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Theoretical Analysis and Application Optimization of the Breaching Party's Right of Rescission

Zhou Zhou[1,*]

[1]*Law School, Anhui University of Finance and Economics, Bengbu, China*
[*]*Corresponding author*

Abstract: *Although the existence of the breaching party's right of rescission is indirectly recognized in the practice of judicial adjudication, there has always been a great controversy among scholars as to whether the breaching party has the right of rescission and how it should exercise the right of rescission. The theoretical basis of the breaching party's right of rescission is mainly derived from the theory of efficiency breach in economics, but its legal applicability is still questionable. Article 580 of the Civil Code is a formal response to the breaching party's right of rescission, but does not explicitly stipulate that the breaching party has the right of rescission. The legitimacy of the breaching party's right of rescission still needs to be explored, and interpreting Article 580 as the breaching party has the right to apply for termination of the contract or the best way to solve the contract deadlock, and it is also the best response to maintaining the unity of the civil law system.*

Keywords: *Contract deadlock; The breaching party's right of rescission; Applying for termination of contract*

1. Introduction

There will be a contractual deadlock in the process of contract performance, in which the purpose of the contract cannot be achieved, and at the same time it is not conducive to the stable development of the trading market. The right of rescission of the breaching party is a favorable way to solve the contractual deadlock, and by giving the breaching party the right to rescind the contract, it can effectively resolve the embarrassing situation of the contractual deadlock. However, there are many disputes over whether the breaching party can have the right of rescission, and judicial practice has also fallen into the dilemma of not having uniform applicable rules, so making a reasonable positioning of the breaching party's right of rescission can sort out the legal logic behind it and provide suggestions for optimizing the application of the rules.

2. The Formation of a Contractual Deadlock and the Cracking Function of the Breaching Party's Right of Rescission

2.1. The Negative Effects of Contractual Deadlock

Contract deadlock is a practical problem that affects the realization of the interests of the parties in the performance of the contract, which is not a legal normative term and is not clearly stipulated by law. The reality is unpredictable, unpredictable and complex, so it is easy to fail to achieve the intended purpose of the contract during the performance of the contract, and contract deadlock will result. Professor Wang Liming believes that contract deadlock mainly refers to the fact that in a long-term contract, one party cannot perform the long-term contract due to changes in the economic situation, performance ability and other reasons, and needs to terminate the contract in advance, while the other party refuses to terminate the contract [1]. The formation of contract deadlock makes the transaction between the parties in a state of stagnation, and the two parties will also have a deadlock, which has formed different degrees of obstacles to the realization of the interests of both parties, and in the long run, the frequent occurrence and long-term existence of contract deadlock will also block the flow of resources and is not conducive to the stable operation of the trading market.

Contract deadlock tied to the breaching party's right of rescission is the narrowest concept, if a broad sense of contract deadlock is adopted, the contract deadlock is not necessarily related to the breaching party, as long as the parties form a deadlock, a de facto contract deadlock will occur [2]. A broad

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interpretation of contractual deadlock is more in line with textual interpretation and more suitable for the needs of judicial practice. Under a broad interpretation, the breaching party's right of rescission Under this view, the extension of the contract deadlock is expanded, and no longer forms a one-to-one binding relationship with the parties' breach of contract, that is, as long as there is a stalemate between the parties and it is difficult to resolve it by continuing to perform the contract, the parties can take relief measures, rather than being limited by the situation of one party's breach of contract, which can avoid the occurrence of malicious breach of contract. In this case, the constituent conditions of the contract deadlock should include the following two: first, one party requests the other party to continue to perform the contract, which is conducive to the continuation and stability of the transaction, and only after requesting the continued performance of the contract can it be known whether the contract can continue to be performed; Second, the contract cannot be actually performed, and the inability to actually perform here does not mean the objective inability to perform, but refers to the excessive cost of performance, resulting in the consequences of outweighing the losses. Under this constitutive condition of contract deadlock, the right of rescission of the breaching party studied in this paper is a contract deadlock arising from the breach of contract by one of the parties, and should be analyzed as a special form of contract deadlock.

