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The Liability for Breach of the Preliminary Contract

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Abstract

The liability for breach of preliminary contract should not completely exclude the application of the enforcement of performance, but denying the application is supposed be taken as the principle, affirming it as the exception. When there is a dispute over the terms of liquidated damages and deposit, the provisions of the general contract law on them shall be applied. The amount of compensation for losses shall apply the compromise theory, considering the possibility of performance of the contract, the degree of achievement of the conditions for the conclusion of the contract and other factors.

Keywords

The Preliminary Contract; Liability for Breach of Contract; the Civil Code.

1. Introduction

In the legislative history, the preliminary contract has experienced the process from scratch, from coarse to fine in China. Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses provides for the preliminary contract for the first time.[1] Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts extends the preliminary contract from the sale of commodity house to all the contracts for sales.[2] Article 495 of Civil Code of the People's Republic of China clarifies the concept of the preliminary contract and the assumption of liability for breach of contract.[3] Interpretation by the Supreme Peoples Court of Several Issues Concerning the Application of Title One General Provisions of Book Three Contracts of the Civil Code of the People's Republic of China has refined the provisions of the Civil Code, stipulating in detail the recognition of the preliminary contract, the recognition of breach of the preliminary contract and the liability for breach of it.[4]

However, there are still many problems in the application of the relevant provisions of the preliminary contract. Article 495 (2) of the Civil Code stipulates that after a party breaches the preliminary contract, the other party can request it to bear the liability for breach of the preliminary contract, but it does not specify the specific types of liability for breach of contract. Article 8 of the Interpretation of General Provisions of Contracts only provides for the damages, and does not involve other remedies. In accordance with Article 577 of the Civil Code, besides paying damages, the types of liability for breach of contract includes enforcement and remedial measures, etc. This paper will mainly discusses whether the the enforcement of performance can be applied and the amount of the compensation for losses, which are more controversial. The solution of these problems is of great significance for unifying the path of judgment, effectively safeguarding the legitimate rights and interests of the parties and judicial justice. Hope China's experience on the issue of liability for breach of the preliminary contract contributes to the protection of parties' legal interests in the negotiation stage of contracting in the world.

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2. The Liability of The Enforcement of Performance

(1) Only affirming or denying the enforcement of performance of the preliminary contract each has their advantages and disadvantages.

The academic and practical world have not yet reached a consensus on the issue of the enforcement of performance. The affirmative opinion deems that the enforcement of performance can be taken to the preliminary contract. In the case of *Fujian Putian Guangyuan Feed Corp Ltd v Chen Hua*, the judge held that 'both parties can base on the article 8 in the preliminary contract to conclude the land lease agreement',[5] affirming the view of the enforcement of performance. The negative opinion says that the enforcement of performance shall not be applied to the preliminary contract for breach of it. The conflict between the affirmative and negative opinions mainly lies in the following aspects:

To begin with, from the perspective of an independent contract, the affirmative opinion thinks that the preliminary contract has the legal binding force as an independent contract, so the enforcement of performance is certainly applicable in the preliminary contract as the form of liability for breach of general contract.[6] The negative view holds that the enforcement of performance may lead to the same result between the preliminary contract and the official contract, so that the regulation function of the preliminary contract can't be realized, and confusing the preliminary contract with the official contract.[7] Comparatively speaking, the affirmative view is reasonable. At present, there is no special law to stipulate whether the enforcement of performance can be taken to the preliminary contract. According to the general contract law, there is no reason to deny the the enforcement of performance of the preliminary contract from this perspective. The negative argument that the effect of the preliminary contract and the performance of the official contract are the same is confusing the preliminary contract with the official contract. The the enforcement of performance of the preliminary contract is the conclusion of the official contract, while the performance of the official contract is the performance of its own. Is the conclusion of the official contract equivalent to the performance of it? In addition, some scholars have pointed out that the negative viewpoint ignores quantitative analysis in its reasoning from the perspective of confusion, which means it does not consider the specific scheme of compensation for losses. The difference in this respect can completely distinguish the preliminary contract from the official contract and achieve the value of the preliminary contract.[6] This point of view is of indicative value.

