

Original Paper

Judicial Determination of Manifest Unfairness in a Contract—Taking Mr. Bao's Contract Dispute Protest Case As an Entry Point

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Abstract

In practice, there are still differences in the judicial judgement of manifest injustice, the differences between the single element theory and the double element theory have not been completely eliminated after the promulgation and implementation of The Civil Code, and the practice of circumventing the double element by "non-general contract" has been developed, and there are also differences in the judicial application of the judgement of "serious imbalance of interests" and the choice of the point of time for judgement. The judgement of "serious imbalance of interests" and the choice of the point of time for judgement are also subject to divergence in judicial application. The judiciary should fully respect the principle of freedom of contract, maintain modesty in determining manifest injustice, adhere to situational judgement, abide by the principle of double materiality in the content of the judgement, and adopt a hierarchical thinking in the logic of the judgement.

Keywords

Apparent unfairness, single element theory, double element theory, rule of judgement

1. Introduction

1.1 Facts

In 2009, YiHai Company for the construction of coastal engineering auxiliary ship and need a lot of money, YiHai Company's original legal representative Mr. Chen repeatedly to Bao borrowing, and invited Mr. Bao help enterprise financing. Subsequently, Mr. Bao provided financing services to Yihai Company. On January 20, 2010, Yihai Company issued a 'Letter of Entrusted Financing Commitment' to Mr. Bao, stating: 'Due to the construction of engineering ships and the need for financing, we hereby

entrust Mr. Bao with full authority to handle the financing loan matters with Zhoushan City Dinghai District Construction Bank. Considering the significant difficulty and involvement of energy in this financing. The company now solemn promise: if Mr. Bao so-and-so financing money can end up not less than 100 million yuan (according to the actual amount of bank loans issued), the company will pay to Bao so-and-so additional monthly 0.5 per cent of the calculation of the financing remuneration (calculated on the basis of the actual amount of the loan and paid to the expiry of the loan period). The time of payment is the same as the time of interest payment to the bank. All expenses incurred as a result of this financing, whether successful or not, will be at Mr. Bao's own expense." After the signing of the commitment letter, Mr. Bao secured a total of 110 million yuan of bank loans for Yihai Company, and Yihai Company failed to fulfil the financing remuneration agreed in the Entrusted Financing Commitment Letter due to the poor flow of funds.

After consultation, the two parties signed an agreement in 2012, which made clear the fact that Mr. Bao provided financing services for Yihai Company, and re-agreed on the financing remuneration, agreeing that "The initial financing service fee is 1 million yuan... The remaining portion of the financing service fee: According to the actual completion of the project quantity by Party A, Party A shall pay Party B 1 yuan per square as the remaining portion of the financing service fee." Later, as the agreement was not actually performed, Mr. Bao sued to the court in 2017, requesting payment of financing remuneration in the amount of 4,146,009 yuan and property preservation fees of 5,000 yuan.

1.2 Issues

The court of first and second instance in this case considered that the financing remuneration agreement was too high, and the remuneration of RMB 1 yuan/party had been substantially detached from the attributes of the financing service fee, although the contract was concluded voluntarily by both parties and was lawful and valid, the abnormally high financing service fee should not be protected by the law, and the remuneration agreement constituted manifest unfairness, so the court altered the financing remuneration agreement in the contract in accordance with the court's discretionary power and substantially reduced the amount of the contract. However, the prosecutor's office, after reviewing the case, believed that the court abused its discretion, and the civil liability determined by the judgement was contrary to the valid agreement of the parties, the rationale being that, since the two parties had already made a clear agreement on the financing service fee, the court should give full consideration to the agreement in accordance with the basic principle of freedom of contract, respecting the autonomy of the parties' meanings, and the court obviously lacked the legal basis for the substantial reduction of the service fee.

