her entitlement, the transfer should be deemed valid. Secondly, the transfer had been performed. For purpose of performing this agreement, the Group held a shareholders' meeting on the same day, with all shareholders agreeing to the transfer. At the same time, Commercial Property Co's board of directors added WU as a Director and appointed him the Chairman, who has been subsequently registered as Legal Representative of that company. He has since invested RMB 5 Million in the company, performed a large amount of work to launch and operate the commercial property. And thirdly, Commercial Property Co is a subsidiary of the Group. Commercial Property Co is, nominally, an independent Sino-Foreign joint venture company, because Deceased WU registered the company in the name of Jiahao (United States). In fact it does not have any international investment, but is established and registered by Deceased WU personally. Therefore, it is a subsidiary of the Group. Hence the first trial decision was correct and should be affirmed.

That is, the Appeal should be dismissed.

- XII Commercial Property Co states at the second trial: The first instance judgment concluded that Commercial Property Co is a member company of the Group, ruling that a few natural persons should divide the shares in Commercial Property Co, thereby seriously undermining and infringing the rights of Commercial Property Co and its shareholders. Commercial Property Co contends that it is not a member company of the Group. According to the records of the Industries and Commerce Administration Commission Private Companies Division [hereinafter referred to as “the Division”], Commercial Property Co has only one investor from China - Changchun Dadi Properties Limited [hereinafter referred to as “Dadi”], and one foreign investor - Jiahao (United States). Since this dispute involves shares in the Group, to which Commercial Property Co has no legal relationship at all, and since Commercial Property Co neither seeks legal remedies nor has standing in this matter, it was an error on the part of the Court of First Instance to have included Commercial Property Co as a third party. 245 250 255
- XIII This Court finds at the second trial that: on 25 April 1999, the STA signed by WEI and WU entails the following: “The shareholder of the Group WEI is willing to transfer 27.62% of her (in total 54.62%) shares to natural person Mr WU. As soon as this agreement takes effect, WEI ‘s shares in the company will be 27%. This agreement shall enter into force upon execution.” 260
- XIV According to the “Application for Incorporation” by the Group, kept in the archive of Shenyang Municipal Administration for Industry and Commerce, all seven companies, among which Commercial Property Co, were the founding investors of the Group. A memorandum of the Division dated 8 June 2001 states, [at the time of application.], Commercial Property Co (as well as two other founding investors) was a Sino-Foreign joint venture company. The member companies of the Group were not parent-affiliates among each other, each company was an independent legal entity. The Chinese investor of Commercial 265 270

Property Co was Shenyang Guangfu Shares Limited Company [hereinafter referred to as “Guangfu”], the foreign investor was Jiaohao (United States).

- XV On 18 March 1996, Guangfu signed a joint venture contract with Jiahao (United States). It was agreed that Guangfu invested USD 2.8 Million, making 10% of the total investment, and Jiahao (United States) invested USD 25.20 Million, making 90% of the total investment. The Articles of Association was signed on the same day. On 17 August 2000, Guangfu, Jiahao (United States) and Dadi agreed to transfer 10% of Guangfu’s shares in the joint venture to Dadi against the payment of USD 2.8 Million, Jiahao (United States) approved the deal and waived thereby his preemptive right. On 19 August 2000, the State Administration for Industry and Commerce issued Commercial Property Co a business license with WEI as Chairman of the board. On 28 August of the same year, Shenyang Municipal Foreign Economic and Trade Commission issued Commercial Property Co a certification attesting it as a foreign invested company, on which Dadi is indicated as the Chinese investor and Jiahao (United States) as the foreign investor. 275
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- XVI On 26 February 2001, WU sought the Liaoning Provincial High People’s Court to confirm the validity of the STA, whereby the Defendant was to pay the legal costs. 290
- XVII This court is of the view that: It is agreed by all parties that the STA in question is for a consideration, the subject of transfer was the shares in the Group. Both STAs were silent upon the price of shares (27.62% from WEI respectively 0.38% from WU senior). According to Article 12 *Contract Law of the People’s Republic of China*, a non-gratuitous contract shall stipulate the price or reward. Articles 61 and 62 provide that if the price is unclear or has not been agreed upon, it can be supplemented. If the price for consideration could not be supplemented bilaterally, it must be determined through interpretation of the contract or according to usage of trade. If the price cannot be so determined, the contract shall be performed at the market price at the place of 295
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performance to the time of execution of the contract. Therefore, the consideration is an essentiality of a contract for remuneration. Failing this content, the contract could not be performed.

