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A Typological Analysis of the Liability for Specific Performance in Preliminary Contracts

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Abstract: China's current legal framework does not expressly stipulate whether the rule of specific performance is applicable to preliminary contracts, leaving an unresolved dilemma for both theoretical research and judicial practice. By reviewing the three predominant scholarly perspectives on specific performance and analyzing divergences in judicial rulings, this paper affirms that, grounded in the principles of party autonomy and practical necessity, the "content-determinative theory" should serve as the paradigm for adjudicating the validity of liability for specific performance in preliminary contracts. On this basis, a typological analysis of preliminary contracts can be conducted employing dual subjective and objective criteria, categorizing them into: defective preliminary contracts arising from subjective causes; defective preliminary contracts arising from objective causes; and preliminary contracts with complete content. The study concludes that: specific performance is inappropriate for defective preliminary contracts stemming from subjective causes; for those resulting from objective causes, a distinction must be drawn based on whether the breaching party acted intentionally or negligently; and specific performance is applicable to preliminary contracts whose content is complete.

Keywords: Preliminary Contract; Specific Performance; Typological Analysis.

1. Introduction

With the continuous development of the market economy, preliminary contracts have become a core instrument for market entities to solidify negotiation outcomes, lock in contracting opportunities, and allocate pre-transaction risks. Their application scenarios continue to expand across fields such as commercial housing sales, the transfer of construction land use rights, and corporate mergers and acquisitions. While existing laws have completed the statutory recognition of preliminary contracts, they have yet to clearly define the boundaries, identification standards, and adjudication rules regarding the application of specific performance as a form of breach liability. Significant divergences persist within academia and judicial practice concerning this issue. However, existing research primarily focuses on the value trade-offs regarding the validity of specific performance, rarely constructing refined and operable typological application rules combined with empirical judicial analysis. Consequently, it remains difficult to effectively resolve the predicament of inconsistent judgments in similar cases within judicial practice. Based on this, starting with a systematic review of theoretical divergences and practical chaos, this paper employs dual subjective and objective standards to achieve a typological classification of preliminary contracts, establishing differentiated application rules for specific performance. The aim is to provide normative guidance for judicial adjudication and improve the liability system for breaches of preliminary contracts in China.

2. Theoretical and Practical Divergences Regarding Specific Performance in Preliminary Contracts

Article 495 of the Civil Code formally established the legal status of preliminary contracts, clarifying that breaching parties shall bear liability for breach of contract. However, it did not specify the concrete forms of such liability, particularly the applicability of specific performance. Although Articles 7 and 8 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the General Provisions of the Contract Book of the Civil Code refined the identification of breach behaviors in preliminary contracts[1], they still adopted an evasive stance regarding the application of specific performance. This legislative gap has directly led to prolonged academic debate on the issue of specific performance and severe divergences in judicial practice.

2.1. Academic Divergences on Specific Performance in Preliminary Contracts

Regarding whether preliminary contracts can be subject to liability for specific performance, academia has formed three core viewpoints: the Affirmative Theory, the Negative Theory, and the Content-Determines-Validity Theory. These theories construct vastly different rule systems from different value standpoints, reflecting the tension between the two major principles of contract law: party autonomy and *pacta sunt servanda* (strict adherence to contracts).

2.1.1. Core Arguments of the Affirmative Theory

The Affirmative Theory posits that, as an independent contract type, breach of a preliminary contract falls under Article 577 of the Civil Code, thereby permitting specific performance. Consequently, if a party refuses to conclude the main contract, the non-breaching party may seek judicial compulsion to finalize it. This stance rests on four pillars: First, specific performance is essential to realize the institutional purpose of preliminary contracts: securing future contracting opportunities [2]. Denying this remedy would render the preliminary contract's binding force and value void. Second, it upholds party autonomy. By voluntarily accepting the obligation to conclude a future contract, parties foresee and consent to compelled performance upon breach; thus, enforcement respects rather than infringes upon their prior consensus. Third, it ensures adequate remedies. In sectors like commercial real estate, where subject matters possess unique value[3], monetary damages often fail to fully compensate for losses caused by market fluctuations. Specific performance effectively safeguards legitimate interests where damages fall short. Finally, no jurisprudential obstacles exist. Since the core terms are already agreed upon, courts can simulate the parties' intent through judgment to compel conclusion, a practice well-established in Germany[4], Japan, and China's Taiwan region[5].