However, one view indicates that the enforcement of performance can only be applied when the civil liability like damages is not enough to compensate the creditor, and the default party can compensate the the creditor's losses through liquidated damages and compensation. So the enforcement of performance can't be applied.[8] This viewpoint is exactly the same as that of the common law, which holds that the breach of contract only leads to the consequence of damages, and the enforcement of performance is an exceptional remedy.[9] But China's legislation does not adopt this view, and some scholars even think that China is opposite to it, which means the creditor must first make a request for the enforcement of performance, and then file a request for damages.[10] Therefore, from the perspective of general contract, preliminary contract should not refuse the the enforcement of performance. As for other aspects on whether there will be limitations of it, the following will elucidate.

Secondly, based on the perspective of parties' autonomy, the affirmative opinion respects the parties' autonomy and considers that the object of the preliminary contract must be to sign the official contract within a certain period of time. [11] This view affirms the theory of contracting, but the theory of contracting does not mean that the contract can be enforced. From the angle of the basic analysis of the right to claim, the parties' right of request to the other party to conclude the official contract is generated based on the valid conclusion of the preliminary contract. Even if there is no cause of stopping or eliminating the right to claim, it does not mean

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that the right of claim can be enforced. The negative view holds that the conclusion of the official contract must follow the voluntary principle, and the enforcement of performance is tantamount to forcing the parties to make a contract [12], which is 'unable to be performed in law'.[13] However, some scholars object to the idea that the preliminary contract is the product of respecting the parties' freedom of will and guaranteeing the results of their autonomy. Strictly adhering to the validly established preliminary contract is also the request of parties' autonomy. They believe that the enforcement of performance of the preliminary contract violates the precondition that the default party has breached the preliminary contract, which does not respect the parties' autonomy.[14][6][8] The viewpoint is cogent. The logic that the enforcement of performance is equivalent to forcing the parties to make a contract and that it violates the parties' autonomy is tantamount to denying the freedom of the preliminary contract by the freedom of the official contract. After all, freedom is relative in civil law, and self-determination requires self-responsibility. Affirming the the enforcement of performance in the preliminary contract is also the embodiment of parties' autonomy. Furthermore, this view is also different from the logic that the the enforcement of performance of the preliminary contract is based on the purpose of it, which only holds that the enforcement of performance of the preliminary contract does not violate the principle of freedom of contract. The preliminary contract can take the enforcement performance as the form of liability for breach of it, which does not mean that the default party will inevitably bear the liability for the enforcement of performance after the breach of the preliminary contract. In addition, the so-called 'unable to be performed in law' refers to the impossibility of performance due to legal reasons.[15] Performing the obligation of concluding the official contract does not conform to 'unable to be performed in law'. Therefore, Affirming the enforcement of performance as the form of liability for breach of preliminary contract does not damage the freedom of contract, but respect the meaning of the contract.

Thirdly, from the nature of the subject matter of the contract, the negative opinion holds that the subject matter of the preliminary contract points to human behavior and has personal attributes. So it can't be because of its nature. Otherwise, it violates the theory of civil law and the spirit of modern law.[16] In the case of *Zhang Li v Xuzhou Tongli Real Estate Corp Ltd*, the decision held that the legal basis for the official contract to be concluded by the people's court is not sufficient, and it does not conform to the basic principle that enforcement is limited to things or acts but doesn't include the will payment.[17] However, some scholars believe that this does not belong to the situation that the subject matter of the obligation is unfit for enforcement, which is different from the circumstance of compulsory execution of personal attributes such as employment, labor service and so on.[18] First of all, the so-called condition that the subject matter of the obligation is unfit for enforcement refers to the situation with personal dependence, mainly referring to the labor contract and service contract. From the perspective of research of type, the preliminary contract has nothing to do with ethics, personal freedom and personal dignity, and the conclusion of the official contract is neither a debt of omission, nor does it force one party to continue to maintain a personal relationship.[19][14] Therefore, the enforcement of performance of preliminary contract does not belong to the scope of unenforceable subject matter. Secondly, the specific forms of the enforcement of performance include direct enforcement, substitute enforcement and indirect enforcement. The law can't force the party to directly perform its promise, but the creditor obtains the judgment, which will be on behalf of the debtor to perform. In this way, the purpose of the enforcement of performance is achieved and the personal freedom of the parties is not affected. Finally, the court or arbitration institution does not force the parties to make groundless expression of intention. The certainty of the content of the preliminary contract requires that the main provisions of the official contract are stipulated in the preliminary contract, which can

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be regarded that both parties have made due expression of intention for the conclusion of the official contract.[20] Therefore, the subject matter of the preliminary contract is enforceable.

