

Research on the Arbitrary Right of Revocation of Gift Contract

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Abstract: *As a typical kind of gratuitous contract, gift contract is an important part of the contract section of our civil code. The right of revocation in the gift contract is an important part of the gift system, and it also gives the donor a certain right of estoppel in law. However, due to the imperfect provisions of our laws on the right of arbitrary revocation, and the different legislations of various countries on whether to establish the right of arbitrary revocation in the gift contract, it is necessary to discuss the necessity of our country on the right of arbitrary revocation in the gift contract and study the improvement methods of this system.*

Keywords: *Gift contract, Arbitrary revocation right, Civil Code*

1. Introduction

As a typical kind of gratuitous contract, gift contract is an important part of the contract section of the Civil Code. The right of revocation in the gift contract is an important part of the gift system, and it also gives the donor a certain right of estoppel in law, which is the core difference between the gift contract and other contract. However, due to the imperfect provisions of our laws on the right of arbitrary revocation, there is no uniform answer to the application of the law. In the meanwhile, the legislation of various countries has different opinions on whether to establish the right of arbitrary revocation in the gift contract. Therefore, it is necessary to clarify China's attitude towards the right of arbitrary revocation in the gift contract, discuss the necessity of China's right of arbitrary revocation in the gift contract and study the improvement methods of the system to make our civil code more perfect and mature.

2. Concept of Gift Contract

A contract is divided into a contract for value and a contract for free according to whether the parties pay the consideration. A contract for value is a legal act between the parties to obtain payment by paying the corresponding consideration. A contract for free is a contract in which one party fully pays, and the other party does not lose all of its property because of the nonpayment of the consideration. According to the explicit provisions of Article 185 of the Civil Code of China and the interpretation of the law articles by means of textual interpretation, a gift contract is a legal act that the donor gives his own goods to the donee free of charge out of the attitude of gift. According to Mr. Lixin Yang, "a gratuitous legal act refers to a legal act in which one party gives a certain benefit to the other party and the other party only accepts the benefit and does not pay the corresponding consideration." The typical feature of a gratuitous contract is that one party has no obligation to pay to the other party accordingly, so a gift contract is a typical gratuitous contract.

The gift contract conforms to the general principle of the contract, that is, it is a legal act that requires both parties to form a consensus, and it is a relationship state that generates legal binding force on both parties through the formation of the contract^[1]. Therefore, even if it is gratuitous, it is also binding on the donor of unilateral payment, which is determined by the nature of the gift as a contract. The essence of gift as a contract means that the law presumes that both parties, especially the donor, should sign a gift contract. Just like the paid bilateral contract, the parties are all for the purpose of achieving some interests. After reaching a binding agreement, they may lose some of their own interests, but the purpose of doing so is to obtain some more valuable interests. Although modern society pays attention to the role of commodity economy, gift is still an irreplaceable important form of communication. The gift itself cannot create new value, but it has important social significance. For example, Professor Rong said: "To regulate unrealistic life relationships by giving gifts with many unrealistic factors as lubricants can make big difference." From the outside world's perspective, the donor who has made generous acts cannot obtain

the paid payment from the donee. On the surface, it is obviously unfair to the donor. The interpretation around the right of arbitrary revocation is mostly from the standpoint of protecting the donor. In fact, as far as the nature of the contract is concerned, gift is one of the important means for people to maintain a stable social interpersonal relationship, and it also cultivates the quality of mutual help necessary for people in social life.

3. The Concept of Arbitrary Revocation Right

The gift contract is a promissory contract. After the contract comes into effect, the donor should not be allowed to cancel the contract arbitrarily before the transfer of the property rights of the gift, because it does not conform to the general principles of the Civil Code, or even violates the principles of law. And among the gratuitous contracts stipulated in the Civil Code of China, only the gift contract adopts this mode. Mr. Yongjun Li, professor of China University of Political science and Law believed that: "The reason why a gift contract is granted such a privilege is related to two factors: 'transfer of ownership that does not need to be returned, and being free'. That is, it is free when transferring ownership, and only when there is real property to give, and it is free and does not require return, can it constitute a gift. It is reasonable to allow the donor to revoke with this feature, while other gratuitous acts do not have this feature, that's why it is more reasonable to construct the gift as "important thing" or "arbitrary right of rescission". Because the gift is a free transfer of ownership and cannot be returned, it needs the right of arbitrary revocation to make up for the shortcomings of non-formalism.

