A Simple Analysis of the Contract Rescission Right of the Breaching Party

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Abstract: This article delves into the implications of extraterrestrial laws on China's system of contract rescission rights for breaching parties. The article compares similar systems, revealing the uniqueness of the breaching party's right to rescind contracts, and explores the termination point of contractual rights and obligations. Finally, suggestions are put forward to improve the Chinese Civil Code system and balance the rights and interests of both parties.

Keywords: Contract Rescission Right of Breaching Party; Extraterritorial Law; Theoretical Basis; Comparison of Similar Rules; Civil Code

1. Question Posed

It is the traditional view of contract law that the right to rescind a contract is only enjoyed by the observant party, and it is also the mainstream view of traditional theory of contract law in China [1]. Until 2006, when the case of Xinyu Company v. Feng Yumei was published [2], the mainstream view was challenged. After the Nanjing Xinyu case was published by the Supreme Court in 2006, there were widespread academic disputes about the rescission of contract by the defaulting party. In judicial practice, judges try to find a trace of rationality for the legitimacy of the party in breach of contract by interpreting Article 110 of Contract Law. However, China is not a case law country, and the guiding cases issued by the Supreme Court cannot be the basis of judgment. In order to alleviate the dilemma of contract deadlock in judicial practice, Article 48 of the Minutes of Civil and Commercial Trial Work of National Courts (hereinafter referred to as "Nine Civil Minutes") issued by the Supreme Court in 2019 stipulates that the defaulting party is allowed to terminate the contract under certain conditions, which provides important support for judges. However, Jiumin Minji belongs to informal origin and cannot be used as the basis for deciding cases. The dilemma of contract deadlock still cannot be solved from the root. At the same time, the academic debate on whether the breaching party has the right to terminate the contract is more intense.

With the start of the compilation of Civil Code, the problem of the party in breach of contract terminating has experienced twists and turns in the legislative process. Paragraph 3 of Article 353 of Civil Code Contract Series (First Draft) and Paragraph 3 of Article 353 of Civil Code Contract Series (Second Draft) stipulate the rule of the party in breach of contract terminating right. Due to the pressure of dispute, this content has been deleted from Civil Code Contract Series (Third Draft). Article 580 of the Civil Code, which was published until May 2020, provides that a party may apply to a court or arbitration body for termination of contractual rights and obligations in cases where the right to continue performance is excluded.

According to Article 580 of the Civil Code, if one party fails to perform a non-monetary obligation or the performance of a non-monetary obligation does not conform to the agreement, the other party may require performance, except in any of the following circumstances: (1) performance is legally or factually impossible;(2) the subject matter of the obligation is not suitable for compulsory performance or the cost of performance is too high; and (3) the creditor fails to require performance within a reasonable time limit. If the purpose of a contract cannot be fulfilled due to one of the exceptional circumstances specified in the preceding paragraph, the people's court or arbitration institution may, at the request of the parties, terminate the rights and obligations under the contract, but this shall not affect the assumption of liability for breach of contract.

Article 580 of Civil Code provides clear legal guidance for those cases of breach of contract that cannot be performed or the cost of performing the contract is too high for certain reasons. When continuing to perform the contract has failed to achieve the main purpose of the contract expected by both parties when the contract was concluded, and the contract has been in such a state of failure to perform and has not been dissolved for a long time, it will undoubtedly have an adverse impact on the economic activities of both parties.

Academic circles is a sensation, some scholars will object to the main reasons for sorting out the following: first, violation of the principle of strict contract. Since the NPC standing committee's law committee stated in its third draft that the stipulation that contracts can only be terminated after breach of contract runs counter to the principle of strict observance of contracts, it was deleted. Just as Professor Wang Liming said: "As a remedy system for breach of contract, only the non-breaching party enjoys the right of dissolution, which is conducive to maintaining the principle of strict observance of contract" [3]. Second, it will lead to moral hazard [3]. Opponents believe that if the defaulting party is allowed to terminate the contract, it may induce a deliberate breach of contract by one party, thereby obtaining greater benefits or reducing the losses that should have been suffered, but putting the non-defaulting party in a more disadvantageous position. Third, the right of the breaching party to terminate violates the system of contract termination. The right of rescission is a means for the non-defaulting party to obtain relief [4], even some scholars call it the debtor's autonomy when he defaults [5]. Therefore, if the breaching party is given the right to cancel, the intention of the system of contract cancellation is destroyed. Fourthly, the essence of the party in breach of contract's right of rescission is the turning of the choice of relief means. The choice of the breaching party to terminate the contract or to fulfill the contract violates the basic value of fairness and justice of law [6].