Fourthly, from the perspective of the legal feasibility of the enforcement of performance, the affirmative theory holds that the content of the preliminary contract should be definite in the legal sense of China, which makes it possible to force the party who violates the preliminary contract to conclude the official contract.[21][20] Moreover, the current contract law in China have lowered the basic requirement of the establishment of contract, which only requires the party, the subject matter and the quantity. The preliminary contract can even be fulfilled without the coordination of the default party.[14] There are also regulations in support of the enforcement of performance in foreign countries. Article 894 of the German Code of Civil Procedure provides that the court judgment can substitute for the defendant's expression of intention to conclude a contract. Japan even simply omits the step of substituting judgment for the parties' intention. Article 556 of the Japanese Civil Code stipulates that the official contract is completed as long as one of the parties requires the signing of the contract. It's seen that there are precedents in the world to support the enforcement of performance of the preliminary contract. However, one view indicates that absolute support for the actual performance of the preliminary contract will make the identification of the preliminary contract too high requirements of its content and form, and the scope of protection is too narrow. [22] The point of view is advisable. The aforementioned countries which adopt the enforcement of performance, like Germany and Japan, all put forward higher requirements for the certainty of the content of the preliminary contract. However, China has no special provisions on the certainty of the content of the preliminary contract at present. Judging the preliminary contract only by the elements of the general contract and supporting its enforcement of performance will indeed greatly devalue the preliminary contract. However, if higher content and form requirements are put forward for the preliminary contract, the adjustment scope of it will be largely limited.

According to the negative view, from the perspective of China's current legal system, the Civil Enforcement Law is still in the drafting process, and China has no provisions of using the court judgment to replace the parties' intention.[23] In addition, the practice of substituting the intention of the parties by judgment mainly stems from the recognition of the theory of juristic act of real right in these countries, there are supporting provisions as well. In Germany, the preliminary contract is regarded as a proper means to adjust the *contractus re*, while in France, which doesn't affirm the theory of juristic act of real right, the enforcement of performance can't be applied to the preliminary contract. Scholars supporting the negative theory believe that China's civil law does not recognize the theory of juristic act of real right, and naturally there is no need to replace the intention of the parties with decision when the parties can't reach an agreement like Germany.[23] As scholars who hold the negative viewpoints have said, China's current legislation does not fully adopt the view of the theory of juristic act of real right, nor does it have relevant supporting provisions. It may be too radical to directly generalize and affirm the enforcement of performance in the preliminary contract, which not only lack effective regulation in the actual implementation stage of the enforcement of performance, but also easily lead to the imbalance of interests between the two parties. After all, the integrity degree and interest orientation vary from different contracts, so how to maximize the fairness is a problem that should be considered by legal hermeneutics. As for the provisions of the Japanese Civil Code, the academic community call it 'sale completion right' or 'preliminary completion right', whose legal nature is one of the formation rights.[24] The preliminary contract stipulated in Article 495 of the Civil Code is the right to claim, so it is obviously different from the Japanese model.

In addition, some scholars point out that even in countries or regions that recognize the theory of juristic act of real right, it is necessary to replace the parties' intention with judgment, but

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the relation between the act of debt and the act of real right is different from the relation between the preliminary contract and the official contract. Substituting the court judgment for the parties to conclude the official contract will devalue the existence of the preliminary contract.[8] The above-mentioned relations are indeed diverse. The conclusion of both contracts are the act of debt, and the preliminary contract plays an important role in the mitigation of *contractus re*. In this perspective, it may limit the scope of application of the preliminary contract. However, as for China, there is no burden of *contractus re*. When the party fails to perform the preliminary contract, the practice of directly executing the court's judgment will not lead to the derogation of the existence value of the preliminary contract, because the most important value of the existence of the preliminary contract is to conclude the official contract in the future. Therefore, the agreement approved by the parties in the early stage and fixed as the content of the preliminary contract must be the result of careful consideration by the parties. If the parties are willing to be bound by the preliminary contract, it will not damage the value of it. On the contrary, limiting the liability for breach of the preliminary contract is detrimental to the function of the preliminary contract. The parties' interests can also be protected through the system of *culpa in contrahendo* without concluding the preliminary contract.

