

# Concurrence of Liability for Contracting Negligence and Liability for Breach of Preliminary Contract

Qiu Jieyi

Jiangsu University, Zhenjiang, China

**Abstract:** Both the liability for contracting negligence and the liability for breach of preliminary contract in advance have the function of protecting the legitimate rights and interests of the parties in the negotiation and consultation stage before contracting, which will inevitably lead to the problem of overlapping of responsibilities. Therefore, further exploration and analysis of the differences between the two will help the parties better obtain remedy. The legal effects of these two kinds of liabilities on compensation for losses have a competing relationship under specific conditions, and they are also reflected in four kinds of situations: juxtaposition, overlapping, inclusion and intersection according to specific circumstances. The competing relationship between the two causes differences in the determination of the cause of action in judicial practice. In the case that the criterion for determining the cause of action has not been amended, it is not a big problem to take the contract dispute as the cause of action, and it can also solve the problem of determining the cause of action in the case of concurrent liability. The concurrent liability between the two is also related to the exercise of the judge's interpretation power and the choice of the path of the parties' accountability.

**Keywords:** The Civil Code of the People's Republic of China; Contract law; Liability for contracting negligence; Liability for breach of preliminary contract; Concurrence of liability

## 1. Introduction

The relevant provisions of the preliminary contract first appeared in the Interpretation of the Supreme People's Court of The People's Republic of China on Several Issues Concerning the Application of Law in the Trial of Disputes over Commercial Housing Sales Contracts. Since then, the Interpretation of the Supreme People's Court of The People's Republic of China on the Application of Law in the Trial of Disputes over Sales Contracts has further regulated the form, scope and remedy of the preliminary contract in the relationship between sales contracts, which is not universal and mainly within the scope of the sales contract. Article 495 of the Civil Code, for the first time, makes general provisions on the composition and remedies of pre-contract in the general rules of contract. The Civil Code sets the advance contract in the chapter of contract conclusion, so it must be closely related to the contract conclusion, and the rights and obligations of the parties around the advance contract must also take the contract conclusion as the field; At the same time, in order to promote the parties to abide by the principle of good faith in the conclusion of the contract, Article 500 of the Civil Code continues the provisions of the Contract Law on liability for contracting negligence. As a result, the liability for contracting negligence and the liability for breach of contract in advance are also created, which meet in the Civil Code.

In fact, disputes occurring at the stage of contract conclusion are not uncommon, and many cases have been tried by higher courts. During the negotiation process, the parties may have reached an agreement on the conclusion of the contract, but if the contract is not concluded, there may be disputes such as requiring the termination of the contract, return of money, compensation for losses, etc. However, in judicial practice, the handling of such disputes is not consistent, and often there are differences around what responsibilities the parties should bear, how to bear responsibilities and how to determine the nature of the agreement. In other words, this kind of problem is how to identify the parties' agreement on the conclusion of the contract and how to deal with the liability when the parties violate the principle of good faith and breach of the contract after reaching an appointment with the other party, resulting in the failure of the contract and causing losses to the other party.

This paper attempts to discuss the liability for breach of contract and the liability for contracting negligence in the case of contract failure, so as to reveal the dual system of the liability for breach of contract and the liability for contracting negligence in the Civil Code, show the concurrent liability and pattern of the liability for breach of contract and the liability for contracting negligence in specific

circumstances, and explore the cause of action, interpretation and the choice of the path of the parties' liability investigation concerned in judicial practice.

## 2. Conceptual Analysis

There are many similarities and overlaps in the conceptual understanding and practical application of the liability for contracting negligence and the liability for breach of preliminary contract. If we want to distinguish the application of the two types of liability, we must distinguish and understand the two groups of concepts, so as to understand the theoretical roots of the two types of liability, so as to study their concurrent patterns and explore the applicable methods.

### 2.1 Liability for breach of preliminary contract

Article 495 of the Civil Code stipulates that the purchase letter, subscription agreement lawspirit, etc. that the parties agree to conclude a contract within a certain period of time in the future constitute an advance contract.

If a party fails to perform its obligation to conclude the contract as agreed in the advance contract, the other party may request it to assume the liability for breach of the advance contract.