The author believes that the promulgation of Article 580 of the Civil Code creatively endows the breaching party with the right to terminate the contract under certain conditions. This innovative provision not only improves the system of the right of rescission in China's contract law, but also is an important innovation in the judicial practice of contract law. Through this provision, Civil Code provides a new and effective way to solve the long-standing problem of "contract deadlock" in judicial practice. This is undoubtedly a great progress in the process of building the rule of law in our country, and also provides a more fair and reasonable legal guarantee for both parties to the contract.

2. An Analysis of the Dissolution Right of the Party Violating the Contract in Extraterritorial Law

In the civil law countries, when faced with contract deadlock, there are two different solutions. France and Germany, as the two representatives, have adopted their own distinctive methods. Although the paths are different, both adhere to a core principle: the seriousness of the contract and fair compensation to the observant party.

France's response to the contract impasse, mainly depends on the intervention of the judiciary. In the French legal tradition, the decision of the authority is regarded as the key to solve the problem of legal relations. The French Civil Code makes it clear that any party wishing to terminate the contract must apply to the court. This means that even if the parties to the contract have reached a certain termination conditions at the time of signing, when these conditions are triggered, they still need to go through legal channels, and the court will make the final decision. This practice not only reflects France's deep respect for strict adherence to contracts, but also ensures the stability and security of market transactions to a certain extent. In recent years, in order to adapt to the rapidly changing market environment, France has also adjusted its contract termination system, introducing the automatic termination mode under the permanent performance barrier, thus improving the efficiency and flexibility of contract termination. Article 1142 of the French Civil Code stipulates that the debtor's obligation to perform the contract will be converted into damages if it is clear that the debtor will not continue to perform the contract [7]. Different from France, Germany in dealing with the contract deadlock, pay more attention to give the

right to terminate the contract.

In the German legal system, the provisions on the rescission of the contract has its own characteristics, mainly reflected in the payment of obstacles and major causes of the termination of the contract rights and obligations. First of all, the performance obstacle rule is an important concept in the German contract law.

According to the first paragraph of article 275 of the German Civil Code (the new debt law), the debtor can refuse to perform the contract obligation to the creditor based on the payment, that is, in the case of the debtor cannot perform, no matter the performance cannot be from the beginning or in the future, no matter it is subjective or objective, the creditor's request to continue to perform is excluded [8]. Whether this is not from the beginning or in the future, subjective or objective, the debtor shall have the right to refuse to continue to perform the contract obligations. This provision gives the debtor the right of defense in certain circumstances, making it in the contract to fulfill the obstacles to legally get rid of the bondage of the contractual obligations. At the same time, it also means that the creditor's right to continue to perform the claim is excluded in this case, but its treatment in the contractual relationship to pay the obligation is exempted accordingly. Secondly, the German civil code also provides for the termination of the contract rights and obligations under the major cause of the rules. In case of any major cause during the performance of the Contract, the rights and obligations of both parties to the Contract shall be terminated in the future. This provision for the parties to the contract provides a way to terminate the contract under special circumstances. However, some scholars point out that the concept of major cause is relatively abstract and the content is not clear, which may cause uncertainty in judicial practice. Nevertheless, the rule still has certain reference significance for our country to deal with similar situations, especially in determining the subjectivity of "contract purpose."

In terms of damages relief, German law provides two ways: one is to deprive the breaching party of the benefits arising from the breach of contract, which is similar to the theory of return of benefits in French law, but the provisions of German law are stricter; the other is substitute damages, that is, the creditor can ask the debtor to provide substitute performance or goods in the case of inability to continue performance. This approach requires two conditions: the causal relationship between the breach and the payment received by the debtor, and the identity of the failure to perform with the substitute performance received by the debtor.