It can be seen that the key issue in this case is whether the financing service fee agreed by both parties is manifestly unfair. In fact, the question of how to judge the apparent unfairness also troubled the judicial organs, showing that there are many differences in the judgement of fairness, the decision standard is not the same. In practice, the parties to use the rules of obvious unfairness to avoid the performance of valid contracts occur from time to time, accurate judgement of obvious unfairness to

maintain the security of the transaction order, to protect the legitimate rights and interests of the parties to the contract is particularly necessary. In addition, with the official implementation of *The Civil Code*, which makes *contract law*, article 54, "in the conclusion of the contract is unfair," one party has the right to request a change or revocation of the provisions of the contract is invalidated, which adds to the judicial application of the unfairness of the new problem. In this regard, from the basic theory of the fairness of the systematic investigation, in-depth sorting and summary of the practice of the unfairness of the decision of the differences, and then study the rules of judicial judgement of the fairness of the unfairness of the obvious.

2. Basic Problems of the Manifest Injustice System

2.1 The Theoretical Origins of Manifest Injustice

2.1.1 Contractual Formalism

Legal proverb: "There is a right only if there is a remedy". In ancient Roman law, substantive law and litigation law has not been separated, the parties to a substantive rights can be protected depending on whether the parties to meet the litigation elements, which is the litigation elements system. In the stage of legal proceedings, the ancient Roman law to adopt a strict formalism, the parties must use the legal way, language and action to participate in the litigation, otherwise it will be considered that the parties do not have the legal right of action. This strict formalism is manifested in the contractual relationship, as long as the parties to the contract follow a strict programme and fixed phrases, complete the prescribed rituals, the contractual relationship is established. As long as the form meets the legal requirements, the contract will produce legal effect (Han, 2018). In this period, the system of obvious unfairness is covered by the fixed form, the formal elements that the establishment of the contract, but also to judge the validity of the contract of all the elements. Once a contract is formally concluded, the parties are bound by this "legal lock".

2.1.2 The Less-Than-Half Rule

The embryonic system of manifest injustice should be traced back to the late Roman Empire. With the increasing frequency of commodity transactions, the strong colour of strict formalism at the stage of legal proceedings was broken, and fixed actions, language, etc., were no longer essential for the establishment of a right of action, which was acquired more flexibly and with more emphasis on examination in a substantive sense. Moreover, influenced by moral philosophy and theology, it was believed that any object should have a reasonable price (Barry, 2004). Thus, Roman law promised a right of action based on extraordinary damages. The magistrate should scrutinise the price of a contract and could adjust the content of a contract that did not have a reasonable price. In this context, *Corpus Juris Civilis* created the "rule of half the shortfall", which stipulated that if the sale of land suffered a loss of more than half of the fair market price, the price should be paid in full or the contract should be null and void. In the late imperial period, "solicitude for debtors replaced the protection of claims, and the freedom of contracting was subjected to paternalistic interference by legislators (Xu, 2017)", and

the protection of the weaker party in the contractual relationship had developed into an important principle of legislation and justice at that time.

It can be seen that the theory of apparent fairness has taken shape, although it only applies to land transactions, the scope of application is narrow, but the spirit of contractual fairness implied by it has begun to be manifested.

2.1.3 Fair Price Theory

The theory of fair price was developed in France on the basis of Roman law, and scholars of ecclesiastical law considered, from a moral and ethical point of view, that it was unlawful for one of the parties to over-exploit and to reap exorbitant profits in a contract (YIN, 1995). However, the theory of "fair price" did not "advance", on the one hand, in the era of autocratic kingship, prices and rents are subject to the strict control of the king's decree or professional groups, unfair price actually rarely occurred, on the other hand, by the 17th and 18th century contractual. On the other hand, influenced by the 17th and 18th century contractual thought of freedom, "the parties are the best judge of their own interests", respect for the free will of the parties to the contract, to maintain the security of the transaction has become a powerful proposition, therefore, the theory of fair price actually encountered unprecedented challenges. The result of the compromise is that although *Napoleonic Code* recognises manifest unfairness (contractual damages), Article 887 and Article 1674 stipulate that manifest unfairness may lead to the nullity of the contract, but its Article 1118 makes it clear that manifest unfairness generally does not constitute the cause of contractual nullity (Han, 2018). Since the apparent fairness is essentially for the judicial organs to intervene in the contract to provide a channel, from its inception there is a contract justice or freedom of contract controversy. The different value considerations and orientations of the two have determined the different elements of manifest injustice in various countries and the great differences in judicial application.