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- XVIII Other than tangible properties, the value of shares of a company is determined by a combination of factors, such as its fixed assets and working capital, its intellectual property or proprietary technology, as well as its product profitability and personnel quality. Only through specialized assessment or valuation could the price of shares be so determined as to reflect the true value of the shares. And only the price so determined can reflect the true intention of the parties to the STA. We find that by acting as the Chairman of Commercial Property Co, WU rather gained management right, and investing in that company is a matter of capital injection, they cannot be regarded as a compensation for the share transfer to WEI. If the return service of WU has to be regarded as the consideration, then WEI must consent to it and a special agreement must be reached [thereupon], failing which WU's allegation cannot be established. In fact, the kind of consideration alleged is neither written in the STA, nor has it been agreed to by WEI. During the course of this second trial, the judges' panel tried to conciliate the parties and encourage them to reach a new agreement, but the efforts were frustrated by differences between them. Since no agreement has been reached as to the consideration, the STA cannot be performed, and because the agreement cannot be performed, it is inexistent ("无法履行而未成立"). For this non-existence both parties have to bear their respective responsibilities. This court supports WEI's allegation that since the STA does not cover an essentiality and therefore does not exist, the lower court's judgment must be revoked. The question whether a contract has entered into force or is effective can only be answered when the contract exists. Without an existing contract, [the contract] is not binding to the parties from the very beginning. We hereby find that the lower court judgment, recognising the return service of WU as a reward to WEI for the transfer of her shares in the Group, ruling both STAs valid, has erred both in fact and at law. Pursuant to

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2009

CHINESE AND SWISS APPELLATE JUDGMENTS

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Article 153 Para. 1(2) and 1(3) *Civil Procedural Law of the People's Republic of China*, therefore,

- XIX We order that: 335
 1. The judgment of Liaoning Provincial High People's Court (Civil Law First Instance Judgment No. 3 of 2001) is revoked.
 2. The STA between WEI and WU is annulled.
- XX Costs of the first trial is \$260,015, of which WU is to pay \$130,007.50 and WEI and WU senior each bears \$65003.75. Costs of the second trial is \$260,015, to be paid by WU. 340
- XXI This is judgment is final. 345
- XXII Judge: ZHOU Fan
 Assistant Judge: GIA Wei
 Assistant Judge: SHA Ling 350
 7 September 2002
 Court Reporter: YIN Jing

VIII. ANNEX B

Case head

98 II 96

13. Extract from the judgment of the First Civil Division, 24 May 1972, Böhli vs Bindschedler & Co.

Indexes

Purchase of shares, lack of will, approval, abuse of right. Article 31 OR. Approval of a purchase after it had been legally challenged. Question left open (par. 3). Art 2 ZGB. A shareholder, who has taken advantage of the dispute over the non-binding nature of share purchase to carry out the capital increase of the company with its minority votes does not act in good faith (par. 4).

Facts from page 96

A. - Bindschedler W. & Co., a limited partnership for grain and feeding stuff in Zurich, concluded on 15 May 1961 with the stock company Böhli, Mill Bürglen / Thurgau, represented by Hans Ulrich Böhli, an agreement to establish a stock company named "Futtermühle Buerglen AG" in Bürglen. The Company was established on 18 May 1961. The share capital was CHF 300'000.-, divided into 60 shares of CHF 5000.-. W. Bindschedler & Co. took over 40, Böhli 20 shares. On 6 April 1965, the Board of Directors of the Company, of which Böhli was the Chairman, ascertained a loss of CHF 53,000.- by the end of 1964. W. Bindschedler & Co. wanted to retreat from the business of the Company. It offered Böhli its 40 shares for sale, which the latter acquired based on an agreement on 15 September 1965,

BGE 98 II 96 p. 97

against a payment of CHF 200'000.-. The parties agreed further that the loan extended to Böhli with the loan agreement of 18 March 1963 may be terminated, that is, repayment is due on 30 September 1966 at the earliest, with a three-months notice period.

By a letter dated 25 March 1966, Böhli requested W. Bindschedler & Co. to alter the agreement of 15 September 1965, and reserved meanwhile his right to contest the share purchase. On 6 April 1966, W. Bindschedler & Co. rejected Böhli's proposition, who, with a letter dated 25 May 1966, then contested the share purchase due to error and refused further payments.

On 13 June 1966, W. Bindschedler & Co. gave notice to recall the loan by 30 September 1966. Böhli refused to refund the loan and to pay further interest rates, because the loan was allegedly granted to finance Futtermühle Bürglen AG. On 9 August 1966, he demanded from W. Bindschedler & Co. the refund of the prepayment for the shares in the amount of CHF 40'000.-, made on 17. September 1965 in accordance with the share purchase agreement.

B.- On 9 December 1966 W. Bindschedler & Co. claimed against Böhli for payment of CHF 100,000.- plus an interest of 4.75% since 18 December 1965 based on the loan agreement, and CHF 160'000.- plus an interest of 5% since 1 October 1965 based on the share purchase agreement (residual claim).

The defendant demanded by means of counter-claim the refund of deposit in the amount of CHF 40'000.-, plus an interest at the rate of 5% since 17 September 1965.

The District Court of Zurich approved the claim and dismissed the counter-claim. It rejected the assertion of Defendant that the loan was actually granted to finance Futtermühle Bürglen AG based on the findings of trial procedure, and denied with respect to the purchase of shares a fundamental mistake.