On the whole, France and Germany have adopted different strategies in dealing with the contract deadlock, but both are committed to safeguarding the seriousness of the contract and the rights and interests of the observant parties. These two models have certain referential significance for our country. We can not only learn the French model in the judicial organs of the gatekeeper role, in order to ensure the fairness and authority of the termination of the contract, you can also refer to the German model of payment cannot be detailed provisions and major reasons, and its clear provisions on damages. Of course, any reference to the legal system needs to be combined with the actual situation of our country, in order to ensure its applicability and effectiveness in our country.

Anglo-American law system countries adopt different methods to solve the contract deadlock. The United Kingdom tends to use the "contract frustration theory," while the United States focuses more on the "efficiency default theory." Although there are some differences in concept, American law inherits the characteristics of English law, and it is more flexible and open [9]. In the common law system, the termination of the contract and the termination of the contract is not strictly distinguished. Once the contract is terminated, the parties will no longer need to bear the obligation to treat each other to pay. At the same time, Anglo-American law system also carefully considers the termination status of different types of contracts. For temporary contracts, rights and obligations end after the termination is declared, while for continuing contracts, their legal effects only face the future.

In Britain, the theory of contract frustration is a breakthrough to the traditional principle of strict adherence to the contract. When a party to the contract due to external factors beyond the control of the contract cannot continue to perform, the party may apply for termination of the contract according to the

contract frustration theory. This theory is mainly applicable to the special events lead to the contract cannot be performed, continue to perform will violate the relevant laws, or continue to perform and the parties to the original expected serious discrepancy, etc. For example, in the case of a business purpose completely frustrated, the parties to a contract may apply for termination of the contract. In addition, if the contract is substantially interrupted for a long period of time, may also meet the conditions of the contract.

Different from Britain, the United States pays more attention to the theory of efficient breach of contract when dealing with the problem of contract deadlock. The theory holds that, if the breaching party through the breach of contract benefits more than the observant party's expected benefits, and the liability for breach of contract damages is limited to the expected benefits, then the breaching party can choose to default. In such a case, the court will not order the defaulting party to continue to perform the contract if the damages provided by the defaulting party can fully compensate the non-defaulting party's losses. This approach helps to determine the termination of the contract in a timely manner, prevent the loss from expanding, and allow the parties to move to the next stage of the transaction faster.

Generally speaking, the provisions of contract rescission in Anglo-American law system countries embody the characteristics of flexibility and practicality. Not only do they consider different types of contracts and specific situations, they also provide a variety of solutions to suit different scenarios and needs. Therefore the article has some reference value to perfect the system of rescission of contract in China.

3. Theoretical Basis of Contract Termination Right of the Party in Default

1. Efficiency theory Efficiency is one of the basic values pursued by private law [10]. There is a phenomenon of ignoring efficiency value in civil law circles in China [11]. Efficiency breach theory provides strong support for the right of contract cancellation of the defaulting party from the perspective of economics. The theory argues that in certain circumstances it may be more efficient and economical for the defaulting party to opt out of the contract. Efficiency is the core foundation of the system of the party in breach of contract rescission right. Contract formation and performance is designed to protect the interests of both parties, but in the course of contract performance, there may be various unexpected circumstances. In these cases, continued performance may result in unexpected errors or high costs for both parties. Therefore, giving the breaching party the right to rescind the contract helps to achieve higher efficiency under certain circumstances while protecting the interests of both parties. Specifically, when the cost of continuing to perform the contract far exceeds the benefits that both parties can derive from the contract, termination becomes a more reasonable option. This practice helps to avoid ineffective investment and waste of resources, thus achieving optimal allocation of social resources.