2.1.2. Main Basis of the Negative Theory

The Negative Theory argues that liability for breach of preliminary contracts should be limited to damages and should not include specific performance[6]. First, specific performance violates the principle of freedom of contract[7]. Party autonomy in contract law grants parties the freedom to decide whether to conclude a contract, with whom to conclude it, and what content to include. This freedom permeates the entire contracting process. A preliminary contract only imposes an obligation of good faith negotiation on the parties. Even if consensus is reached on some clauses, the final decision to conclude the main contract still depends on the parties' autonomous will. Compelling the breaching party to conclude the main contract is essentially a coercion of their expression of intent, directly depriving them of contractual freedom[8], which contradicts the essence of private law autonomy. Second, the subject matter of debt in preliminary contracts is unsuitable for forced performance. Article 580 of the Civil Code lists "debt subject matter unsuitable for forced performance" as an exclusionary circumstance for the continued performance of non-monetary debts. The primary obligation of a preliminary contract is to conclude the main contract, which belongs to behavioral debt. Since this behavior centers on the parties' expression of intent and possesses strong personal attributes, it cannot be forced[9]. Finally, specific performance will blur the boundary between the main contract and the preliminary contract. The preliminary contract and the main contract are two independent contracts. The core distinction lies in the fact that the preliminary contract generates an obligation to conclude a contract in the future, while the main contract generates direct performance obligations. If the liability for specific performance of preliminary contracts is recognized, the preliminary contract will directly produce the legal effects of the main contract[10], dissolving the institutional value of the preliminary contract as an independent contract type—if a preliminary contract can be forcibly performed until the main contract is established, parties would have no need to distinguish between the two and could simply conclude a main contract with conditions or time limits attached.

2.1.3. The Logical Core of the Content-Determines-Validity Theory

The Content-Determines-Validity Theory attempts to transcend the binary opposition between the Affirmative and Negative theories. It argues that whether a preliminary contract can be subject to specific performance cannot be generalized but must be judged based on the specific content of the preliminary contract. The validity of a preliminary contract is not singular or fixed but exhibits a gradient characteristic. The strength of its binding force directly depends on the completeness of the parties' consensus. The more complete and specific the provisions regarding the main contract clauses in the preliminary contract, the stronger the contracting consensus, and the closer the binding force of the preliminary contract approaches that of the main contract; thus, the justification for applying specific performance is stronger. Conversely, if the preliminary contract only stipulates preliminary transaction intentions and a large number of clauses still require further negotiation, the parties' consensus stops at good faith negotiation, leaving no room for the application of specific performance.

2.2. Judicial Adjudication Divergences on Compelled Performance of Preliminary Contracts

The aforementioned academic divergences regarding the applicability of specific performance in preliminary contracts are not confined to theoretical normative interpretation and value games. Against the backdrop of the explicit omission of rules on specific performance for preliminary contracts in the Civil Code and relevant judicial interpretations, and the lack of a unified academic consensus, the adjudicatory stance and operational status in judicial practice serve as both a core window to observe the realistic dilemmas of the preliminary contract system and a foundational premise for constructing application rules that possess both jurisprudential legitimacy and practical operability. Therefore, to comprehensively present the current judicial operation status of such disputes, this paper used "preliminary contract" and "continued performance" as keywords, limiting the dimension of litigation requests, and searched the Beida Fabao judicial case database. This yielded 670 judicial documents from the five-year period of 2022 to 2026. The distribution of case instances is shown in Table 1 below:

Table 1. Distribution of Case Instances by Trial Level

Trial Level	First Instance	Second Instance	Retrial/Third Review	Total
Documents (Count)	111	525	34	670
Percentage	16.6%	78.4%	5.0%	100%