3.1 Applicable Conditions of Arbitrary Revocation Right

Although it is called "arbitrary revocation right", it does not mean that the donor's exercise of revocation right is unlimited^[2]. If it is not limited, the gift contract will not have any legal binding force, which is neither in line with the principle of good faith nor fair to the donee.

3.1.1 Positive Application Conditions

3.1.1.1 There are gift contracts already established

The right of arbitrary revocation is the right of the donor, so the existence of the gift contract should be taken as the logical premise. In practice, there are often disputes that couples agree to "donate" their property to their children in divorce agreements or divorce mediation documents made by the people's courts, but after divorce, they renege on exercising the right of arbitrary revocation before the transfer of the rights to the donated property. Some courts may take this as a gift dispute, and preconceived that it constitutes a gift contract, and determine whether the parties may revoke the gift before the transfer of property rights according to the rules of the gift contract. However, the subject of the contract is ignored in defining whether a gift contract is established and whether the gift contract can be revoked between husband and wife and children. The "gift" to the children agreed by the couple in the divorce agreement or mediation statement is the agreement between the couple, and the subject of the agreement is the couple. That is, there is no promise of donation to children in this agreement. The agreement that property is "donated" to children in a divorce agreement or mediation agreement is a contract for the interests of a third party, that is, the husband and wife are the subject of the divorce agreement or mediation agreement, the relationship between them is a compensation relationship, and the children are the beneficiaries of the third party. If the property is owned by the husband or wife, it is a promise to the other party. The reason for this promise is the overall arrangement of child rearing and property division based on divorce agreement or mediation statement; If the property is jointly owned by husband and wife, it is a mutual promise. The reason for the promise is that the other party also promises to own its own share of the property to the children^[3]. The object of the promise is the children. Therefore, there is no room for such contracts to apply the right of arbitrary rescission.

3.1.1.2 The gift property has not been transferred

According to the provisions on the transfer of rights in the property right section of the Civil Code, the right of arbitrary revocation can only be exercised before the movable property being delivered or the immovable property being registered. When the gift property can be divided, the right of arbitrary revocation can be applied to the part of the property right that has not been transferred. The transfer of property rights shows the donor's clear and firm intention to donate. After the transfer of property rights, the property rights will belong to the donee. If the contract is allowed to be cancelled arbitrarily, the donee needs to return the property rights that have been obtained, which will have a negative impact on the production and life of the donee and violate the principle of good faith. If the transfer of rights is still

allowed to be revoked arbitrarily, it will result in unjust enrichment under the rules of non-causation of real right acts, which will shake the new transaction order that has been formed; However, the negative effect of such revocation still exists in the law that does not adopt the rule of non-causation of real right act, that is, the revocation after the transfer of rights will lead to the return of property. That is to say, the function of restricting the arbitrary revocation right to exercise before the transfer of the gift property right, which can avoid damaging the transaction security and order, has nothing to do with the non-causation of the property act. In fact, the regulation of the exercise of the right of arbitrary revocation is determined by the function of the right of arbitrary revocation before the transfer of the right of gift property. The reason why there is a system of the right to revoke the gift at will is that in our law, the gift contract is a promise contract, and there is no requirement for the form, while other gratuitous contracts, such as borrowing contracts, custody contracts, are mostly practical contracts, and the delivery of the subject matter is the key element of the contract, so there is no need to adjust the system of the right to revoke at will. The function of the arbitrary revocation right is to adjust the balance of interests between the donor and the recipient and prevent the donor from hasty agreement under the model of promissory and informal gift norms^[4]. The transfer of rights reflects that the promise of the donor has been carefully considered, because it can see the adverse effects such as the reduction of property brought about by the transfer of rights. If the donor can still exercise the right of revocation after the transfer of property rights, it will also make the rights of the donor too large, and the interests of both parties will be unbalanced.

3.1.2 Negative Application Conditions

The negative application condition of the right of arbitrary revocation means that the right of arbitrary revocation is not excluded. As long as the right of arbitrary revocation not excluded and meets the positive application conditions of the right of arbitrary revocation, the right of arbitrary revocation can be applied. In addition to stipulating that notarized gifts and gifts of moral obligation nature cannot be arbitrarily revoked, China's Civil Code also adds that donation contracts of public interest nature cannot be arbitrarily revoked.