Efficiency breach theory, as an idea of contract cancellation from the perspective of economics, its practical significance lies in optimizing resource allocation and reducing ineffective social and economic costs. When the two parties of a contract are deadlocked, the theory provides a flexible solution, that is, by comparing the benefits of breach with the cost of performance, to decide whether to choose breach. This is not to encourage arbitrary default, but rather to seek a more economical solution under certain circumstances [3]. For example, in contracts such as housing leases, the application of efficiency default theory can help parties make more informed decisions in the face of market changes. For example, when rental market prices drop significantly and the original contract rent is too high, the lessee may consider defaulting to seek a more economical lease option. In this case, if the economic benefits of default exceed the expected benefits of compliance, and the breaching party can bear the resulting liability for damages, then efficiency default may become a reasonable choice [12].

2. The principle of voluntariness is a basic principle in contract law, which emphasizes that both parties to a contract have the right to voluntarily decide whether to sign a contract, choose a contract object and determine the content of the contract. In the case that the contract cannot continue to be performed, giving the breaching party the

right to terminate is actually respecting and embodying the voluntary principle of the contract. This practice allows both parties to have more choices when faced with difficulties, thus better safeguarding their legitimate rights and interests [3]. The intrinsic value of contracts lies in ensuring transaction safety, promoting transaction efficiency and maintaining social fairness and justice. The theory of efficient breach agrees with the intrinsic value of contract in some cases. For example, in business, it may be in the long-term interest of both contracting parties to stop losses and seek new opportunities for cooperation. This flexible way of contract cancellation helps to release the bound resources, comply with the voluntary principle of contract, conform to social efficiency, and promote the healthy development of market economy.

3. Principle of Fairness and Justice Principle of Fairness and Justice is also an important theoretical basis to support the right of the breaching party to terminate the contract. In some special cases, in order to maintain the fairness and justice of the contract, it is particularly necessary to give the breaching party the right of rescission. For example, when the non-breaching party takes advantage of its dominant position in the contract to unfairly suppress or exploit the breaching party, allowing the breaching party to terminate the contract can effectively balance the interests of both parties and prevent one party from using the contract to unfairly bind and restrict the other party [13]. This practice helps to achieve the objectives of substantive justice and fair trade in contracts.

The principle of fairness and justice is one of the basic principles of civil law, which requires that the rights and obligations of all parties in civil activities be reasonably determined. In the case of efficient breach, the principle of fairness and justice also applies. When the breaching party chooses to breach, it must bear the liability for damages arising therefrom to ensure that the interests of the non-breaching party are reasonably compensated. Such damages should be calculated on the basis of the actual losses of the non-defaulting party in order to achieve true equity and justice.

4. Limitation of continued performance Continued performance is the preferred remedy for breach of contract, but in some cases, continued performance may not be the best choice due to objective factors or the inability to achieve the purpose of the contract. At this time, the theory of efficiency breach can be used as a supplementary remedy, allowing the breaching party to choose breach of contract on the premise of bearing the liability for damages. This approach helps to avoid unnecessary disputes and waste of resources and achieve more efficient resource allocation.

4. A Comparison between the Right of Dissolution of Contract of the Defaulting Party and the Rule of Similarity

1. Compared with the principle of change of circumstances: Article 533 of the Civil Code After the establishment of a contract, the basic conditions of the contract have undergone major changes that cannot be foreseen by the parties at the time of conclusion of the contract and are not commercial risks. If it is obviously unfair to one party to continue to perform the contract, the party adversely affected may renegotiate with the other party; If consultation fails within a reasonable time limit, the parties may request a people's court or an arbitration institution to modify or terminate the contract. The people's court or arbitration institution shall modify or terminate the contract according to the principle of fairness in light of the actual circumstances of the case.

There is a clear difference between change of circumstances and contract deadlock. Contract deadlock mainly refers to the impossibility, unreality and meaninglessness of contract performance. It refers to the fact that the parties did not foresee and unavoidable reasons when concluding the contract make the contract impossible to perform or the further performance is unrealistic or the cost is too high. The purpose of the contract of one party has been impossible to realize, and the contract can be solved. Although deadlock of contract and change of circumstances are very similar, they have subtle and essential differences: (1) different extension: the extension of deadlock of contract is wider than change of circumstances, including the death of the parties, the loss of specific subject matter, the non-existence of performance mode and the violation of contract in addition to common causes such as force majeure and accidents. (2) Different standards: obvious