As seen from the distribution by trial level, second-instance cases account for nearly 80%. This directly reflects a serious lack of predictability regarding adjudication results for the parties. Whether it is the non-breaching party claiming continued performance or the breaching party arguing for exemption, there is a high probability of dissatisfaction with the first-instance ruling. A large number of cases entering second-instance or even retrial procedures not only exacerbates the consumption of judicial resources but also makes it difficult to form stable market transaction expectations through effective judgments. On this basis, this paper adopted a stratified random sampling method, drawing 208 sample documents from the 670 judgments at a sampling rate of 30% (89 from 2022, 48 from 2023, 40 from 2024, 29 from 2025, and 2 from 2026). After removing duplicates and documents with low relevance to the research content, a total of 171 sample judicial documents were obtained. Regarding the support status of claims for continued performance in these sample documents:

Table 2. Statistical Table on Support for Claims of Continued Performance

Outcome	Supported	Not Supported	Total
Documents (Count)	37	134	171
Percentage	21.6%	78.4%	100%

Statistical results show that judicial practice presents an adjudicatory tendency of “principally not supporting” claims for continued performance. Only [specific number missing in source] supported continued performance in the sample documents, with an overall support rate of [percentage missing in source]. Overall, although the introduction of the Interpretation on the General Provisions of the Contract Book has standardized the determination of preliminary contract validity in judicial practice, and the support rate for continued performance has improved slightly between 2024 and 2026 compared to previous years, courts still maintain an extremely cautious attitude towards the application of specific performance in preliminary contracts. Theoretical divergences directly lead to obvious opposition and fragmentation in the adjudication logic of different courts. Specifically, the reasons given by courts for supporting or not supporting continued performance generally fall into the following categories:

2.2.1. Circumstances Where Specific Performance is Applied

In judicial practice, judgments supporting the continued performance of preliminary contracts occur only when the content of the preliminary contract is highly complete, the parties’ contracting consensus is clear, and there are no objective obstacles to performance. The primary adjudication reason in such cases is the belief that the preliminary contract already contains the main clauses of the main contract and should substantively be regarded as the main contract. In the case of Dong Yunhan; Zhang Zhaoyi; Kunming Zunyuan Real Estate Brokerage Co., Ltd. House Sales Contract Dispute, the court, relying on Article 3, Paragraph 1 and Article 6, Paragraph 3 of the Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the General Provisions of the Contract Book of the Civil Code, determined that the main contract contents such as the parties, subject matter, price, and payment methods under the contract in question were clear and specific, meeting the conditions for contract formation. Furthermore, since the main debts under the contract had been actually performed, the court confirmed the contract in question as a main contract. In another case (xxx Contract Dispute), the first-instance court identified the contract as a preliminary contract, while the second-instance court held that the “Commercial Housing Reservation Contract” should be identified as a commercial housing sales contract, deeming the first instance’s characterization incorrect. Additionally, during the trial process, some courts directly ruled that the contract should be fully performed as agreed because it was legal, valid, and the parties had partially performed. In the case of Li Mouqiong, Wang Mouyang vs. Xie Mouling, Deng Mou, et al., House Sales Contract Dispute, the court held that the Real Estate Intermediary Sales Contract and Property Sales Preliminary Contract signed by the plaintiffs and defendants represented the true intent of both parties, did not violate mandatory provisions of laws and administrative regulations, and were legally valid; thus, both parties should fully perform their obligations according to the agreement. Similar rulings were made in cases such as Gao Mou, Tai Organization House Sales Contract Dispute and Huang Mou vs. Zhang Mou, Zhang Mouyong House Sales Contract Dispute. Furthermore, a minority of courts supported continued performance citing the absence of obstacles to continued performance, the ability of both parties to actively negotiate and properly handle the matter in accordance with the principle of good faith, and the view that terminating the contract would violate the principle of good faith.