3.1.2.1 Notarized gift excludes the right of arbitrary revocation

The notarization effect is the core of the notarization system and an important embodiment of the functions of the notarization system. The law takes notarization as one of the forms of contracting, endowing notarization with legal effect, making notarization an important choice for people to prudently make legal acts in their daily exchanges, ensure the authenticity of their intention, determine the effectiveness of the contract, and fix evidence to reduce disputes. The exclusion of notarization as the donor's right of revocation is the affirmation of notarization effect. A notarized donation means that the donor expresses his intention of donation in a written statement, and the notary organ makes a notarized certificate of donation. On the one hand, during the notarization process, the notary will inform the donor of the legal effect of the donation in detail. The donation decision made by the donor on this basis is presumed to be made by the donor after careful consideration and should be bound by his own declaration of will. Therefore, the law stipulates that the donor is not allowed to revoke at will. On the other hand, notarization is made by a state organ, which has a strong probative force. Limiting the revocation is to maintain the authority of the notary organ, avoid waste of resources, and protect the trust interests of the donee. The smaller the scope of the exclusion of the arbitrary revocation right, the less the parties' dependence on legal remedies, the greater the role played by the reputation mechanism, and the greater the realization of the gift function.

3.1.2.2 Donations of public welfare nature exclude the right of arbitrary revocation

With the development of social public welfare and philanthropy in China, more and more people have realized the importance of public welfare behavior. Public welfare donation, a civil activity, is becoming more and more popular and plays an irreplaceable role in helping the poor. Especially with the development of national economy and the improvement of people's living standards, people will pay more attention to the vulnerable groups and the overall progress of society. In judicial practice, the donation relationship of public welfare also occupies a place. As the public welfare donation reflects the importance and encouragement of the state to charity, the legislation makes special provisions on public welfare donation, so that the donor who meets the statutory conditions does not have the right to revoke at will. In addition, the "civil law" of Germany, Switzerland and Taiwan provides that after the death of the donor, certain government departments can request the donee to perform the donation and use the donated property for the agreed public welfare purposes.

Compared with the original Contract Law, the Civil Code has deleted the word "society" in the articles, which not only ensures the simplicity of the terms of the articles, but also does not cause changes in the scope or ambiguity in understanding. The Contract Law stipulates two typical public welfare situations

of "disaster relief and poverty alleviation" by way of enumeration. It is no doubt that the situation omitted by the subsequent enumeration of "etc." only includes public welfare activities equivalent to "disaster relief and poverty alleviation" or includes all public welfare situations including public welfare undertakings. The author believes that, regarding the definition of whether the gift contract involved in the gift dispute in practice is a gift contract with a public welfare nature, we can refer to the enumeration of charitable activities in the Charity Law and believe that the gift contract concluded for all public welfare activities within the scope of enumeration has a public welfare nature. Due to the rich connotation of social public welfare, it is impossible to include all the public welfare properties through full enumeration. Therefore, the civil law only lists the typical situations that often occur as a reference, which not only reflects the importance of these typical situations, but also provides a reference standard for the characterization of public welfare activities that are not clearly listed. The Civil Code adds "helping the disabled" to reflect the protection of the rights and interests of disabled groups and regulates the problem of false donation of helping the disabled in practice. However, it does not mean that the scope of application of public welfare gift is limited. "Gifts made for the purpose of disaster relief, poverty alleviation and student aid, or for the purpose of financing public utilities such as public facilities construction and environmental protection" are all public welfare gifts.

3.2 Meaning of the Right of Arbitrary Revocation

As we all know, civil law countries, adhering to the civil law legislation based on the autonomy of the parties, must pay more strict attention to the expression of the donor's will in the gratuitous contract gift contract. It is not only necessary to examine whether the donor has a true expression of intent to give, but also to examine the recipient of the other party to the gift contract and the subject matter of the gift. That is to reduce the probability of the donor's impulsive commitment, reduce the donor's contractual liability in the gift contract, and give it the right to revoke under certain circumstances. Since the gift is still a contract in essence, the basic principle supporting the contract law must logically be the general jurisprudence that explains the special provisions such as the right to revoke the gift contract arbitrarily. The author believes that the most important thing is to give the donor the relevant revocation right. Once the gift contract is established, the gift contract is binding on all parties. The successful performance of the gift contract is the greatest respect for the donor's autonomy^[5]. However, the reality is complicated. During the performance of the gift contract, the donor's own reasons or the donee's reasons may affect the performance of the gift contract. Therefore, various countries and regions endow the donor with certain rights to deal with "sudden changes". Firstly, the donor's economic situation has deteriorated seriously. It is unfair for the donor to require the donor to continue to perform his contractual obligations. Therefore, under this special background, the donor has refused to continue to perform his contractual obligations, and the poverty defense right has played its due role; Secondly, if the donee violates the donation contract, the donor exercises the statutory right of revocation within the scope of authority prescribed by law; Thirdly, the donor can revoke the gift before the transfer of the property rights of the gift, and the arbitrary revocation right protects the rights of the donor to the maximum extent.