unfairness is the objective standard to judge the change of circumstances; while the contract deadlock is caused by some objective reasons that the contract basis no longer exists or the contract obligations have undergone fundamental changes, resulting in the inability to perform the contract or the performance is very difficult and expensive, which is completely different from the obvious unfairness of the change of circumstances. (3) Different effects on the validity of the contract: in the case of contract deadlock, apply to the judicial organ for automatic termination of the contract, and the validity of the contract will be extinguished; the change of circumstances does not necessarily lead to the termination of the contract, but only endows one party with the right to request modification or termination of the contract. Whether to modify or terminate the contract depends on the judgment of the court or arbitration organization. (4) The responsibilities of the parties are different: the deadlock of the contract relieves the parties of their future obligations, and both parties are responsible for restoring the property relationship between the two parties to the condition at the beginning of the contract and the breaching party will bear damages; the situation changes, and the party exercising the right of claim still needs to compensate the other party for losses or make appropriate compensation.

Although the principle of rebus sic stantibus and the right of contract rescission pursue the same value goal, there are significant differences between them in terms of applicable conditions and legal consequences. The principle of change of circumstances mainly applies to the situation that the objective basis changes significantly after the establishment of the contract, while the right of contract termination of the breaching party pays more attention to the situation that the contract cannot be performed normally due to the breaching party's own reasons. In addition, the principle of rebus sic stantibus does not involve the liability for breach of contract, while the right of the breaching party to terminate the contract may be accompanied by the liability for breach of contract.

2. Compared with the rule of force majeure, both the rule of force majeure and the right to terminate the contract of the defaulting party have the legal effect of terminating the contract, but they are different in the way of exercising and the applicable conditions. When the purpose of the contract cannot be realized due to force majeure, either party has the right to terminate the contract directly without judicial intervention. The right to terminate the contract of the defaulting party needs to be exercised through judicial procedure or arbitration procedure. In addition, the application of force majeure should meet three conditions: unforeseeable, unavoidable and insurmountable, while the applicable conditions of the right of rescission of contract of the defaulting party are related to the relevant circumstances stipulated in Article 580, Paragraph 1 of Civil Code.

3. Compared with the derogation rule, the derogation rule requires the non-defaulting party to actively take measures to prevent the loss from expanding when facing the contract deadlock. However, this rule has some limitations in solving the problem of contract deadlock. Firstly, the standard of judgment of loss extension is unclear and depends on the discretion of the court. Secondly, the derogation rules only work in the scope of damages, and do not fundamentally solve the problem of resource allocation and whether the contract should be cancelled. Finally, derogation rules may not be effective in preventing non-defaulting parties from allowing deadlocks to occur, and in some cases, non-termination of the contract by non-defaulting parties may not necessarily lead to loss extension.

To sum up, although the principle of change of circumstances, the rule of force majeure and the rule of derogation are similar to the right of the breaching party to terminate the contract in some aspects, they are obviously different in terms of applicable conditions, exercise methods and legal consequences. Therefore, when dealing with the problem of contract deadlock, we should fully consider the characteristics and limitations of various rules in order to better protect the legitimate rights and interests of the parties and improve the efficiency of resource allocation.

5. Time Point of Contract Rescission Right of Breaching Party

Article 59 where a party requests termination of the contractual rights and obligations relationship in accordance with Paragraph 2 of Article 580 of the Civil Code, the people's

court shall generally take the time when the copy of the complaint is served on the other party as the time for termination of the contractual rights and obligations relationship. According to the specific circumstances of the case, if it is more in line with the principles of fairness and good faith to take other time as the time for the termination of the contractual rights and obligations, the people's court may take that time as the time for the termination of the contractual rights and obligations, but it shall fully explain the reasons in the judgment document. [14] The Supreme People's Court has changed a lot in the provisions on the time for the defaulting party to apply for cancellation of the contract. On the whole, there exists a court discretion doctrine and a determination date doctrine. From the point of view of the functional purpose of contract termination, system interpretation and internal logic of rule design, the definite date theory is a better and ideal choice to realize efficiency, conform to rule system and arbitrary rule design. Although the discretionary doctrine describes most of the actual practice of the courts, its doctrinal kernel remains only the definitive date doctrine. This analysis can provide better guidance for the court in determining the general and exceptional circumstances of the time point of rescission in the application for rescission of contract by the defaulting party.