The reservation is opposite to this contract, and generally refers to the contract that is agreed to conclude this contract in the future. That is to say, the liability for breach of contract in advance contract is based on the effective contract, and its essence is consistent with the ordinary liability for breach of contract. The Civil Code provides for the typical forms of pre-contract in the form of enumeration, but it is impossible to judge whether some non-typical agreements in civil and commercial activities are pre-contract based on this provision alone. The identification of pre-contract can be grasped from three aspects: (1) the conditions to be met include: the qualification of the subject, the legality of the content and form, and the authenticity of the expression of intention; (2) The main content of the contract is that the parties agree to conclude this contract within a certain period in the future; (3) The content of the contract shall at least include the parties, subject matter, quantity and other relevant basic elements to which the contract should be concluded in the future. <sup>[1]</sup>

With regard to the legal effect of breach of an advance contract, the law stipulates that the observant party may request the breaching party to assume the liability for breach of the advance contract, but it does not further reveal its specific form. The general provisions of the Civil Code on the legal effect of liability for breach of contract include the following forms: continuing to perform, taking remedial measures, compensating for losses, paying liquidated damages, repairing, remaking, replacing, returning goods, reducing the price or remuneration, and the penalty provisions for deposit. In principle, the liability for breach of preliminary contract should also include these forms. However, since the subject matter of performance of the advance contract is the act of concluding this contract and has no transaction nature and content, there is no scope for the forms of replacement, return, reduction of price or remuneration. In addition, based on the autonomy of will of the parties, the legal effect of breach of an advance contract should give priority to the principle that the agreement is followed. Article 2 of the Judicial Interpretation of Sales Contracts stipulates that the consequences of breach of an advance contract for sales include bearing the liability for breach of contract or rescinding the advance contract and claiming compensation for damages. The non-breaching party can choose one to claim. The consequences of breach of an advance contract stipulated in the Civil Code only bear the liability for breach of contract, but this does not mean that the non-breaching party cannot claim to terminate the advance contract under the advance contract stipulated in the Civil Code. Because according to Article 563 of the Civil Code, the parties can exercise the right to terminate the contract in accordance with the law when the other party breaches the contract, so if there is no exception, the parties can exercise the right to terminate the contract in case of breach of the contract. <sup>[2]</sup>

### 2.2 Liability for contracting negligence

Article 500 of the Civil Code stipulates that the parties shall be liable for compensation if they have any of the following circumstances in the process of concluding the contract, causing losses to the other party:

- (1) make use of concludes contract , ill will undertakes consulting;
- (2) conceal as important as what conclude the contract is concerned fact intentionally to perhaps

provide false case;

(3) have other the act that violates honest credence principle.

The biggest difference between the liability for contracting negligence and the liability for breach of contract in preliminary contract is that the liability for contracting negligence is constructed according to the pre-contract obligation arising from the principle of good faith, not from the contract. This pre-contract obligation is a legal obligation based on the principle of good faith that both parties to the contract must abide by. If one party violates this obligation, it shall bear the liability for contracting negligence.

Whether the contract is established or not, there can be the problem of liability for contracting negligence. Since this article focuses on the situation that the contract is not concluded, this part only refers to the liability for contracting negligence in case of contract failure. There are four aspects of the constitutive requirements of the liability for contracting negligence when the contract fails: (1) one party has the fault in contracting stipulated by law; (2) The other party suffers losses; (3) The contract that the parties intend to conclude has not been concluded; (4) There is a causal relationship between the result of loss and contracting failure and the negligent act of contracting. According to the law, the legal effect of liability for contracting negligence is compensation for losses, so the legal effect of liability for contracting negligence in case of contract failure is also reflected in compensation for losses.

### **2.3 Concept differentiation**

An effective pre-contract is a prerequisite for the establishment of the liability for breach of contract. The realization of the liability for breach of contract is generally legally enforceable. When the debtor fails to perform his obligations, the law forces the debtor to perform his obligations and bear legal liabilities. An advance contract is also a kind of contract. The essence of the liability for breach of an advance contract is the liability arising from a party's breach of contractual obligations. The liability for contracting negligence is the liability arising from the breach of the pre-contract obligations based on the principle of good faith by the parties to the contract at the contracting stage, resulting in the loss of the trust interests of one party.

As mentioned earlier, the liability for breach of contract of an advance contract is based on the liability arising from the contract. Therefore, like an ordinary contract, the parties can agree on the liability for breach of contract. The advance contract can be applicable to the relevant provisions such as deposit and liquidated damages, and can also stipulate the exemption. If there is no agreement, the general provisions on liability for breach of contract in the contract part of the Civil Code shall apply. Therefore, the liability for breach of contract is a strict liability, and its application is basically consistent with that of ordinary liability for breach of contract. The liability for contracting negligence is a kind of fault liability, that is, the parties should bear the liability for contracting negligence only if they have fault for the failure, invalidity or cancellation of the contract.

The liability for breach of a preliminary contract belongs to contractual liability, which can be freely agreed by both parties. If there is no agreed exemption clause, the defaulting party can claim exemption only in case of force majeure. However, the breaching party must provide evidence for the force majeure it claims, and the burden of proof is borne by the breaching party. However, due to the application of the principle of fault liability, if one of the contracting parties causes the contract to be invalid or cancelled due to its intention or fault, and causes losses to the other party, the party at fault shall bear the liability for contracting negligence. At this time, the party without fault shall bear the burden of proof.