2.1.4 Social Orientation

The social orientation of the law has led to the final establishment of the system of manifest injustice. Under the social principle, the interests of society as a whole are taken seriously by the legislator, and the individual cannot exist in isolation from society. The interests of society take precedence over those of the individual, and freedom of contract and freedom of contract are gradually "relegated to the background", so that the law no longer focuses solely on the interests of the individual, but rather on the coordination of the interests of the individual and the interests of society. Therefore, "legislators and judges should have the right to examine whether the contract is consistent with the public interest, whether to balance the individual interests of private individuals" (Cai, 2015), which laid a solid theoretical foundation for the development of the system of manifest injustice. In addition, with the large number of transactions, in order to improve the efficiency of the transaction, the use of form contracts more and more frequently, in this context, the situation of manifest unfairness from time to time, the conclusion of the contract and the assumption of responsibility is more and more does not reflect the will of the individual, as the trust contract theory scholars, "people voluntarily assume the

contractual obligations of the situation is becoming more and more rare, most of the contractual obligations in the life of the contract is based on the benefit of one party or one party due to the reliance on the contract. imposed on the basis of a benefit to one party or a loss suffered by one party as a result of relying on the other (Chen, 2007)." As a result, the regime of manifest injustice has developed rapidly to become a general regime that can be applied to a wide range of contracts.

The history of the development of the system of obvious fairness is the history of the game of contract justice and freedom of contract, but also the history of the change of Western thought. In the course of this journey, the scope of application has been continuously expanded, and the hidden "conscience sanction" has finally developed into a written general regime.

2.2 Controversy Over the Elements of Manifest Injustice

2.2.1 Single-Element Versus Double-Element

Legislation varies from country to country and theories differ on the elements of manifest injustice. Depending on whether the cause of the manifest injustice is taken into account, the relevant theories can be divided into the single element theory and the double element theory.

The single element theory, i.e., the objective element theory, believes that the judgement of showing fairness should not take into account the cause of the apparent unfairness, but only from the comparison of the interests between the parties to the contract to draw conclusions. In other words, as long as the parties are considered to exist in an objective imbalance of interests, rights and obligations clearly unequal situation, should be considered to constitute unfairness. (Tong, 1990) This doctrine is essentially the "contract fair" to the extreme, in the interests of the weighing of the side of the contract completely on the side of fairness. The Single Element Doctrine holds that the entire normative value of manifest unfairness lies in preserving the reciprocity of interests between the parties in a civil transaction without regard to the subjective attitudes of the contracting parties. Typical examples are Article 1118 of *Napoleonic Code*, which states that "the loss suffered by a party as a result of a manifest injustice constitutes a cause for the cancellation of the contract", and Article 934 of *Allgemeines Bürgerliches Gesetzbuch*, which states that a party to a dual contract may request the annulment of the contract if the value of the payment made by the party is less than half of the value of the other party's payment. *The Austrian General Civil Code* provides that a party to a dual service contract may request the cancellation of the contract if the value of the payment is less than half of the value of the other party (Wang, 2019).

The doctrine of double essentials advocates the addition of subjective elements to the objective elements. To constitute manifest unfairness, there must not only be an objectively significant imbalance of interests between the parties to the contract, but also a subjective purpose to obtain a windfall profit based on taking advantage of the other party's unfavourable state of affairs, such as inexperience, distress, or imprudence. Article 138 of *The German Civil code* provides regulations on profiteering behavior, specifying that "a legal act is invalid if it takes advantage of another person's distress, inexperience, lack of judgement or weak administrative will to make an agreement or guarantee of a

property interest for a payment to himself or to a third person which is clearly disproportionate in relation to the payment (Peng & Ge, 1999)". It can be seen that the determination of manifest injustice in Germany is stricter than that in France, which adopts the single element theory. In determining manifest injustice, the judge, in addition to weighing the interests of both parties to the contract on the level of results, also needs to examine whether there is a situation at the time of the conclusion of the contract where one party is in a disadvantageous position and the other party takes advantage of it to obtain exorbitant profits.