Contract deadlock does not mean that the contract cannot continue to be performed, on the contrary, under the deadlock of the contract deadlock, the parties have the basis for continuing to perform the contract, but the continued performance of the contract harms the interests of the other party. The real reason for choosing actual performance may be that the exclusivity and uniqueness of the subject matter will greatly reduce the cost of judicial supervision [3]. Therefore, when the subject matter of the contract is not special, it is more appropriate to terminate the performance of the contract rather than force the parties to complete the performance of the contract. When a party is in breach of contract, although it can provide relief to it, it should be liable for breach of contract, which is the fundamental difference between contractual deadlock and other situations where the contract cannot be performed, such as a change of circumstances. Therefore, when dealing with the situation of contract deadlock, it should also be distinguished from the change of circumstances, etc., and the occurrence of liability for breach of contract is a distinctive feature of different legal consequences. Liability for breach of contract is a burden imposed on the breaching party and a punitive consequence of the breach, and it is clear that the non-breaching party should not bear such a burden.

2.2. The Specific Practice of The Breaching Party's Right of Rescission in the Deadlock of the Contract

Rescission of a contract is less restrictive for the non-breaching party and can be formed by the unilateral expression of intention of one party. Obviously, this unrestricted form of rescission is not intended for the breaching party in breach and generally applies to the non-breaching party to the contract. The relevant application of the breaching party's right of rescission in practice is not very long, and its application in practice to resolve the problem of contract deadlock was first reflected in the "Xinyu Company v. Feng Yumei case" published in the Gazette of the Supreme People's Court No. 6 in 2006. Xinyu Housing rented out its own houses other than those sold for use as a shopping mall, which was closed twice and made it difficult for other shop users to operate. Therefore, Xinyu Company proposed to rearrange Times Square, hoping to terminate the shop sales contract with the owner, but Feng Yumei did not agree to the cancellation. Xinyu Company held that the above circumstances constituted a change of circumstances and requested an order to rescind the shop sales contract signed between the defendant and the plaintiff. The court's final decision in the case was to rescind the contract with guaranteed the actual vested interests of the other party.

The phenomenon of contract deadlock occurs from time to time in subsequent judicial practice, and a search of "contract deadlock" as the keyword can retrieve 3,317 civil cause cases, a large number and rapid growth. In such cases, although some rulings hold that the breaching party's right to rescind the contract can break the deadlock of the contract, the breaching party's losses need not continue to expand, and the non-breaching party's resources can also be flowed, which is conducive to balancing the interests of both parties and promoting the redistribution of market resources. However, there is still controversy in the award, and the dispute is whether the breaching party should have the right to rescind the contract, and disputes in practice have arisen from time to time, and litigation difficulties on how to resolve the breaching party's right of rescission continue to exist. In the face of judicial cases of contract deadlock, the court has two ways of adjudicating: one is to simulate the parties' will, which will lead to the situation of "implied consensual rescission" and "express consensual rescission"; Second, the court's bold exercise of discretionary power will lead to a situation of "judicial rescission" or "discretionary rescission" divorced from the parties' basic civil rights [4]. Universal procedural rules are difficult to form and are

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not explicitly stipulated.

2.3. The Theoretical Source of the Breaching Party's Right of Rescission

The people's court held that "when the financial and material resources required by the breaching party to continue to perform the contract exceed the benefits that both parties to the contract can obtain based on the performance of the contract, the breaching party should be allowed to rescind the contract and replace the continued performance with compensation for losses." This view breaks through the traditional limitation that the breaching party cannot rescind the contract, and allows the breaching party to rescind the contract under the restrictive conditions, replacing actual performance with the form of assuming liability for breach of contract. Mainly from the macro perspective of economy and society, it reflects the value orientation of maximizing the overall interests of society, integrates the consideration of economic interests, and is a concrete manifestation of the integration of efficiency breach theory into practical application.