Fifthly, from the perspective of modern market development, the affirmative opinion believes that enforcement of performance is in line with the requirements of modern market development. The modern market is highly divided and pays attention to the rapidness. It requires the enforcement of performance to ensure that all links in the supply chain are closely linked and will not break.[21] But from another point of view, when the parties have lost mutual trust, the enforcement of performance will bring inefficiency and uneconomy.[8] In fact, the latter view is more reasonable. There is no large-scale commercial activity in our country to widely use the preliminary contract now. Its disputes occur in the field of commodity house sales contract more, so there is no need to protect as the bill act with abstract action. In the performance of the preliminary contract, the subject matter is that both parties sign the official contract in the future, and the subsequent action is involved, including the performance of the official contract, etc. It is necessary to consider the trust basis of the parties. If the negotiation basis of honesty and fairness of the parties has been lost, it is no longer enforceable to force the default party to perform the preliminary contract.[16] In the case of *Huilin v Beijing Jiahong Real Estate Development Corp Ltd,* the court held this view.[25] If one party's behavior has made the other party can't trust it, it is possible to meet the situation stipulated in Article 563(4) of the Civil Code, for it's impossible to achieve the purpose of the contract. The parties can terminate the contract, for the law entitles the performing party with the right to unilaterally terminate the contract.

(2) The theory of content determination is desirable.

As can be seen from the above, the reasons for simply affirming or denying the enforcement of performance of the preliminary contract have their advantages and disadvantages. One view indicates that whether the parties are required to conclude the official contract should be judged according to the specific circumstances. They mainly consider differences between the system of preliminary contract and the enforcement of performance, legal limitation of the enforcement of performance in the contract law, and the consideration of balancing the interests of both parties.[26] This view is desirable. First of all, it should be clarified that whether the form of liability for breach of contract includes the enforcement of performance and whether the mode of the enforcement of performance can be applied in specific application. They belong to different categories. Secondly, it has been explained before that the enforcement of performance is the form of liability for breach of contract in general. Affirming the enforcement of performance in preliminary contract does not mean denial of parties' autonomy, nor does it belong to the situation where the enforcement of performance is not applicable as

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stipulated by law. Besides, there is room for wavering in the legal feasibility, and the issue of trust basis should be considered from the perspective of modern market. Therefore, the liability for breach of contract should not completely exclude the application of the enforcement of performance. However, whether the liability for enforcement of performance can be applied in specific cases needs to be classified and discussed.

The theory of content determination classifies the preliminary contract according to the content of the preliminary contract and assigns different liability for breach of preliminary contract to different types. In this way, some scholars classify the contract in line with the completeness of the content or the nature of the pending clauses, and divide the preliminary contract into those that should be concluded and those that should be negotiated. The former applies the enforcement of performance, while the latter doesn't. In this regard, it should be pointed out that no matter the content of the contract is detailed or not, the parties' are bound by the legal effect of concluding the official contract as long as the conditions for the establishment of the preliminary contract are met, which means the legal effect should not be different due to the completeness of the preliminary content. However, in terms of the liability for breach of contract, the classification of the theory of content determination can be used for reference. There is also a 'principle-exception' model which takes the content of the preliminary contract and the balance of the interests of the parties into consideration. It affirms the enforcement of performance as the principle and denies it as the exception [27], or the opposite.[28]

First of all, the two opposite viewpoints of the 'principle-exception' model needs to refer to the content of the preliminary contract, so as to judge whether the preliminary contract is able to be performed, whether the content is complete, and whether it can apply the enforcement of performance. In this way, the classification of content in the theory of content determination is worth reference. For instance, if affirming the enforcement of performance is taken as the principle, there are key subjective pending clauses related to the contract like quantity, the preliminary contract can't continue to be performed in the condition. For another example, if denying the enforcement of performance is regarded as the principle, the clauses of the contract in the preliminary contract have been complete and meet the standard of 'complete contract' [29] in the theory of content determination, it may be considered to apply the enforcement of performance.