In the liability for fault in concluding a contract, reliance interest should be taken as the basis of compensation. The loss of trust interest should be limited to direct loss, but not extended to indirect loss. The direct loss can include various reasonable expenses and the interest lost by these expenses. The liability for breach of an advance contract is a kind of contractual liability, but no transaction has occurred during the performance of the advance contract, so there is no economic interest. Therefore, the breach of the advance contract will not cause loss of interest. <sup>[3]</sup>

### **3. Concurrent Liability for Contract Failure**

According to the scope of damage caused by breach of contract and contracting negligence, when the liability for breach of contract and contracting negligence in the event of contract failure occur at the same time, the legal effects of the two on compensation for losses logically have the following four

competing states.

### **3.1 Juxtaposition**

That is, the damage results of both parties are juxtaposed. The losses of the parties include both the loss of trading opportunities with the other party and the loss of trading opportunities with a third party. For example, both A and B are sellers, while C is the buyer. B and C negotiate to purchase a total of 10 tons of a commodity at the normal market price of 6000 yuan/ton. In order to disrupt the transaction between B and C, A falsely claims that it is willing to enter into a contract with B at the price of 5800 yuan/ton. B then terminates the negotiation with C and enters into an appointment contract with A, but A fails to enter into a contract with B as agreed, and B has no choice but to renegotiate and enter into a contract with C, but the market has risen to 6500 yuan/ton. In this case, B lost both the opportunity to trade at a low price with A and the opportunity to trade at a low price with C due to A's behavior. The two losses are respectively the liability for breach of contract and the liability for contracting negligence, and they are juxtaposed.

### **3.2 Overlapping**

That is, the damage results of the two coincide. In the above case, if A negotiates a purchase and sales contract with B by deliberately concealing the fact that it has no inventory of a certain commodity, and fails to sign a contract with B after reaching an appointment contract, B will pay a total of 2000 yuan for transportation and accommodation expenses. In this case, the losses suffered by B due to A's behavior are both the actual losses caused by A's breach of the contract, and the reasonable expenses paid by B for the contract. Although both of them belong to the liability for breach of the contract and the liability for contracting negligence, they overlap with each other.

### **3.3 Inclusive**

That is, the two damage results are mutually inclusive. Try to change the above case slightly: A and C are both sellers. B is the buyer. B and C negotiate to purchase a certain commodity. A is to destroy the transaction between B and C, and falsely claims that it is willing to enter into a contract with B at a low price. B then terminates the negotiation with C and enters into an appointment contract with A, but A fails to enter into a sales contract with B according to the agreement, and B has no choice but to renegotiate and enter into a contract with C, and B has to pay a total of 3000 yuan for transportation and accommodation expenses due to the negotiation with A and renegotiation with C. In this case, B has both the actual loss and the loss of low-price trading opportunity with A. The former also belongs to the reasonable expenses paid by B for the contract. Therefore, B's loss due to A's breach of the contract has included its loss due to A's contracting negligence.

### **3.4 Crossing**

That is to say, the damage results of the two have both partial intersection and other situations where the damage exists independently. The above case will be slightly changed: A and C are both sellers. B is the buyer. B and C negotiate to purchase a total of 10 tons of a commodity at the normal market price of 6000 yuan/ton. A to destroy the transaction of B and C, falsely claiming that it is willing to enter into a contract with B at the price of 5800 yuan/ton. B then terminated the negotiation with C and reached an advance contract with A, but A did not enter into a contract with B according to the contract. B had no choice but to renegotiate with C and enter into a purchase contract, but the market has risen to 6500 yuan/ton. B paid 3000 yuan for transportation and accommodation due to negotiation with A and renegotiation with C. In this case, B has both the loss of low-price trading opportunity with A, the loss of low-price trading opportunity with C, and the actual loss. The actual loss also belongs to the reasonable expenses paid for the contract. Therefore, B's losses due to A's breach of contract and contracting negligence have both the intersection of the actual loss and the reasonable expenses for the contract, and also have separate parts.