Efficiency default theory is a theory based on the pursuit of social efficiency, reflecting the tilt of efficiency between fairness and efficiency. The theory of efficiency breach of contract should meet two conditions, one is that the profit from the breach of contract of the breaching party must be left over after compensating the counterparty to the contract, and the other is that the damages must be an optional form of liability for breach of contract by the breaching party [5]. It can be seen that the core of the efficiency breach is not the breach of contract, but the right of the breaching party to achieve the termination of the contract through damages. Granting the breaching party a right of rescission may be a misreading of the efficiency breach theory, and the breaching party's claim to rescind the contract has not escaped the contract law mechanism at the expense of damages.

Under the premise of the theory of efficiency breach, either party can decide whether to actually perform according to the actual situation, and the mandatory observance of the contract should not be a mandatory provision made by the law. On this basis, the theory of efficiency breach can play a good supplementary role in the analysis of traditional contract law issues, and can also fully alleviate the burden of judicial enforcement [6]. When the continued performance of the contract will bring higher performance costs to the parties, the efficiency breach theory becomes the basis for cracking this unequal relationship. In the case of contract deadlock, the continued performance of the contract will cause the loss of overall interests and is not conducive to the stability of the trading market. Therefore, when the continued performance of one party is not the only way for the other party to obtain a vested interest, the breaching party should be allowed to rescind the contract and reach a new agreement through other means to compensate the non-breaching party for its losses.

3. Theoretical Dispute over the Breaching Party's Right of Rescission

3.1. Origin of the Dispute

The traditional civil law view holds that the right to rescind the contract is the exclusive right of the non-breaching party, and the breaching party does not have the right to actively rescind the contract relationship. According to the principle of sunt servanda, only the non-breaching party has traditionally enjoyed the right to rescind the contract. Article 353, paragraph 3 of the draft contract of the Civil Code directly gives the breaching party the right to apply for rescission, so that the breaching party has the same right of rescission as the non-breaching party. In judicial practice, in many cases, the breaching party is granted the right to rescind the contract, but whether the breaching party should enjoy the right of rescission has always been the focus of controversy in academic circles, and the above provisions were greatly adjusted when the Civil Code was finally concluded. The final written clause stipulates that the parties can apply for termination of the contract and the termination of the contract does not affect the liability for breach of contract, so the breaching party enjoys the right to form a lawsuit, which requires a people's court or arbitration institution to make a ruling. However, due to different value considerations, there is still a dispute as to whether the breaching party should have the right to rescind the contract.

3.2. The Focus of the Dispute

Regarding the legitimacy of the exercise of the right of rescission by the breaching party, there are hundreds of schools of thought in the academic circles, and there are different views, which can be generally divided into two factions: positive theory and negative theory. It affirmed that the breaching

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party should be given the right to rescind the contract, but only under strict conditions or in specific circumstances. The continuation of a contract that can no longer be performed will have a negative impact on the breaching party and will not be positive for the non-breaching party. After all, the original intention of the Civil Law is not to punish and deter, but to provide relief and compensation under the condition of party autonomy to achieve a balance between the interests of the parties. After all, civil law is not a punishment law, but a law of relief and compensation, so that the liberation of the parties is more in line with fairness and justice [7]. Adhering to the traditional civil law viewpoint, it is believed that the right to rescind the contract has the effect of rescinding the contractual obligations of the parties and dissolving the binding force of the contract, which is an exception to the traditional concept of "the contract must be observed" in the civil law tradition, and the establishment and application of the statutory rescission right should be particularly cautious and strict. Granting the breaching party the right of rescission undermines the existing civil law system and runs counter to the legal basis. The breaching party's right of rescission will produce inconsistencies in both substantive and procedural law, such as inconsistencies with the rules of substantive law on claims for performance, compulsory performance and modification of circumstances, and inconsistencies with procedural law [8]. Professor Wang Liming believes that the breaching party can be allowed to rescind the contract, but it cannot give the breaching party the right to rescind the contract. Under certain circumstances, the breaching party may apply for rescission of the contract in order to prevent the damage from being aggravated, but this does not mean that it has given it the right to rescind the contract. Cai Rui believes that granting the breaching party the right of rescission has the purpose of returning the subject matter, but instead of giving the defaulting debtor the right to rescind the contract, it is better to give it the right to terminate the contract by actively performing the obligation to compensate for damages [9].