The High Court of Canton Zurich confirmed on 23 September 1971 the judgment of the first instance.

C. - The Defendant sought the repeal of the judgment of the High Court of Canton Zurich, and send the matter concerning fundamental mistake for retrial back to the lower instance.

The Claimant requested dismissal of the appeal.

BGE 98 II 96 p. 98

Extract from the considerations:

The TF takes into consideration:

1. / 2. - .

3. The TF has left the question open whether the Defendant justifiably relied on the one-sided nonbinding nature of the share purchase. It is of the view that he had, on 28 by March 1969, decided the capital increase of Futtermühle B ürglen AG from CHF 300'000.- to CHF 600'000.- through the issuance of 60 fully paid-in bearer shares of CHF 5000.-, and thereby changed the legal nature and economic substance of the 40 shares (which before the capital increase had represented 2/3 majority) significantly, and by doing so, approved the purchase, while making his eventually justified contestation invalid.

The Defendant denies that it has approved the share purchase. The one who signed a contract under the influence of a substantial error or intentional deception is not bound by it (Article 23, 28 para 1 CO). He can however, approve it expressly or impliedly. In BGE 72 II 403 the TF, citing its earlier jurisprudence and doctrine, stated that the declaration of contestation needs to be received, but not accepted, so that the contract is made void for good with the arrival of the declaration at the contracting party. It is irrevocable and precludes, as far as the requirements of defect will have been satisfied, a subsequent approval of the contract. Should the parties decide to uphold the agreement afterwards, that is to be treated as the conclusion of a new contract with the same content (regarding the irrevocability of declaration, see GUHL/MERZ/KUMMER, *Das Schweizerische Obligationenrecht*, p. 139; Von B üren, OR p. 224/225). In BGE 88 II 412, it is stated that the approval is even possible after the contestation has taken place, however with the consent of the counterparty. In the present case, however, it can be left open, under which conditions the contract may resume effect after it has been contested, because the Claimant disputes the ground of contestation.

4. It is to test whether the reliance on the alleged error is against good faith.

BGE 98 II 96 p. 99

a) Pursuant to Article 703 CO, the General Assembly makes its resolutions principally with an absolute majority of votes represented at the meeting. According to public deed dated 28 March 1969, to which the High Court refers, the decision on the capital increase of Futtermühle B ürglen AG was made with only 20 votes held by the Defendant. The defendant claimed that this decision should be attributed to the company, not him personally. It is undisputed that after the contested purchase of shares, he

was the sole shareholder of Futtermühle Bürglen AG and controlled the company economically. A one-man limited company has basically its own legal personality. Due to the economic identity between the company and the sole shareholder, however, the formal legal independence of the company should not be observed when in relation to third parties – should good faith so require. (BGE 81 II 459 and decisions cited therein).

b) The consequence of the capital increase of the company was that the legal and economic power of each share was half reduced, so that the controversial 40 shares no longer accounts for $\frac{2}{3}$, but only $\frac{1}{3}$ of the total capitalization. Admittedly, this change was based on a resolution, which came into being without the purchased shares. This is however not significant. Critical is: The dispute over the validity of the share purchase has paralyzed the 40 shares and thereby put the Defendant in a position to push through the capital increase. It is as if the Defendant had voted *with* the purchased shares. This situation cannot be changed by the fact that the Defendant has invited the Claimant to attend the General Assembly and offered him the pre-emptive right. The Claimant sent the invitation and subscription form back to the Defendant with the comment that she was not a shareholder anymore. By doing so the Claimant declined the contestation of the Defendant, which was consistent from her point of view. Because, by attending the General Assembly and subscribing to new shares, she would have eventually exposed herself to Defendant's objection that she has recognized, through implied conduct, the alleged fundamental mistake and thereby the nonbinding nature of the share purchase. By increasing the capital in spite of Claimant's statement

BGE 98 II 96 p. 100 and taking advantage of the dispute over the share purchase, the Defendant has acted against good faith.

c) The Defendant claimed that he has not forfeited his right of rescission, just because through the capital increase, the value of the shares has been changed. He invoked BGE 97 II 48, in which decision the TF held that the pleading of substantial error does not require that the value of performance, which has been received by the erring party, is, by the time of restitution, at least the same as it was by the time of receipt. This comparison does not sustain, because in that case, it was about the restitution of the entire share package, and the seller, as the sole shareholder, therefore, kept the possibility of claiming damage from the buyer who pleaded error, should it have disposed of the assets of company. In this case, during mutual restitution of performances, the 40 shares that the Claimant received would only represent one third of the total share package, whereas the Defendant would be able to keep two thirds of it.

Admittedly, the shareholder has no vested right that the relative size of its participation does not decrease (JAEGGI, *Zum Verfahren bei der Erhöhung des Aktienkapitals*, in *Festschrift B ürgi*, p. 198). However, this principle does not apply here, because the Claimant would have

contradicted her own point of view if she were to participate in the General Assembly.