## **4. The Application and Related Issues of the Contract Failure Concurrent Liability Norms**

In order to further refine the practical problems related to the liability for contract failure in judicial practice, some scholars mainly found the following problems by sorting out the causes of action, litigants'

claims, reasons for adjudication, and judgment results of these judicial documents:

(1) The distribution of cases is uneven. The number of cases involving housing sales is the largest, reaching 125. The remaining cases are scattered in the fields of rural land contracting, recruitment and employment, cooperative operation, investment invitation, bidding, equity transfer, construction engineering, land transfer, processing and customization, housing leasing, etc;

(2) The contents of the parties' petitions are diverse and the interpretation is not uniform. Most of the litigants' petitions revolve around the issues of continuing to perform, rescinding the contract, compensating for losses, double return of deposit, return of intention money, payment of liquidated damages, and payment of interest on capital occupation. The people's court has only explained the basis of the claim in 14 cases;

(3) The criteria for determining the cause of action are not uniform. In addition to determining the cause of action based on the transaction area involved in the case, some cases directly take contract disputes or contractual fault liability disputes as the cause of action;

(4) Judges have different ideas. In quite a few cases, there are differences in the identification of the advance contract and the determination of the nature of the liability. Even in some cases, the reasons for the judgment still believe that the parties should bear the liability for contracting negligence in violation of the agreement of the advance contract;

(5) The basis of the parties' claim for compensation for losses is not fully clarified, and the determination of the scope of losses is unclear.

There are three main reasons for the above problems: (1) The lack of legislation leads to the low applicability of the pre-contract system in the whole contract field, and the lack of uniform provisions on pre-contract in judicial practice also makes the application of relevant rules too cautious; (2) The determination of civil cause of action is relatively backward and cannot fully meet the actual needs; (3) The people's court did not explain the basis of the claim on which the claim was based, and could not guide the parties to make an efficient choice under the premise of ensuring fairness, which led to the inconsistency of the trial ideas and the ambiguity in the handling of specific issues such as the scope of compensation for losses. The provisions of the Civil Code on the pre-contract to a certain extent alleviate the urgency of the basis for the application of the law, but the other two aspects still have practical significance.<sup>[4]</sup>

#### ***4.1 Identification of the object of litigation and determination of the cause of action***

The cause of action is a high summary of the nature of the legal relationship of the main civil entities in the lawsuit, with the characteristics of legality, abstraction, diversity, openness and systematization. In judicial practice, the causes of the cases concerning the appointment contract are not consistent. Some directly take the contract dispute as the cause of the case, while others take the contract pointed to by the appointment contract as the cause of the case, such as the commercial housing sales contract dispute, the commissioned design contract dispute, etc.

At present, although there is no uniform cause of action for disputes over pre-contract, considering that this rule is set in the chapter on the conclusion of part of the contract in the General rules of contract of the Civil Code, and that there is a special cause of action for the liability for contracting negligence in this chapter, we can consider appropriately expanding the cause of the contract conclusion part to include disputes over pre-contract; At the same time, before the relevant provisions are revised, the contract dispute can also be taken as the cause of action temporarily to achieve the unification of the cause of action determination, and the problem of determining the cause of action when the liability for breach of contract and the liability for contracting negligence are overlapping can also be reluctantly solved.

#### ***4.2 Interpretation in the trial and the choice of the path of the parties' accountability***

In the case of contract failure, there may be both liability for breach of contract and liability for contracting negligence. The two belong to different legal relationships, and the legal effects, especially the scope of compensation for losses, are also different. If the parties' claims are not the same as the legal relationship on which they are based, interpretation is necessary. At the same time, interpreting the value of fairness and efficiency as its litigation value orientation. Therefore, the limit of interpretation should be based on the principle of judicial neutrality and reducing litigation burden. Through proper interpretation, it can not only promote the parties' litigation capacity to balance, but also improve the

efficiency of dispute resolution and reduce litigation burden.

The liability for breach of contract corresponds to the agreed obligation. The other party is required to bear the liability for breach of contract of the reservation contract. It should bear the burden of proof for the basic facts such as the existence and establishment of the reservation contract objectively, and the other party's violation of the agreement of the reservation contract. According to the specific way of liability claimed by it, the party should bear the burden of proof for the corresponding damage results. The liability for contracting negligence in the event of contract failure corresponds to the legal obligation of good faith, requiring the other party to bear the liability for contracting negligence, and should bear the burden of proof for the fact that the other party objectively has contracting fault, has subjective fault, has its own loss, and has a causal relationship between the contracting fault and the loss.

## 5. Conclusion

The concurrent liability between the liability for breach of contract and the liability for contracting negligence in the event of contract failure may lead to differences in the cause of action. Although it may be considered to set up a first-level pre-contract dispute under the contract dispute that is equal to the liability for contracting negligence, it is no big problem to temporarily take the contract dispute as the cause of action in the case of the rule for determining the cause of action has not been amended. At the same time, the overlapping of the two is also related to the exercise of the judge's interpretation authority and the choice of the path of the parties' accountability; The latter is reflected in that when the parties choose the path of accountability, they should fully consider the difficulty of proof and the legal effect that can be supported, so as to achieve the balance between the economy and integrity of the right relief.

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