2.2.2 China's Law of the Constitutive Elements of Manifest Injustice Controversy

China's theoretical and practical circles for the composition of the elements of the apparent loss of fairness there is some controversy, but tends to take double important elements. *General Principles Of The Civil Law Of The People's Republic Of China*, Article 72 provides that "one party to take advantage of the other party's inexperience, resulting in the rights and obligations of the two sides of the obvious violation of the principle of fairness, the principle of equal pay for equal value, can be recognised as manifestly unfair", which is obviously at the same time on the subjective and objective elements to make the limitations of the drafting body of the legislation, also adopts the double important elements (Hu, 2009). However, since the introduction of *Contract Law* did not make any provisions on the elements of manifestly unfair, and *General Principles of Civil Law*, as the "one stroke", not only that, the draft contract law has stipulated that the rights and obligations of the parties are clearly unequal, so that one party suffers a significant disadvantage can be cancelled contract. Accordingly, some scholars have concluded: manifestly unfair only need to contract the existence of an imbalance between the interests of both parties (Han, 2011). Professor Cui Jianyuan also holds a single element, he believes that China's legislation in the German law on profiteering behaviour is split into multiplying people's peril as well as manifestly unfair, at the same time, because both for the revocable contract, taking into account in order to effectively distinguish between the two boundaries, so as not to make multiplying people's peril and manifestly unfair scope of protection of the overlap, it should be regarded as the manifestly fair stripped of subjective elements, and only regulates the interests of serious imbalance of the act, the German law on the subjective element (Cui, 2011). The subjective elements of German law, namely, the use of disadvantageous situation and the elements of profit actually belong to the danger of others. It must be said that there is a certain degree of reasonableness in this interpretation. In view of *General Principles Of The Civil Law Of The People'S Republic Of China*, the practice of the general tendency to double important elements. However, in *Zhonghua Huang v. Sanming Liu Creditor's Right of Avoidance Dispute (Gazette Cases)* (Bulletin of the Supreme People's Court, 2013), the court stated that "manifest unfairness means that the rights and obligations of the two parties are obviously unequal, so that one party suffers a significant disadvantage." Judicial practice shifted back to the single element theory, and a "compromise" emerged in the theoretical community, which held that under some specific circumstances, the single condition theory could be adopted to protect the clearly disadvantaged party. (He, 2017)

However, this disagreement was put to rest with the promulgation and implementation of *The Civil Code*, and Article 150 stipulates that "if one party takes advantage of the other party's state of distress or lack of judgement, resulting in the establishment of a civil legal act that is manifestly unfair, the injured party shall have the right to request the people's court or arbitration institution to revoke it", thus shifting to the theory of double essentials.

2.2.3 The Rationality Argumentation of the Dual Essentiality Doctrine

It should be said that the double element theory has a consensus, which is more conducive to the protection of the order of the transaction, the two sides through the "due process" of the contract concluded by the principle of lawfulness and validity, if the adoption of a single element theory, the composition of the manifest injustice is too easy, which increases the risk of the contract was cancelled by the court, improperly added to the contractual relationship between the unstable factors. One party in the contract may produce after the signing of the "precarious" feeling, and the other party is the existence of the system of obvious unfairness to avoid the contract performance of the possibility of "to the system of obvious unfairness to escape". Market transactions are particularly complex, the price of the contract often involves the consideration of many factors, the judiciary should fully respect the true meaning of the parties, "if the free expression of the parties without any defects, then even if the result is unfair, but also can not be applied to the rule (Zilin, 2019)", the law in the face of the freedom of contract should be kept to a minimum of The law should maintain a minimum of regulation in the face of freedom of contract, and when it has to intervene in a contractual relationship, it should exercise the utmost restraint and not expand its discretion at will. The single element doctrine provides a gateway for judicial involvement in contractual relations, which should be closed more often than not. Single element is not conducive to the order of transactions, from the surface, the adjudicator on the objective results of the contract there is a clear imbalance in the adjustment, to protect the rights and interests of the parties, but in fact, due to the lack of "obvious imbalance" can be measured standards, the judge's judgement is often required to resort to the judge's discretion, and there is a risk of abuse of discretion, thereby "Tear" the principle of autonomy, whether the contract is valid no longer depends on the parties to the contract, but by the judge to take up the contract validity of the final judge, and then shake the foundation of the contract law.