According to the findings of the District Court, to which the High Court refers, W. Bindschedler must have declared, at the conclusion of share purchase agreement, that the Claimant did not want to inject any more money into the company; she would rather liquidize it or sell the shares to the Defendant. From that we conclude that the Defendant wanted to prompt the Claimant to impliedly recognize the contestation of share purchase and provide the financially weakened company with new resources. That was abuse of right. The further assertion by the defendant that it was not supportable for him to postpone the capital increase for years because of a dispute relevant only to himself personally, cannot change our conclusion. It is indeed true that the Defendant, as the Chairman of the Board of the company, was obliged under Article 725 para 3 CO to summon a General Assembly

BGE 98 II 96 p. 101 and to inform it about the situation, when, according to the latest annual balance sheet, the half of the total share capital is no longer covered. The capital increase was however not the only way to prevent the Company from bankruptcy. If the Defendant were capable of increasing the share capital by CHF 300,000.-, then he could as well have donated this amount to Futtermühle Bürglen AG, paid back or taken over its debts. Such restructuring measures would have increase the intrinsic value of the shares (the own and purchased) without changing the voting ratio. The Claimant would have to offset the increased value of the shares according to the principles governing unjust enrichment in case the share purchase agreement were to be annulled (BGE 97 II 48).

d) Finally, the Defendant argued that the result would have been the same for the Claimant if she had sold the shares to a third person, who, in turn, increased the capital. That is correct in itself. However, under the given circumstances the Defendant is not allowed to plead such assumptions. For he has neither claimed nor offered evidence therefor that at the time the contract was concluded, there was indeed a third party who was prepared to take over the shares and would subsequently have effected the capital increase as well. If the objection of the Defendant must be understood in the sense that he could have used a front man to implement the capital increase, then he must be deemed to have abused his right by so doing.

If the Defendant forfeited his right of rescission, then the lower court was right in leaving the question open whether he had been under the influence of a fundamental mistake.

Decision:

Therefore, the TF recognizes:

The appeal is dismissed and the ruling of the High Court (First Civil Chamber) of Canton Zurich on 23 September 1971 is confirmed.

IX. ANNEX C

STATEMENT OF AFFAIRS

The entrepreneur WU Xiaonan (hereinafter referred to as “Deceased WU”) deceased on 8 April 1999 without a will, leaving behind him as first class legal successors his wife WEI Fengjiao [hereinafter referred to as “WEI”], two underage children out of their marriage, his parents WU Jiuyan [hereinafter referred to as “WU senior”] and WANG Yawen [hereinafter referred to as “WANG”], and three underage extramarital children.

On 25 April 1999, WU senior, WANG, and WEI signed a *Contract of Inheritance* [hereinafter referred to as “IC”], which defines the scale of Deceased WU’s legacy and provides for the distribution of it:

The parties decided that the legacy of Deceased WU consists of 96.62% shareholding of a limited company called Jiahao Group [hereinafter referred to as “the Group”], which the decedent founded on 12 April 1996, together with his father WU senior, who owns the rest of shareholding, i.e. 3.38%. To the time of incorporation, the registered capital of the Group was RMB 413,980,000.00.

The parties agreed further that the legacy shall be distributed as follows: 48.62% of the shares shall belong to WEI and the remaining 48% shall be distributed. It is agreed that 18% shall be left to the management of WU senior, the remaining 30% shall be equally distributed to WU senior, WANG, WEI and the two marital children, so that each of them obtains 6%. The IC shall take effect after notarization, which has however, never taken place.

On the same day, WEI and WU senior each signed a separate Share Transfer Agreement [hereinafter referred to as “STA”] with WU Xiaoyue [hereinafter referred to as “WU”]. The parties agreed that the shareholders of the Group WEI and WU senior transfer part of their respective shares, WEI 27.62% (from her 54.62%) and WU senior 0.38% (from his 9.38%), to WU. The STA between WEI and WU reads:

“The shareholder of the Group WEI is willing to transfer 27.62% of her (in total 54.62%) shares to natural person Mr WU. As soon as this agreement takes effect, WEI’s shares in the company will be 27%. This agreement shall enter into force upon execution.”

Again on the same day, WEI, WU senior, WANG and WU held a shareholders’ meeting, confirming that the new shareholding in the Group as follows: WU senior 9%, WEI 27%, WANG 6%, WU 28%, the two marital children each 6%, and another 18% under the management of WU senior. WU was unanimously elected Chairman of the Group. WEI, WU

senior, WANG and WU signed the resolution of that General Assembly accordingly.

The STA between WU and WEI is silent on whether the share transfer is for a consideration. According to WU and WU senior, the consideration for such transfer is for WU to act as Chairman of Shenyang Jiahao Commercial Property Co Ltd. [hereinafter referred to as "Commercial Property Co"], and to inject working capital in that company in order to launch and operate the commercial property. WEI however, maintains that the transfer should be against a payment of RMB 20 Million.