4. Re-analysis of the Justification of the Breaching Party's Right of Rescission

4.1. The Theoretical Source of the Breaching Party's Right of Rescission is Inappropriate

Through the above discussion, it is known that the source of the breaching party's right of rescission is the theory of efficiency breach in economics, although this theory has certain merits, but it is actually biased to analyze legal issues comprehensively from the perspective of economics, and it is not reasonable to blindly apply it out of the environment in which the theory of efficiency breach is generated. At the same time, using economic theory as a starting point to prove that the breaching party's right of rescission is obviously not fully justified. The theory of efficiency breach does not emphasize the responsibility of the parties, which is also a damage to the foundation of trust between the two parties, which will have a greater impact on the contract system itself and may adversely affect the conclusion and maintenance of the contract. Law is the embodiment of fairness and justice, and talking about law without justice is tantamount to a castle in the air, so we should pay attention to ensuring fairness while pursuing efficiency. The overemphasis on the value of efficiency is inherently flawed in the basic theory, and the theory of efficiency breach has the problem of immorality and inefficiency, and this theory cannot be entered and dominated in legislation and justice as a general proposition [10].

4.2. The Civil Code does not Specify the Right of Rescission of the Breaching Party

The wording in the second paragraph of Article 580 of the Civil Code is that "the people's court or arbitration institution may terminate the contractual rights and obligations at the request of the parties", which shows that the Civil Code is still cautious about the breaching party's right of rescission. From a textual point of view, the clause does not directly stipulate the breaching party's right of rescission, but only provides the breaching party with the option to request termination of the contractual relationship, and does not give the right of rescission. Termination of a contract only has the effect of extinguishing the contractual relationship in the future and does not have retroactive effect, while rescission of the contract has retroactive effect. According to the second paragraph of Article 580, the breaching party's application to terminate the contractual rights and obligations does not affect the breaching party's assumption of liability for breach of contract, and if the second paragraph of 580 is characterized as the breaching party having the right to rescind the contract, it will conflict with the civil law rule that there is no liability for breach of contract when the contract is rescinded. Therefore, the correct positioning of Article 580 of the Civil Code should be to provide a new outlet for resolving the contractual deadlock on the basis of not granting the breaching party the right of rescission, which is a compromise between maintaining the consistent system of civil law and realizing relief for the breaching party.

Although the Civil Code stipulates that the wording of the subject of exercise is "parties", the exercise

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of the statutory right of rescission of the non-breaching party and the application of a party to the contract to terminate the contract seem to be consistent in effect, but in fact the two are not the same. The right enjoyed by the latter is only procedural, that is, the right to submit a request to the court to terminate the relationship of rights and obligations in the contract, because it has not yet entered the substantive trial, objectively as long as it is a party to the contract, it can exercise this right and not only the breaching party. The non-breaching party's statutory right of rescission is a simultaneous manifestation of procedure and substance. As to whether the purpose of rescission of the contract can be achieved, the judicial organ shall make a decision according to the specific circumstances.

Although the Minutes of the Nine Peoples, which play an important guiding role in judicial decisions, stipulate that the breaching party can sue for rescission of the contract in the event of a contract deadlock, its scope is limited to some long-term contracts, such as the performance of housing lease contracts, and does not extend to all continuing contracts or long-term contracts, and the scope of application is relatively narrow. Taking a step back, although the Minutes of the Nine Peoples allow the breaching party to apply for rescission of the contract, it does not mean that the breaching party can continue to rescind the contract once it breaches the contract, nor does it successfully rescind the contract by simply applying for rescission, because the court should play the role of adjudication and determine whether the contract can be rescinded from an impartial and neutral perspective. Although Article 48 of the Minutes of the Nine Peoples can give judicial practice adjudication guidance, it is not an informal legislative norm and can only play an auxiliary reference role, so this article cannot be automatically considered that the breaching party is given the right to rescind the contract.