Secondly, in addition to the consideration of the contents of the preliminary contract, it is also necessary to balance the interests of the parties. For example, if the enforcement of performance is supported in principle, but the enforcement will cause great uneconomy, or if the enforcement of performance is denied in principle, but non-enforcement will cause obvious injustice to the performing party, then it is necessary to maximize the interests of the parties according to the specific case, to set exceptions that are different from the principle.

Finally, what are the principle and the exception depends on the value orientation of the legal policy, whether it tends to widely apply the enforcement of performance or negate. The current law and judicial interpretation have all avoided answering this question. The Supreme People's Court tends to deny the enforcement of performance of the preliminary contract.[23] The current legal system in China does not have a supporting system to support the enforcement performance of the preliminary contract indeed. It is too radical to take the enforcement of performance of the preliminary contract as a principle. Therefore, denying the application of enforcement of performance of preliminary contract should be taken as the principle, but the contents of preliminary contract should also be considered comprehensively and the interests of the parties should be balanced. If the contents of preliminary contract are complete, and the enforcement of performance is beneficial to both parties, or failure to enforce performance will be obviously unfair to one of parties, the enforcement of performance can be applied.

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3. The Liability of Compensation for The Losses

Where performance fails to satisfy the agreement, the liability for breach of contract shall be borne as agreed upon by the parties. In the liability of compensation for the losses of breach of the preliminary contract, we need to firstly consider whether the parties had an agreement on liquidated damages and deposit. If there are above clauses, they should be applied at the beginning. If the parties do not agree on liquidated damages or deposit clauses, or agree on the above clauses but they are not enough to compensate for the losses, according to Article 588 of the Civil Code, it's necessary to bear the liability for damages. The following sections will discuss the application of liquidated damages and deposit clauses in the preliminary contract, as well as the amount of compensation for losses.

(1) The liquidated damages in the preliminary contract applies the provisions of *the Civil Code*. It shall be properly reduced only if the liquidated damages have exceeded 30% of the losses caused therefrom.

Article 585 of the Civil Code stipulates the rule of liquidated damages for contract. It is generally believed that the stipulation of liquidated damages in the Civil Code can certainly be applied to the preliminary contract.[7] Under the circumstance that the parties have clearly agreed on liquidated damages, the plaintiff's burden of proof can be reduced, which means it only need to prove that the defendant has breached the preliminary contract, and the burden of proving that there is no loss or the number of liquidated damages are too high is on the default party.[28] Judicial practice has always held a positive attitude towards the application of the general contract rules of liquidated damages. The question is when one of the parties request reduction of the liquidated damages for breach with the reason that it is too high, how to apply the rule of reduction of liquidated damages.

In the case of *Chongqing Jinhuan Enterprise Port Investment Corp Ltd v Chongqing Blu-ray Real Estate Development Corp Ltd*, the Supreme People's Court considers that the liquidated damages claimed by the parties are too high and request appropriate reduction. It holds that the people's court shall take the actual losses as the basis and take into account the performance of the contract, the degree of the parties' fault, the anticipated benefits and other comprehensive factors, measuring in accordance with the principles of fairness and good faith.[30] Although Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China has been invalidated, the 30% standard is stipulated in Article 12 of Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses (amended in 2020). The rule of reduction of liquidated damages can refer to this provision, combining judicial practice, taking actual losses as the basis, and regarding fairness and good faith as the principles, comprehensively considering the performance of the contract, the parties' faults and interests to measure it concretely.

(2) The deposits in the preliminary contract applies the provisions of the limitation of the amount of deposit in *the Civil Code*.

Article 586 of the Civil Code stipulates the amount of deposit, and Article 587 is the penalty for deposit. However, it is controversial in theory whether the preliminary contract adopt the limitation of the amount of deposit in the Civil Code. The affirmative opinion considers that, the preliminary contract, as an independent type of contract, shall apply the general contract law,[21][26] or that the law does not explicitly exclude the application of such restrictions,[7] or that the official contract applies the limitation on the amount of the deposit, so the preliminary contract, as a state before the conclusion of the official contract, should not exceed the limit.[22][31] In judicial practice, the 20% limitation is also widely applicable. For example, in the case of *Hele Hezhong Real Estate Corp Ltd. v Hong Liang*, the court ruled that the preliminary contract deposit does not exceed 20% of the subject amount of the main