Commercial Property Co is a Sino-foreign joint venture company (10% held by Changchun Dadi Properties Limited and 90% by Jiahao United States). On 25 April 1999, the same day as of IC, STA and the Group's General Assembly, its board of directors held a meeting to add WU as a Director and appointed him the Chairman. On 11 May 1999, the Commercial Property Co's Legal Representative was changed from Deceased WU to WU, who took on the responsibilities of launching and operating the commercial property and injected RMB 4,881,093.92 in Commercial Property Co.

On 10 July 1999, the Vice Chairman of Commercial Property Co and the other directors held a board meeting, agreeing to include WEI as Director of the board and electing her Chairman of Commercial Property Co, while removing WU from the board as well as chairmanship. WU did not attend this meeting. The change of Legal Representative from WU to WEI was subsequently approved and registered by the competent authorities. The Legal Representative of the Group remained however unchanged.

On 26 February 2001, WU sought the Liaoning Provincial High People's Court to confirm the validity of the STA. In its Civil Law First Instance Judgment No. 3 of 2001, the Liaoning Provincial High People's Court held the STA valid and legally binding.

WEI appeals now to this Court and requests the STA be annulled.

X. ANNEX D

Considerations:⁸⁴

The issue of the present suit is whether the STA between the Parties is existent and valid, and if yes, what the consideration for the share transfer should be. With regard to the existence and validity of STA, the court considers in the order of the Appellant's right of disposal (par. 1), the validity of STA absent price agreement (par. 2), the necessity of consent by the other shareholders to the share transfer for the validity of STA (par. 3),

⁸⁴ The purpose of this proposal is to demonstrate legal reasoning and not to opine on what the right solution should be; that is why laws are applied as they were in force at the time of this essay.

the existence of duress at the conclusion of STA (par. 4), and unconscionability (par. 5).

WEI's right to dispose of the shares:

The principal argument furthered by Appellant is that on 25 April 1999, at the time of STA's conclusion, she has not yet acquired title to the shares, so that she could not have effectively disposed of the same. Her STA agreement with WU to transfer 27.62% shares in the Group was therefore invalid.

Article 51 Contract Law provides for the legal consequence of unauthorized disposal of property:

Where a person, without the right to do so, disposes of property of others [by way of contract], such contract is valid once the entitled person(s) has/have retroactively approved it, or once the contracting person has subsequently acquired the respective right.

The test of STA's validity could thus include twofold: a) Did WEI have the right to dispose of 27.62% shares in the Group by way of contract at the time of STA's conclusion. If yes, the STA is valid under the reserve of further tests in par. 2, 3, 4 and 5; If no, b) Has/have the entitled person(s) retroactively approved the STA. If yes, the STA is valid under the reserve of further tests in par. 2, 3, 4, and 5; If no, the STA is invalid.

a) Did WEI have the right to dispose of the 27.62% shares in the Group at the time of STA's conclusion.

Article 39 Property Law provides:

The owner shall have the right to possess, utilize, dispose of and profit from its immovable or movable property in accordance with law.

Whether WEI had the right to dispose of the 27.62% shares in the Group at the time of STA's conclusion depends on whether she was *owner* of these shares at that time. It is undisputed that the relevant shares has been owned by WEI's husband Deceased WU, hence, the question is, whether WEI has already acquired ownership of these shares (as a result of her husband's death) at the time of STA's conclusion.

Article 29 Property Law leads to the answer of this question:

The property rights obtained as a result of inheritance or acceptance of donation shall take effect upon the commencement of the inheritance or the donation.

And Article 2 Inheritance Law provides:

The inheritance commences at the time of decedent's death.

However, the application of Article 29 Property Law in connection with Article 2 Inheritance Law only leads us to the conclusion that the first class legal successors (Deceased WU left no will, the reason why legal succession took place, Article 27 Inheritance Law), altogether, acquired the property rights to Deceased WU's legacy on 8 April 1999.

What constitutes the legacy of a married person. Article 26(1) Inheritance Law provides:

Before distribution, the half of the assets jointly owned by the married couple must first be excreted and the property right thereof be transferred to the outliving spouse, the remaining half of the assets constitute the decedent's legacy, unless otherwise agreed.

Failing assertion of an aberrant agreement, it can be concluded that WEI has acquired half of the assets jointly owned by her and her late husband (hereinafter referred to as "marital assets") before any distribution of his legacy, of which she can dispose regardless whether the IC was valid or not.

It remains to be asked what constitute half of the marital assets of Deceased WU and Wei.

The legal arrangement of marital assets by Article 17 Marriage Law is that, unless otherwise agreed (Article 19(1) Marriage Law), and except for the items enumerated in Article 18 Marriage Law, all assets acquired during the course of marriage are deemed jointly owned by the married couple.

Failing assertions of Article 18 resp. Article 19 Marriage Law, it is to be assumed that all existing assets of Deceased WU and WEI are marital assets under the joint ownership of both.