The view of supporting the breaching party's right of rescission is that the breaching party's right of rescission is based on safeguarding the overall interests of the society, and when the contract cannot create value for the parties or even the society, the breaching party's right of rescission is definitely a practical need to achieve the optimal allocation of market resources. However, granting the breaching party the right of rescission is based on a temporary practical dilemma, and in the final analysis, it is a temporary consideration for the purpose of responding to real needs. However, from the perspective of the actual situation, when the breaching party also has the right of rescission, it will have a great impact on the establishment of the trust system in the trading market, and the legal deterrent of the contract concept of full performance of obligations will be reduced. At the same time, the breaching party's right of rescission lacks a solid theoretical foundation, which is also a violation of the concept of civil law and a strong impact on the existing civil law system. To see it as an innovation in the civil law system is also a bit reckless and reckless.

4.3. The Civil Code does not Specify the Right of Rescission of the Breaching Party

The issue of contractual deadlock is an urgent issue to be resolved, but the resolution of contractual deadlock does not necessarily give the breaching party the right of rescission. Although the breaching party chooses to breach the contract under the deadlock of the contract, granting the breaching party the right of rescission is certainly based on economic efficiency and resource allocation considerations, but legal and economic benefits cannot be mixed. It cannot be regarded as a specific circumstance to break the principle of sunt servanda simply to satisfy the interests of the breaching party, disregarding the basic jurisprudence. Article 580 can reasonably be interpreted as an extraordinary remedy for the breaching party. Remedies are not the exclusive preserve of the non-breaching party, and in order to achieve a balance between fairness and efficiency in civil law, it is necessary to give the breaching party the right to apply for relief in certain circumstances. This interpretation is also an implicit agreement that Article 48 of the Minutes of the Nine Peoples allows the breaching party to apply for rescission of the contract, which meets the actual needs and does not violate the legal basis and cause abruptness in the legal system. Specifically, the breaching party is given the right to apply for contract termination as a remedy, and the breaching party is not automatically granted the right to rescind the contract, but only provides relief to the breaching party under specific circumstances instead of granting it the corresponding right to rescind the contract, which can highlight the value orientation of autonomy and efficiency of civil law while maintaining the unity of the civil law system.

5. Optimization of the Application of the Breaching Party's Right of Rescission

5.1. Explaining the Applicable Conditions

Compared with the relevant provisions of the Minutes of the Nine People, the breaching party does

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not require the long-term nature of the contract itself to exercise its rights, that is, once the above conditions are met in a non-long-term contract, the breaching party can also request the termination of the contract. However, long-term nature cannot be automatically equated with continuity, and the maintenance time of long-term contracts and relationships has a large span, which is mainly reflected in the fact that the period from the occurrence of the contractual relationship to the termination due to the termination of the creditor-debt relationship may be relatively long, which may lead to greater obstacles to payment. Continuing contracts, on the other hand, generally have infinite continuity or inexpendability, and the lack of a definite total payment content from the beginning leads to the length of payment time being decisive for the determination of the total payment of the contract, and the time factor has important value in it [11]. Continuity should be the nature of the contract highlighted here, and when the nature of the contract is determined to be a continuing contract, the breaching party has the right to apply for termination. This interpretation can reduce the binding conditions for the breaching party to terminate the contract and broaden the scope of application of the breaching party's remedies. "Failing to achieve the purpose of the contract" is an important criterion for determining whether the breaching party can finally terminate the contract, that is, the two parties cannot perform after the contract deadlock, and this performance cannot be caused by the parties themselves, and one party is unwilling to rescind the contract. The objective basic conditions for contract performance should be taken as the refinement of the examination criteria, and it should be confirmed that continued performance of the contract will have obvious unfair consequences, that is, the performance costs borne by the breaching party are too high, far exceeding the actual benefits brought by the actual performance of the contract. On the basis of adhering to the principles of fairness and good faith, the judge shall make an objective and accurate judgment on whether a contractual deadlock has been formed, make value measurements and trade-offs, and ensure the legitimacy of the termination of the contract.