6. Suggestions on Perfecting the System of Contract Termination Right of the Party in Default under the Background of Civil Code of China

1. Clarifying the constitutive elements of the right to rescind the contract of the defaulting party In order to judge more accurately when the defaulting party can exercise the right to rescind the contract, it is necessary to clarify its constitutive elements:

(1) The cost of contract performance and the purpose of contract: When the cost of continuing to perform the contract is too high or the purpose of the contract cannot be realized, the breaching party shall have the right to terminate the contract. In assessing whether the purpose of the contract could not be achieved, the gravity of the breach and its fundamental impact on the achievement of the purpose of the contract should be considered. This can be judged comprehensively by value factor, time factor and trust factor [15].

(2) Type of contract and characteristics of subject matter: The right to terminate the contract of the defaulting party mainly applies to non-monetary payment contracts, and the subject matter should be non-specific. This is because there is usually no case that the contract for payment of money cannot be performed continuously, and the specific object is not suitable for the object of the right to terminate the contract of the breaching party because of its non-substitutability.

(3) Subjective state of the defaulting party: When the defaulting party exercises the right to terminate the contract, it should have no malicious intent subjectively. This requires that the breaching party was not at fault at the time of signing the contract and that its breach was motivated by considerations of avoiding greater loss of interest. Careful investigation of the subjective state of the breaching party can prevent the abuse of the right to rescind the contract [16].

2. To balance the interests of the defaulting party and the non-defaulting party and maintain the order and safety of the transaction, the defaulting party shall ensure that sufficient and definite damages are paid to the non-defaulting party when exercising its right to terminate the contract. This may include compensation for reliance interest or compensation for performance interest, but the non-defaulting party may choose only one. Such a provision is intended to prevent the breaching party from making use of the right to terminate the contract for profit, while protecting the legitimate rights and interests of the non-breaching party.

3. Standardize the procedure of exercising the right to rescind the contract of the defaulting party. The right to rescind the contract of the defaulting party is not a right of defense, and its exercise needs to follow certain procedural conditions. According to the Civil Code, the exercise of the right to rescind the contract of the defaulting party should be judged by the people's court. This procedural condition can to some extent prevent the breaching party from abusing the right to terminate the contract and ensure that the court can balance the interests of the non-breaching party and the breaching party according to the specific circumstances of the case. By endowing the breaching party

with the litigation right of contract rescission, it can promote the smooth breakthrough of contract deadlock and further promote the development of social economy.

To sum up, we can further improve the system of contract rescission right of breaching party under the background of Civil Code by clarifying the constitutive elements of contract rescission right of breaching party, ensuring adequate compensation for damages and standardizing the exercise procedure. This will help balance the interests of both parties to the contract, maintain transaction order and security, and promote the healthy development of social economy.

7. Concluding Remarks

After a brief discussion on the right of the breaching party to terminate the contract, we not only examine the diversity of this system from the perspective of extraterritorial law, but also deeply analyze its theoretical basis and clarify the boundary of the right of the breaching party to terminate the contract under certain circumstances. By comparing with the principle of change of circumstances, force majeure rule and derogation rule, we further understand the uniqueness and necessity of the breaching party's right to rescind the contract. At the same time, we also discuss the termination time point of contract rights and obligations, which provides clear guidance for practical operation. On this basis, combined with the legislative background of China's Civil Code, we put forward a series of suggestions to improve the system of contract rescission right of the breaching party, aiming at balancing the rights and interests of both parties of the contract better and maintaining the fairness and efficiency of market transactions. After the analysis of this paper, it is reasonable and necessary to give the breaching party the right to terminate the contract under certain conditions. This not only conforms to the basic principles of freedom of contract, fairness and justice, but also helps to improve market efficiency and optimize resource allocation.

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