The lower instance has not investigated all existing assets of Deceased WU and WEI. From the IC of 25 April 1999 we infer that the 96.62% shares in the Group form at least part of them. For this fact to be established, it is not required that the IC is valid or effective - we are using it only as a circumstantial evidence. The IC may be ineffective in default of agreed form (agreed form as suspensive condition, Article 62 Contract Law), but no involved party ever contended the fact that the 96.62% shares in the Group used to be assets of Deceased WU.

If it can be established that the 96.62% shares in the Group form *at least* part of all existing assets of Deceased WU and WEI, i.e. of their marital assets under joint ownership, then hence, pursuant to Article 26(1) Inheritance Law, WEI has the right to dispose of at least 48.31% shares in the Group as sole appropriator before the distribution of Deceased WU's legacy. In the STA she only promises to transfer 27.62%, which is within the range of her entitlement, question a) can therefore be answered positively – WEI had the right to make such disposition at the time of STA's conclusion under the Marriage Law, Inheritance Law and Property Law.

The right of WEI to disposed of the said shares must be further scrutinized under Company Law.

WEI was not a shareholder of the Group before succession. The transfer of shares in a limited company from a shareholder to an outsider is usually subject to approval by the other shareholders of the company (Article 72(2) Company Law). Does WEI needs such approval to acquire the status of shareholder of the Group. This question has a bearing on whether WEI, on her part, can effectively transfer the inherited shares to WU through STA

and make him a legitimate shareholder of the Group (no one can convey more right than he has).

The Company Law has a special provision (Article 76 Company Law) for this event:

After decease of a natural person, his legitimate successors may inherit his or her shareholder status, unless provided otherwise by the Articles of Association of the company.

WEI, never claimed any aberrant provision of the Articles of Association, therefore, does not need consent from the other shareholders of the Group to acquire her status as shareholder of the Group.

Hence, the Appellant was fully authorized to dispose of the 27.62% shares in the Group also in respect of Company Law.

Consequently, it is not necessary to look into question b) any further. The STA is, subject to tests in par. 2,3,4, and 5, valid and binding.

Existence of contract and impossibility of performance:

The second argument the Appellant forwards is that the STA between her and WU does not prescribe the price for the 27.62% shares in the Group, which is, however, one of the essentialities of such agreement, failing which it is null and void.

Where the STA does not indicate the price, there can be several possibilities: it could be a gift contract, a sale and purchase agreement without explicit definition of price, or under certain circumstances a quasi gift (a hybrid of donation and sale, giving something for a symbolic price, for instance, often occurring between friends or family members) without explicit definition of price.

A gift contract is a contract whereby the donor conveys his property to the donee without reward, and the donee manifests his acceptance of the gift (Article 185 Contract Law). In casu, the Parties acknowledge that the share transfer is for a consideration. There is neither intention to donate nor intention to accept the shares as a donation. Therefore, the STA could not have been meant as a gift contract or a hybrid of gift and sale. It can only be a sale and purchase agreement without price indication. The qualification of the contract is crucial for the determination of applicable rules in this section as well as for the analyse in Section 3.5 (Unconscionability).

Since the STA is a sale and purchase agreement, Chapter 9 (Special Provisions/Sales Contract) of Contract Law is applicable. Article 159 Contract Law provides for the procedure in case the price provision of a sales contract is absent:

The buyer shall pay the price in the prescribed amount. Where the price was not prescribed or clearly prescribed, the provisions of Article 61 and Article 62(ii) shall apply.

Article 61 Contract law provides:

Where a term concerning quality, price or remuneration, or place of performance etc. is not prescribed or clearly prescribed in the contract, the

parties may supplement it through mutual agreement after the contract has taken effect; Should the parties fail to reach a supplementary agreement, such term shall be determined in accordance with the relevant provisions of the contract or in accordance with the relevant usage of trade.

And Article 62(ii) Contract Law provides

Where a relevant term of the contract was not clearly prescribed, and cannot be determined in accordance with Article 61 hereof, one of the following provisions applies:

(ii) If the price or remuneration was not clearly prescribed, performance shall be in accordance with the prevailing market price at the place of performance at the time the contract was concluded, and if adoption of a price mandated by the government or based on government issued pricing guidelines is required by law, such requirement applies;

The pertinent rules of Chinese law do not support the Appellant's assertion that the price is an essentiality of sales contract, or a sales contract absent price indication is immediately null and void. Article 61 Contract Law speaks of the possibility of supplementation after the contract has taken effect. The law would be contradicting itself if it treated such contract null and void while acknowledging its legal effect.

The interpretation that a sales contract absent price indication is not necessarily null and void is also supported by Article 12 Contract Law, which provides:

The terms of the contract shall be agreed to by the contracting parties, normally, it entails the following provisions:

Names or company names and the domiciles of the parties

Object

Quantity

Quality

Price or remuneration

Term, place and mode of performance

Penalty

Method of dispute settlement

The word "normally" in Article 12 Contract Law clearly indicates that the elements listed thereof (including "price or remuneration") are elective, not compulsory; A contract does not need to have all these elements to be a valid contract.