5.2. Emphasize the Non-malice of the Parties' Subjective State

As long as the breaching party complies with Article 580 of the Civil Code, the court or arbitration institution may make a judgment or award to rescind the contract at the request of the breaching party, ignoring the malice of the subjective state of the parties. In order to prevent the negative benefits arising from the granting of legitimate rights to the breaching party, that is, it is considered to be the evil effect of harming fairness by encouraging the parties to the contract to breach the contract in order to obtain the benefits of the breach, so the subjective element should be required, that is, the subjective state of the breaching party should be non-malicious. The legal proverb says that "no one shall profit from his own illegal acts", and it is necessary to strictly limit the mentality of the breaching party subjectively, emphasize the non-malice of the subjective state, and prevent the contractual obligations from being easily breached. The fact that the breaching party can apply for termination of the contractual rights and obligations itself reflects the remedy tendency of the civil law, so the subjective and non-malicious party of the breaching party should be ensured. Civil law wants to remedy the interests of the defaulting party in good faith rather than bad faith, preventing its damage from expanding, so the subjective requirement must meet the situation that the breaching party does not violate the principle of good faith and breach of contract in bad faith. In the review of the subjective mentality of the defaulting party, good faith shall be taken as the main principle, and a comprehensive review of the defaulting party's subjective mentality shall be made in combination with its transaction transactions and asset status, so as to prevent speculation.

5.3. Assumption of Liability for Damages

The breach of contract by the breaching party is objective and cannot be at the expense of the non-breaching party alone. Otherwise, it will undermine the protection of the interests of the non-breaching party and even disrupt the stable order of market transactions. The scope of the breaching party's liability for breach of contract is extended to the full performance of the contract, and when the scope of damages is extended to all the benefits available to the non-breaching party, although the parties are freed from the contractual deadlock, they may enter a predicament of being unable to pay off. The legal effect is manifestly unfair and obviously unreasonable, and the standard of damages here should be determined separately. Since damages include not only material damage, but also moral damage, which cannot be claimed when there is no legal provision for it, the victim may not be fully compensated for the damage suffered. When the market price changes, the price adjustment shall be made according to the value judgment of the protecting non-breaching party. At the same time, in order to avoid excessive damage, the breaching party must bear the liability for damages in a timely manner within a reasonable period of time. In consideration of the differences in the circumstances of each case, the length of a reasonable

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period is within the discretion of the judge and does not need to set a fixed standard.

5.4. It Should be Lifted through Judicial Procedures

When the breaching party expresses its rights, the court should play a judicial function to confirm whether its rights can be established, rather than the breaching party itself unilaterally exercising the right to rescind the contract. The breaching party cannot terminate the contract unilaterally, but should apply to the court to distinguish it from the non-breaching party's right to rescind the contract. The breaching party's termination of the contract is a remedy for the breaching party, so the breaching party should bear the corresponding burden and cannot rescind the contract relatively easily as the non-breaching party. Judicial procedural restraint can reduce the abuse of its rights by the defaulting party and prevent a crisis of confidence. At the same time, the granting of rights to the breaching party stems from the need to solve the contract deadlock and maintain social fairness, so the court's decision is the best determination of this fairness. The court's judgment is also authoritative, which can make the judgment more effectively enforced, help maintain the stability of the final result, and make the contract deadlock more efficient. If the court finds that the parties to the contract have not reached a contractual deadlock, it shall reject the breaching party's application for termination of the contract.

6. Conclusions

Although the Minutes of the Nine Peoples, which serves as a guide for adjudication, mention that the breaching party can apply for rescission of the contract, whether to establish the breaching party's right of rescission was also controversial in the process of codification of the Civil Code. The draft contract part contains a reference to the breaching party's right to rescind the contract, but the relevant provision was eventually deleted. The right of rescission of the breaching party formed by the theory of efficient breach of contract has a certain positive effect, but its essence is contrary to the concept of civil law and is not suitable for formal establishment in the civil law system. From the point of view of interpretation, Article 580 is interpreted as giving the breaching party the right to apply for termination of the contract or as the optimal solution for now. In the optimization of the rules for the breaching party to apply for termination of the contract, the applicable conditions shall be specifically explained, the subjective non-bad faith of the parties shall be emphasized, and the appropriate liability for damages shall be determined, and the judicial authority shall play the final role in deciding whether the breaching party can achieve the termination of the contract.

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