The other reason for setting up the right of arbitrary revocation is that it is not involved in the general theory, that is, based on the legal binding force of the gift contract as a contract, it also requires the necessary legal restrictions on the donor's revocation of the gift. When the donor's gift commitment has become effective, or has been trusted by the donee, the donor's revocation of the gift must be conditional, and it cannot be revoked if the conditions not complied. This is also the meaning of the principle of freedom of contract. According to the contract law, a legally established contract is legally binding on the parties. The parties shall perform their obligations in accordance with the contract and shall not arbitrarily modify or terminate the contract.

3.3 Defects of the Right of Arbitrary Revocation

From the perspective of the whole contract law system, the model of the right of revocation is not perfect, and the trust interests of the donee may be damaged. The loss of trust interest refers to the irreparable loss incurred by the donee in the preparation of the donation contract based on the reasonable trust of the donor and the contract. The loss here can be understood as both economic loss, that is, a series of expenses incurred before the transfer of the gift property, and opportunity loss, that is, the opportunity to trade with other people was given up out of good faith for the donor to enter a contract.

In the gift contract, the donor claims that "the deterioration of its own economic conditions" or "the breach of the contract without cause" directly causes a certain degree of loss to the kind donee, and the donee may suffer economic losses. Therefore, the establishment of arbitrary revocation right will lead to

the risk of abuse of rights by the donor, and the rights of the donee are difficult to be protected.

4. Perfection of the Right of Arbitrary Cancellation of the Gift Contract

4.1 Protection of Expected Interests

When the contract obligation is not performed, the creditor can claim the protection of the expected interests. According to the doctrine of will, a promise has the effect of establishing a creditor's right. After the promise comes into effect, in order to realize the creditor's right, the remedy for nonperformance of the debt is the creditor's right to continue to perform, or the right to claim damages for expected interests as an alternative. At this point, the protection of performance interests (expected interests) is the effect of creditor's rights based on autonomy of will^[6]. The protection of reliance interest is based on corrective justice, while the protection of expectation interest is based on the protection of creditor's rights created by promise (contract). There are two substantial reasons for not protecting the expected interests of the donee. Firstly, the gift is not usually a commercial act, so there is no commercial need to enforce the gift to promote credit; Secondly, the enforcement of the gift will not promote the intimate relationship between the donor and the donee but will destroy the relationship.

4.2 Establishing the Protection Mechanism of Trust Interests

China is a typical human society, and reciprocity is one of the important ways for Chinese people to socialize. To maintain normal production and life transactions, mutual trust between social citizens is indispensable. Although the gift relationship does not occupy a dominant position in production and life transactions and is not as common as the sale and lease relationship in social production transactions, it cannot be denied that it is an indispensable link in the entire transaction chain. To resolve the various contradictions between the parties to the donation contract in judicial practice and ease the embarrassment caused by the one-sided protection of the donor by the donation relationship, it is urgent to establish a reasonable mechanism to balance the donation relationship.

The author believes that the establishment of the trust protection mechanism can refer to the trust protection mechanism of the common law system and the fault rules of the civil law system. The trust protection mechanism is created to protect the reasonable trust. Under this responsibility system, the donor does not need to have a fault in the contract, but only needs to prove that the loss of the donee's trust interest is caused by the donor's exercise of the arbitrary revocation right. As the donor exercises the right of revocation at will, which is a legal right endowed by law, the donor has no subjective fault. However, because the donee has made active preparations for the gift contract, the donee has suffered losses due to its reliance on the gift contract. Without reasonable compensation, it is obviously unfair to the donee.

5. Conclusions

To sum up, it is clear that the liability components of the compensation mechanism for loss of trust interest are as below. Firstly, the gift contract has been established. Secondly, the donee has reasonable trust based on the gift contract. Thirdly, the grantor's exercise of the right of revocation makes the donee suffer losses. Fourthly, the donee has no subjective fault, that is, the donee is in good faith. Fifthly, the donor is subjectively responsible. The donee's trust loss has a causal relationship with the donor's revocation, that is, the donee's trust loss is caused by the donor, and the donor needs to bear the corresponding responsibility.

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