The consequence the Chinese contract law allots to a sales contract devoid of price specification is not invalidity but the duty to fill the gap – first by supplementary agreement between the contracting parties themselves, and if such agreement cannot be reached, by the judge.

This Court has tried to conciliate the Parties and facilitate them to agree on the price, but the efforts were frustrated by differences between them. In this event, it is for this Court to determine the consideration. Such determination will be made in par. 6.

The Appellant also submits that the STA is null and void because of *impossibility of performance* absent price agreement.

The initial impossibility of performance is a concept of Roman Law, which, according to such law, leads to invalidity of a contract. However, the Chinese law, which this court is bound to apply, does not provide for an equivalent. Even according to Roman Law, however, a monetary obligation (such as the obligation of Defendant) can never become impossible. And the fact that the Appellant has already transferred her shares to WU is an evidence that her performance is perfectly possible. Therefore, this assertion of Appellant is unfounded and will not be supported by this court.

Consent of other shareholders to the share transfer

The third argument of Appellant is that her share transfer to WU was not approved by the majority of shareholders of the Group and is therefore invalid.

The transfer of WEI's shares to WU through STA is, unlike the share acquisition through succession discussed in Section 3.1, a case of Article 72(2) Company Law, which provides:

The transfer of shares from a shareholder to an outsider is subject to the consent of more than half of the fellow shareholders. The shareholder shall give its fellow shareholders a written notice about the intended transfer and request them for consent. If any of the fellow shareholders fails to reply within 30 days after receipt of the written notice, it shall be deemed to have consented to the transfer. If half or more than half of the fellow shareholders disagree to the transfer, the disagreeing shareholders shall purchase the relevant shares. If they do not purchase these shares, they are deemed to have consented to the transfer ...

The written notice has the purpose of informing other shareholders of the intended transfer, and giving them a fair chance to decide whether to consent to it or not. WU senior and WANG both approved the transfer at the General Assembly held on the same day as the conclusion of STA. The only other shareholders that could possibly object to the said transfer were the three extramarital children. The two marital children were represented by WEI, who could not voice against herself.

The three extramarital children have never objected to the transfer. It is not clear if they have been timely informed of the share transfer. However, this can be left open, because if they have been informed timely, they will have to be deemed consented to the transfer as of today - and if so, the transfer would have been consented to by all the other shareholders of the Group; If they have not been informed timely, it was a default of WEI, and the principle of good faith (Article 6 Company Law) would prevent WEI from profiting from her default - she has no objection of disapproval in this case.

In conclusion, the STA is also valid and effective under Company Law.

WEI's plea of coercion:

The fourth argument produced by the Appellant is that the STA was signed under duress, the reason why it should be annulled by this Court.

Article 54(2) Contract Law provides:

If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or nullification of the contract.

The Appellant's contention that WU and WU senior have forced her to sign on the STA is disputed by both accused persons. It is a matter of evidence whether at the time of concluding the STA, the Appellant was under duress or not.

Article 64 (1) Civil Procedure Law provides that a party shall have the responsibility to provide evidence in support of its own propositions. Article 5 Provisions of Supreme People's Court Concerning Evidence in the Civil Procedure states further that:

In litigations involving contracts, the party which advocate the existence and validity of the contract shall bear the burden of proof for its supporting facts; The party which advocates the alternation, cancellation, termination or nullification of the contract bears the burden of proof for the respective supporting facts.

It is hence for WEI to provide this Court with evidence in support of her request for nullification. However, WEI has failed to do so. For this event, Article 2(2) Provisions of Supreme People's Court Concerning Evidence in the Civil Procedure provides:

Should there be no evidence or no sufficient evidence to proof the facts, the party which bears the burden of proof shall accept the adverse impact.

The adverse impact for the Appellant is that her request for annulment on account of duress cannot be satisfied by this Court.

Unconscionability:

According to the Appellant, the price of 27.62% shares in the Group should be RMB 20 million, however, the Respondent contents that the consideration was for WU to act as Chairman of Commercial Property Co, and to invest around RMB 5 million in that company in order to launch and operate the commercial property. Since at the incorporation of the Group, three years before the conclusion of STA, the nominal value of such shares had been RMB 114,301.476.00 (RMB 413,980,000.00. * 27.62%), there could at least be a certain presumption of a blatant imbalance between the obligations. Pursuant to Article 54(1) Contract Law,

Either party may request the People's Court or an arbitration institution for amendment or nullification of a contract if:

(ii) the contract was grossly unconscionable at the time of its conclusion.