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contract.[32] On the contrary, the negative theory believes that when the preliminary contract is concluded, the amount of the contract object of the official contract is probably not clear, and usually there is no clear agreement on the amount of the object, so the limitation of the amount of the deposit in the Civil Code can't be applied.[27] The affirmative view is advisable. As for the negative view, the application of the deposit restriction clause can't be denied just because the amount of the subject matter of the official contract may not be clear. On the one hand, even in the official contract, there are many official contracts where the amount of the subject matter is not specified. Is the deposit limitation not applicable to these contracts? Obviously not. On the other hand, in a preliminary contract, even if the amount of the subject matter is not clear, it can be evaluated by the contents of the preliminary contract and the damages of the parties. Therefore, the limitation of the amount of deposit in the Civil code should be applied to the contract.

(3) It is more objective, reasonable and operable to apply compromise theory to compensation for losses of the preliminary contract, rather than the theory of performance interests or the theory of reliance interests.

The preliminary contract is an independent contract. If the party breaches the valid preliminary contract shall compensate the other party for all losses foreseen at the time the preliminary contract was concluded, and compensation for their performance interests shall be taken into account. The performance interests of the preliminary contract are the interests that the creditor can obtain after the performance of the preliminary contract. In short, it can be embodied in the conclusion of the official contract.[14] Then what is the quantity of the performance interests of the preliminary contract? Article 8(2) of the Draft of the Interpretation of General Provisions of Contracts[33] provides that the amount of compensation for losses of the preliminary contract shall be between the compensation for *culpa in contrahendo* and the prospect interests. However, the formal Interpretation of General Provisions of Contracts deletes this provision, and the issue is evaded. At present, the academic world mainly reflects the differences between the theory of performance interests and the theory of reliance interests, which will be detailed in the following sections.

The theory of performance interests claims that the quantity of performance interests of the preliminary contract is equal to that of the official contract. [34] This view is mainly from the perspective of the performance result of the preliminary contract. It holds that the creditor has the right to request the debtor to enter into the official contract according to the preliminary contract, and request the debtor to perform the obligation based on the official contract, so the performance interests of the preliminary contract and that of the official contract are consistent.[34] In the case of *Beijing Elegant Decoration Engineering Corp Ltd v Beijing Henry Day Art Furniture Corp Ltd*, the court held that the damages of the breach of the preliminary contract includes the performance interests, and it shall be in accordance with the profit rate of 5% recognized by both parties to calculate the prospect interests.[35] Some scholars believe that the amount of compensation for losses is not limited to the reliance interests, which can play a role in urging the preliminary contract to be abided by to the maximum.[36]

With regard to the theory of performance interests, for one thing, from the perspective of the performance results of the preliminary contract, it is not excluded that the parties' preliminary contract can be enforced. For example, one opinion proposes that if the preliminary contract with the legal effect of contracting can apply the enforcement of performance, so the amount of compensation for losses can be extended to the performance interests, and the court will also consolidate trial.[31] At this time, the performance interests of the preliminary contract may be the same as the amount of compensation for losses of the official contract. However, in many cases it is not. As mentioned above, based on fairness, reality and other factors, denying the enforcement of performance in the preliminary contract is the principle, and in most cases the losses of the prospect interests of the preliminary contract is less than the that of the official

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contract. For some special circumstances, it can be argued by the means yet. Nevertheless, some scholars point out that the logic of 'enforcement of concluding the official contract--enforcement of performing the official contract--compensation for performance interests' is wrong, and the opinion confuses the enforcement of performance with compensation for losses.[37] The basis of claim rights for the enforcement of performance and compensation for losses are indeed different, and the enforcement of concluding the official contract isn't equivalent to the enforcement of performing the official contract. In the case of *Zhuang Jing v Beijing Changjiu Shida Automobile Sales Corp Ltd*, the court held that the preliminary contract only generates the right to make a contract, while the preliminary contract generates the right to perform a contract. Due to the failure to reach the official contract, it is unable to claim compensation for the performance interests of the official contract.[38] However, under the condition that the amount of the losses of the preliminary contract can be extended to that of the official contract, this approach can be used to calculate the performance interests of the preliminary contract. For another thing, as for the view of strengthening the binding force of preliminary contract by expanding the amount of compensation, it's unreasonable to subjectively expend it, for the principle of compensation is to fill the loss, rather than impose punishment. It can only be filled in according to objective losses. If the compensation of reliance interests can fill the losses, the defendant should only pay the reliance interests. Otherwise, if the preliminary contract has been absolutely complete and mature, like the situation that the preliminary contract can enforce to perform even without signing the official contract, it's possible to compensate for the performance interests to completely fill the losses.