3. Differences in Judicial Judgement of Obvious Loss of Fairness in Practice

3.1 Differences between the Single-Element and Double-Element Arguments

Before *The Civil Code* was issued, the divergence of judgement in judicial practice was mainly manifested in the divergence between the single element theory and the constituent element theory. For example, in the case of Sichuan Province (2014) Shawan Min Chu Zi No. 392, the court relied on Article 72 of the *General Principles Of The Civil Law Of The People'S Republic Of China* to analyse the two aspects of "whether there is a party to take advantage of the situation or take advantage of the other party's inexperience" and "whether there is any unfairness in the content of the agreement in

terms of rights and obligations. "The two aspects were analysed, which is obviously adopting the view of the two-pronged approach. However, some courts take a different position, such as in the case of Zhong weiming and Wang xiaogun right to life, right to health, right to body disputes, the court only based on the objective elements to make the determination of manifestly unfair, "the case of the appellant for the treatment of the injuries have spent more than 10,000 yuan of medical expenses, while the mediation agreement appellant did not get the silk Bo compensation. Obvious violation of fairness, the principle of equal pay for equal value. Mediation agreement should be cancelled according to law". The results-only argument is really unconvincing.

3.2 *The Double Requirement Is Circumvented on the Grounds of "Non-General Contract"*

It should be said that, after the promulgation and implementation of *The Civil Code*, the court should be subjective and objective elements to judge whether it is manifestly unfair or not, and can not adopt the previous *General Principles Of The Civil Law Of The People's Republic Of China* to avoid the application of the practice of avoidance. However, the practice of insisting on the application of objective elements in special circumstances still exists in the practice of applying a single element on the grounds of "non-general contract". This typical reasoning is concentrated in cases involving work-related injuries, such cases, generally workers in the work-related injuries with the employer to sign a compensation agreement, the agreement is fulfilled, the workers apply for work-related injuries, and based on the results of the work-related injuries, requesting the judgement of the previously signed compensation agreement is invalid. In practice, the court no longer adopts double materiality, but directly judges the unfairness from the perspective of imbalance of interests. For example, in the case of the contract dispute between Luo Gang and Gandhi Rongyi Coal Co., the court held that "in this case, although the agreement reached by the two parties on the damage of the work injury has the attributes of a general contract, but this case is not dealt with for the simple creditor's debt relationship, but involves the survival of the rights and interests of the workers, and the workers in the employer's place of work suffered from work injuries, and the employer to the workers to carry out the work injury Compensation is the statutory obligation in the *Regulation on Work-Related Injury Insurance*..... The Agreement undoubtedly excludes the statutory obligation of the employer, so it should be revoked for manifest unfairness."

In terms of system positioning, the rules of manifest injustice in China are located in the general part of *The Civil Code*. This means that the rules of manifest unfairness should have a principle attribute, which is not only applicable to the contract, but to all civil legal acts, with a general effect. The determination of manifest injustice should strictly follow the idea of subjective and objective elements to judge, there should be no "non-general contract" as stated in the above decision. The application of a single element in special circumstances and the reversal of the balance in favour of the special group of "workers" essentially reflects the pursuit of the value of contractual fairness, but this practice of evading the rules of judgement of manifest injustice by means of a "non-general contract" has a tendency to expand in practice. However, there is a tendency in practice for this practice to evade the

rule of manifest injustice by means of "non-general contracts". In the case of contract dispute between Sanfeng Wei and Shijun Cai, the court held that "although the Personal Undertaking issued by the Plaintiff and the Agreement signed by both parties on the ownership of claims in this case have the attributes of a general contract, the Plaintiff and the Defendant are different from the parties to a general contract This case is not dealing with a simple debt relationship, but involves the plaintiff and the defendant during the cohabitation of the ownership of claims".

3.3 The Determination of "Serious Imbalance of Interests" Has Caused Disagreements

The objective element of manifest unfairness is a serious imbalance of interest or a serious disproportion between what is given and what is to be given. The determination of this element, because China's legislation does not make detailed provisions, so the extent to which the imbalance of interests can be considered to be manifestly unfair has become a problem. Generally speaking, the practice can be divided into three kinds of decision-making ideas: first, the judge's discretionary type, the second is the absolute amount of type, the third is the relative proportion type.