There is, however, a limitation to such action as provided for by Article 55 Contract Law:

A party's right to request for nullification expires in any of the following circumstances:

(i) Where it fails to exercise the right within one year, commencing on the date when the party knew or should have known the cause for the cancellation;

If the Appellant was forced to sign on the STA as she asserts, then she should have known about the unconscionability at the conclusion of STA, that is, on 24 April 1999. Even if this Court assumed that the Appellant did have a right of action according to Article 54(1) Contract Law, this right is expired on 23 April 2000. Instead of taking the law into her own hands (WEI, on 10 July 1999, staged a coup within Commercial Property Co and removed WU from the board as well as chairmanship), the Appellant should have timely requested the competent People's Court for justice. Now that the right is extinct, it is impossible for this Court to consider the annulment of STA on account of (a possible) unconscionability.

Supplementation of STA by Court:

Based on the above considerations, the STA has to be deemed concluded and there are no legal grounds to annul it. The law obliges the People's Court to supplement the STA, which the lower instance neglected to do by mistake. It is now for this Court to determine the consideration in the STA according to the method provided by Contract Law.

The first step is to test whether the consideration can be determined through interpretation of STA itself or through application of usage of trade (Article 61 Contract Law), if interpretation of STA leads to no solution or there is no relevant usage of trade, then to test if there is a prevailing market price for the object at the place of performance at the time the contract was concluded, or if there is a price or pricing guideline mandated by the government (Article 62(ii) Contract Law).

This procedure reflects the legislator's philosophy that, while supplementing a contract, the judge should respect the private autonomy (Article 4 Contract Law) by first trying to find out what the parties' true agreement was ("subjective interpretation") or could reasonably have been ("objective interpretation"), and if both are not possible, which price a reasonable third person would have paid (i.e. market price). The prescribed governmental price would be the last choice, since its departure from the "true private agreement" is, supposedly, the greatest [Citation].

The object of STA are shares in a non-listed limited company and no usage of trade can so far be ascertained by this Court for the transfer of shares in such companies, so that for purpose of contract supplementation in terms of Article 61 Contract Law, the Court is bound to interpret the STA.

The purpose of subjective interpretation is to ascertain the actual agreement of the parties on the consideration to the time of STA's conclusion. However, this purpose could not be effected through the trial. This Court now has to establish what such consideration *could reasonably have been* through objective interpretation.

The objective interpretation bases itself on what reasonable and decent contracting partners, through the wording of the contract and their other conducts in particular circumstances, could have expressed and wanted (i.e. the hypothetical will of the parties). The judge supplements the contract with such hypothetical will of the parties [Citation].

While the actual will of the parties is a natural consent, the hypothetical will of the parties is a normative one, based on the presumption that both parties were, at the time of concluding the contract, reasonable and decent, i.e. they were in good faith (Article 6 Contract Law) and wanted a just and fair deal (Article 5 Contract Law) [Citation]. In other words, the wording of contract and other related conducts of the parties are to be analyzed in light of good faith and fairness.

In this case, the wording of the STA does not allude to any implication of remuneration for the share transfer, so that this Court must study the surrounding circumstances of the STA and the Parties' conduct therein.

The circumstances and conducts this Court deems determinative are: the actual value of the share in question, the negotiation procedure of STA, the facts accompanying STA's conclusion, the correlation between the IC, STA and the resolution of General Assembly on 24 April 1999, the (veiled) ownership structure of the Group, the significance of Commercial Property Co in the Group, the underlying interests of the Parties, and last but not least, the purpose(s) of STA.

According to the existing evidences, WEI has already performed to the extent that the 27.62% shares in the Group were effectively transferred to WU, and WU has performed to the extent that he has already injected RMB 4,881,093.92 in Commercial Property Co. If acting as the Chairman of Commercial Property Co. were really a performance in place of payment, an obligation hence, then removing him from the chairmanship and board would be a release of debt. However, WU was the Claimant before the lower court, and the purpose of his litigation was obviously to regain chairmanship and board membership in the Commercial Property Co. In other words, to act as Chairman and member of the board is apparently a positive asset rather than a burden for him. His conduct thus contradicts his words, so that further investigation is especially needed in this respect.

Pursuant to Article 64 (2) Civil Procedure Law, the People's Court shall, *ex officio*, investigate and collect evidences that it considers necessary for the trial of the case, where the evidences supplied by the Parties are not sufficient. Since the lower court neglected its duty to supplement the STA, it accordingly failed to investigate and collect the corresponding evidences, which is now performed by this Court.

[description of facts/ fact inferences]

Based on the above analyses and taking into consideration of all determinative facts and surrounding circumstances, the consideration of STA would have been RMB [...] per share, assuming of course that the Parties to the STA were reasonable and decent. [Calculation based on the price per share... /final result]

Decision:

Therefore, we hold that, the judgment of Liaoning Provincial High People's Court (Civil Law First Instance Judgment No. 3 of 2001) is upheld.

The [Respondent] is to pay the [Appellant] RMB [...] *plus an interest of* [...] % p.a. since 24. April 1999.

Costs of the first trial is RMB [...], of which WU is to bear RMB [...] and WEI and WU senior each bears RMB [...]. Costs of this trial is RMB [...], to be borne equally by the Parties.