The theory of reliance interests holds that the performance interests of the preliminary contract is closer to the reliance interests of the official contract.[39][28][29] Scholars who support it believe that, from the perspective of the content of losses, after breaching the contract, the performing party loses the opportunity to conclude the contract, there might be the cost paid for it at most, but not the official contract itself.[40] From the perspective of the nature of the losses, they claim that the nature of the losses is the losses of reliance interests, and what arising from the preliminary contract is a kind of expectation right.[40] Many judicial practices tend to regard the reliance interests as the standard of compensation for losses. For example, in the appeal case of *Cao Canru v Shanghai Rhines Real Estate Corp Ltd*, the court limited the amount of compensation to the price spread between the price of the house when the subscription agreement was signed and the market price of the same kind of house in 2004.[41] The losses of breach of preliminary contract is indeed different from that the official contract in nature. But in terms of the amount of compensation, based on the principle of full compensation, the damage compensation aims to completely fill the losses of the performing party, and the losses may not be within the quantity of reliance interests of the official contract, which is similar to the problem in the theory of performance interests. Limiting the amount of compensation for breach of preliminary contract only to the quantity of reliance interests may lead to the performing party's losses not being fully filled, which is detrimental to fairness.

To sum up, the theory of reliance interests and the theory of performance interests both have their own reasonable points, but simply adopting one or the other is not suitable for solving the disputes of the preliminary contract in different situations. It should be applied according to the specific circumstances, either to compensate for reliance interests, or to compensate for performance interests, or to compensate between the two as appropriate, the compromise theory. In this way, first of all, from the perspective of causal relationship, it can compensate the losses reasonably foreseen by the parties. Secondly, it is conducive to protecting the parties' legitimate rights and interests, and balancing the interests of both parties. Thirdly, it can avoid the confusion between the preliminary contract and the official contract, and the confusion between the breach of the preliminary contract and *culpa in contrahendo* caused by simply

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adopting one of the certain theory, and better plays the function of the preliminary contract system, rather than compressing its applicable space.

In respect of compromise theory, scholars make different divisions according to various factors that they think are important in the process of preliminary contract conclusion, including the theory of contracting stage, the theory of content determination and so on. According to the theory of contracting stage, the damages for breach of contract should be determined based on the contracting stage. The more mature the transaction is and the closer it is to the conclusion of the official contract, the compensation for losses is closer to the performance interests of the official contract.[22] The theory of contracting stage is reasonable in principle, but the problem lies in how to interpret the so-called 'maturity of transaction'. The theory of contracting stage does not provide a relatively objective and feasible method to judge it. If just based on 'contracting stage', it gives too much discretion to judges, which is easy to cause the inconsistency of judgment results. The theory of content determination, divides the contract types in accordance with different contents of preliminary contracts as mentioned above, and there are various amount of compensation for different content types. For example, the preliminary contract is divided into complete preliminary contract, simple preliminary contract and typical preliminary contract on the basis of its content completeness. The complete preliminary contract applies the theory of performance interests, while the simple preliminary contract and typical preliminary contract adopt the theory of reliance interests.[18] The theory provides specific classification and related considerations, which is more objective, reasonable and operable.