The discretionary model of judges entails complete judgment by the judges regarding "serious imbalance of interests." The price of the contract, the equality of rights and obligations, and the experience of the parties are all left to the judge's judgement. The biggest advantage of this approach is flexibility, but inevitably there is a risk of abuse of discretion by the judge, the court in the case cited in this paper adopted this criterion, and adjusted the financing remuneration on the basis of a comprehensive consideration of various factors. Absolute amount type, i.e., taking a specific amount as the criterion for constituting a serious imbalance of interests (Sui, 2015). For example, in the case of Wen Yuan Liu and Yuqing Han, the market price of the house was 2.7 million, while the contractual agreement was 2 million, which may constitute an obvious unfairness. Relative proportionate decisions are generally based on Article 19 of the *Contract Law Interpretation II*, which limits of 30% and 70% respectively constitute unreasonably high and unreasonably low prices.

3.4 Differences in Judgement of Timing

The point of time for judgement of manifest injustice is also divided in practice. Tendency of the opinion that should be based on the General Rules of the Civil Law of the People's Republic of China, Article 151 of the establishment of civil legal acts, and after the conclusion of the contract of manifest injustice into the normative field of the change of circumstances. Differences in practice mainly around the time of signing the contract, the contract performance, the decision of these points. In a house sale contract dispute case, the price at the time of signing the contract for 2,000 yuan / square metre, for the transfer of the price of 4,500 yuan / square metre, the seller refused to hand over the house, the buyer sued the court for the transfer of the formalities, the seller filed a counterclaim claiming that the contract shows fairness (Wang, 2010). The case should be applied to show fairness or change of circumstances becomes a problem. Courts are accustomed to examining the relationship of rights and obligations between the parties in a contract from the standpoint of the time when the judgement was

made. This reflects the fact that there is still controversy in our judicial practice regarding the determination of the point of time for judgement of manifest unfairness.

4. Rules for Determining Manifest Injustice

4.1 Adherence to Contextual Judgement at the Point of Judgement

The point of time for judgement of manifest unfairness should be "when the civil legal act is established", which is the clear provision of *The Civil Code* and also the intention of the establishment of the manifest unfairness system. The adjudicator needs to put himself in the shoes of the parties and weigh the rights and obligations of the parties in the light of a combination of factors. Just as in the determination of self-defence, the referee should be "based on the specific situation of the defender defence", back to the time of the crime, a comprehensive consideration of the overall process, only to take this hindsight in order to ensure that the referee in a calm, rational perspective to assess the case. In some cases, the interests of both parties to a contract may appear to be out of balance, but the judge cannot conclude that there is a "serious imbalance" on the basis of the outcome alone, but needs to take into account the circumstances in which the contract was concluded. For example, in the case cited herein, it is clearly inappropriate for the judge to base his judgement of manifest injustice solely on facts that occurred five years later. At the time the contract was signed, the two sides of the Yi Hai Company in the next five years, how the development of profit or loss, and can continue to operate are unknown, therefore, as long as the contract is the two sides voluntarily entered into, should not be considered as the establishment of the manifestly unfair, if we adhere to the context of the judgement will be able to avoid the problem to a large extent. In fact, similar agreements are also very common in life, the parties to buy lottery tickets, at a very small cost, fortunate to get a high prize, stand in hindsight, is this again belong to the interests of a serious imbalance? In Valuation Adjustment Mechanisms, the failure of an investment may result in a high buy-back obligation for the enterprise, which may seem unfair. However, Valuation Adjustment Mechanism is a risk allocation mechanism based on information asymmetry and future uncertainty, and the rights and obligations of both parties should not be judged after the fact. The price of the agreement is the result of negotiation between the two parties, which is a prudent and free choice for unknown situations.

The Supreme People's Court has stated that "the disproportion of the payment is based on the time of the conclusion of the contract, and the increase in the price of the transaction after the conclusion of the contract belongs to the commercial risk" (Ran, 2015). In fact, it is only by adhering to contextual judgement that the systems of manifest injustice and change of circumstances can be effectively coordinated, otherwise the scope of normative protection of the two systems will overlap.

4.2 Adherence to Double Weight in the Content of Judgements

The judgement of fairness should be made in strict accordance with *The Civil Code*, which requires both objective and subjective elements. In practice, it is not only difficult to justify the decision to adopt a single element on the grounds of "non-general contract", but also detached from the

increasingly complex economic life, which should be corrected.