The Interpretation of General Provisions of Contracts takes the theory of content determination. On the one hand, Article 8(2) of Interpretation of General Provisions of Contracts has been greatly modified compared with the draft of it. The consideration of 'the possibility of performance of the official contract' has been deleted and replaced with 'the completeness of the preliminary contract in terms of the content'. The deleted content may be considered that the possibility of performance of the official contract is not necessarily related to the liability for breach of preliminary contract. After all, the performance of the preliminary contract corresponds to the conclusion of the official contract. And the addition of 'the completeness of the preliminary contract in terms of the content' means that the legislation gradually accepts the theory of the content determination, which is more objective and operable than the expression of the draft. On the other hand, Article 8(2) of the Interpretation of General Provisions of Contracts also stipulates the consideration of the factor of 'the satisfaction of the conditions for concluding of the official contract'. This can also be included in a broad scope of the theory of content determination. As mentioned above, pending clauses can be divided into subjective pending clauses and objective pending clauses according to their nature. Referring to the view of the Supreme People's Court, taking into account some conditions for signing the official contract is not mature, the parties conclude the preliminary contract instead. For instance, the property developer has not obtained a pre-sale license.[23] It obviously corresponds to the viewpoints of the degree of satisfaction of the objective pending clauses. It can be seen that the theory of content determination is inspired by the judgment of the liability for breach of contract. Therefore, when it comes to specific cases, it can also refer to the theory of the content determination for detailed explanation.

Moreover, what other factors may be considered comprehensively in addition to the above two factors? Some scholars have pointed out that the maturity of the negotiation, the time span between the conclusion of the official contract and the conclusion of the preliminary contract, and the maturity of other objective conditions related to the performance of the official contract are all substantive impact factors in the calculation of damages.[42] Some scholars also put forward factors such as the time of performance of the contract, the subjective fault degree of the parties, and the difficulty of re-signing.[43] The above considerations can be used for

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reference in practice. The most important is standing in the position with fairness and good faith to determine the factors to be considered, protecting and balancing the legitimate rights and interests of the parties, maintaining the security of the transaction, and letting the preliminary contract play its due function. In the case of *Zhong Chongqing v Shanghai Jinxuan Dadi Real Estate Project Development Corp Ltd*, the appellate court comprehensively considering the exact situation of the shop in the letter of intent involved, the development trend of Shanghai real estate market in recent years and the basis of the performance of the parties, decided the quantity of compensation for the breach of the preliminary contract between the reliance interests and the performance interests.[44] In the case of *Zhang Li v Xuzhou Tongli Real Estate Corp Ltd*, the court held:

> "[T]he losses caused to the plaintiff by the defendant's breach of contract should be determined according to the market conditions and current prices of commodity house at the time of signing the preliminary contract, but taking into account that the objective conditions such as construction costs have changed significantly compared with the time of concluding the contract. So it's necessary to comprehensively consider the price change process of the commodity house market and the amount of money paid by the plaintiff to the defendant to determine the amount of compensation."[17]

It shows that the flexibility of the factors considered. Therefore, the factors taken into account should be open, requiring judges to consider the specific circumstances of the case, in addition to the completeness of the preliminary contract in terms of the content and the satisfaction of the conditions for concluding of the official contract, but also take considerations of various reasonable factors in equal and good faith, in order to balance the interests of both parties and achieve social justice.

4. Conclusions

As for the liability for breach of contract, in terms of the liability for the enforcement of performance, it is a form of liability for breach of contract in general. The enforcement of performance of the preliminary contract does not mean denial of parties' autonomy, nor does it belong to the situation where the enforcement of performance is not applicable as prescribed by law. There is room for wavering in the legal feasibility, and the trust basis should be considered from the perspective of modern market. The liability for breach of preliminary contract should not completely exclude the application of the enforcement of performance, but based on the legislative and judicial status quo of in China, denying the application is supposed be taken as the principle. But it's necessary to comprehensively consider the content of the preliminary contract and the balance the interests of the parties. If the content is complete, and the enforcement of performance is beneficial to both parties or failure of the enforcement would be obviously unfair to one of the parties, it may be applied.

In terms of the liability of compensation or losses, if the parties have agreed on liquidated damages and deposit clauses, it will be preferentially applied. In case of disputes, the general contract law such as the Civil Code on liquidated damages and a deposit will be applied. If the parties has not agreed on liquidated damages or a deposit, or agreed on them but it's not enough to compensate for the losses, the default party shall to bear the liability for damages, the specific scope of compensation for losses simply adopt the reliance interests or performance interests are not appropriate. It's supposed to apply the compromise theory based on the specific circumstances to compensate between the two. The specific standard also refers to the theory of content determination, comprehensively considering the completeness of the preliminary contract in terms of the content, the satisfaction of the conditions for concluding of the official

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contract, and other factors that can be considered under specific circumstances of the case, to determine the amount of damages fairly and reasonably.

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