4.2.1 Determination of Objective Elements

The question at hand, however, is what degree of "imbalance of interests" is required for manifest injustice. In extraterritorial legislation, France has adopted the "objective model", i.e., legislation that specifies the amount or proportion of imbalance of interest to be achieved. For example, article 1674 of *The French Civil Code* provides that "if the seller suffers a loss of more than seven-twelfths of the price of the immovable property because the sale is manifestly unfair and the price is too low, the seller shall have the right to request the cancellation of the sale of the immovable property", a legislative model that originated in ancient Roman law. In contrast, Germany has adopted a subjective model, does not specify the proportion, and "clearly asymmetrical" as a general expression as the standard (Qin, 2010). The author believes that our country should adopt a compromise approach, with flexibility and at the same time play a role in limiting the discretion of the judge. The court can refer to the *Contract Law Interpretation II* in the provisions of the 30% as the price is obviously too high standard, 70% as the price is obviously too low standard, at the same time, the court in the process of adjudicating the case can also be made in the process of alternative treatment, such as in the case quoted in this paper, due to the special nature of the Valuation Adjustment Mechanism, with a certain "Adjustment" nature, rather than a purely contractual relationship, and not a simple contract. In the case cited in this paper, due to the special nature of the agreement, it has a certain "betting" nature, rather than pure contractual relationship, the judge should have the flexibility of the determination of such cases of obvious unfairness. The highest judicial authority may, when the time is ripe, determine the standard of imbalance of interests in the form of judicial interpretation.

4.2.2 Determination of Subjective Elements

The subjective element is to take advantage of the other party's state of distress and lack of judgement. In the case of manifest unfairness, one party to the contract is in a clearly unfavourable position, and the other party is based on such a disadvantageous position to obtain profiteering. Specifically need to pay attention to the following points.

The adjudicator should pay attention to identify the subjective characteristics of the parties. The supreme people's court has actually established the "bad faith rule", that is, the law on the unfairness of the fairness of the results of the transaction is not abstract, general evaluation, but in the presence of the law does not allow the malicious behaviour of the situation, for the malicious parties to be deprived of the undue benefits. Courts in many places have also incorporated this "bad faith rule" into their reasoning. Therefore, the court should give full and comprehensive consideration to the relevant evidence in the trial of the case. If it cannot be proved that the parties entered into the contract in bad faith, then even if there is a serious imbalance in the results, it should not be regarded as manifestly unfair.

The adjudicator should focus on examining whether the parties are equal civil subjects, whether the price of the contract has been freely negotiated, and whether the conclusion of the contract has been

made under sufficient weighing. This is also a refereeing idea that deserves to be recognised in current practice. In addition, generally speaking, the judge can make a judgement on the subjective element by judging the option of one of the parties to enter into the contract or not. When a party is in a state of distress, the expression of its meaning is imperfect, the content of the contract is not fully understood, the choice of meaning is restricted, if the above circumstances do not exist, should be denied the constitution of manifest unfairness.

4.3 Logical Hierarchy of Judgement

The stratification theory has become an influential viewpoint in the theory of criminal composition. In determining whether an act constitutes a crime, the hierarchy theory is logical and progressive, with the possibility of incrimination at almost every level. This has an important positive effect on limiting incrimination and maintaining the modesty of criminal law. The author believes that this kind of hierarchical thinking can be applied to the judgement of manifest injustice. The determination of obvious fairness, like the determination of crime should be maintained to the maximum extent of restraint, the rationale is the principle of freedom of contract, the judiciary can not through the system of obvious fairness wantonly erosion of the foundation of the contract law.

In judging manifest injustice, objectivity should precede subjectivity and form before substance. Specifically, the judge should carry out a two-stage judgement, in the first stage, the judge should review the following elements: standing at the point of time when the contract is signed, whether there is inequality of rights and obligations between the two parties, whether there is a serious imbalance of interests, whether a party is in a state of distress, if the above elements are in full compliance with the judge can be preliminarily presumed that the contract is manifestly unfair. But at this point, the judge must still carry out the second stage of judgement, that is, the subjective malice of the perpetrator of the other party's state of distress to judge, if there is no such malice, should be excluded from the composition of the manifestly unfair.

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