2.2.2. Circumstances Where Specific Performance is Not Applied

In judicial practice, the vast majority of claims for continued performance of preliminary contracts are dismissed by courts. Judging from the adjudication reasons, most concentrate on situations where the preliminary contract suffers from legal or factual impossibility of performance, the debt subject matter is unsuitable for forced performance, or the consensus stops at good faith negotiation. For instance, in the case of Lu’an XX Automobile Culture Investment Co., Ltd.; Kuang XX Contract Dispute, the court held that nearly seven years had passed since the time agreed in the Order Form for both parties to sign the Commercial Housing Sales Contract, yet the contract remained unsigned. The appellant also failed to provide evidence proving they had actively fulfilled the notification obligation to handle house purchase procedures according to the sales process and project progress. The performance of the Order Form and the promotion of the conclusion of the main Commercial Housing Sales Contract obviously could not proceed and had fallen into a performance deadlock; therefore, it could be determined that the preliminary contract was unable to be performed. In the case of Sun Moumou vs. Hulunbuir XX Real Estate Development Co., Ltd. House Sales Contract Dispute, the court similarly held that since the plaintiff, through their actual conduct and explicit statement during the second instance, indicated they would no longer continue to perform the payment obligation, the contract no longer possessed the conditions for continued performance and should be terminated. In the case of Gan Mou vs. Ruili XX Real Estate Investment Co., Ltd., Ruili City XX Real Estate Brokerage Co., Ltd., et al., Commercial Housing Preliminary Contract Dispute, the court ruled that since the preliminary contract lacked clear agreements on specific times for signing the commercial housing sales contract, house delivery conditions, and handling of title certificates, the contract was unsuitable for forcing Gan Mou to fulfill the obligation to conclude the main contract.

3. Selection of the Validity Determination Paradigm for Liability of Continued Performance in Preliminary Contracts

By reviewing the theoretical and practical divergences, it is evident that both the Affirmative Theory and the Negative Theory regarding the application of specific performance possess theoretical defects and practical dilemmas that are difficult to overcome. In contrast, the Content-Determines-Validity Theory not only aligns with the institutional essence of preliminary contracts but also provides operable adjudication standards for judicial practice, making it the optimal paradigm for determining the validity of liability for continued performance in preliminary contracts. This section will validate the legitimacy and rationality of the Content-Determines-Validity Theory from three dimensions: boundaries of validity, value compatibility, and practical feasibility.

3.1. Boundaries of Validity Between the "Obligation to Conclude" and the "Obligation to Negotiate"

The controversy over the applicability of specific performance in preliminary contracts essentially stems from the core divergence regarding the validity of preliminary contracts: namely, whether a preliminary contract imposes an obligation on parties merely to negotiate or an obligation to conclude the contract. Only by clarifying this boundary can a theoretical premise be provided for the "Content-Determines-Validity" theory.

Under the view of the "Obligation to Negotiate," the validity of a preliminary contract is limited to constraining parties to negotiate the conclusion of the main contract within the agreed period in accordance with the principle of good faith[11]. As long as parties fulfill their negotiation obligations, they do not bear liability for breach of contract even if the main contract is ultimately not concluded[12]. The core of this theory lies in maximizing the protection of parties' freedom of contract, but its defects are also obvious: First, the standard for fulfilling the obligation of good faith negotiation is very vague, making it difficult to judge in judicial practice whether parties have fulfilled their negotiation obligations. For example, in the case of Feng Tao vs. Haiyang Dazhao Real Estate Co., Ltd. Commercial Housing Preliminary Contract Dispute, the court held that "regarding payment methods and timing, both parties mentioned bank loan matters during the first negotiation; there is no proof that negotiations were unsuccessful." Therefore, unless a party explicitly refuses to negotiate or maliciously proposes harsh conditions, mere active participation in negotiations can be deemed as fulfilling the obligation[13]. This renders the binding force of preliminary contracts almost entirely hollow. Second, this theory conflicts somewhat with the institutional purpose of preliminary contracts. Parties enter into preliminary contracts not to secure an "opportunity to negotiate" but to secure an "opportunity to contract." If only a negotiation obligation exists, there is no essential difference between a preliminary contract and a non-binding letter of intent or memorandum, failing to protect the parties' reliance on contracting[14].

Regarding the "Obligation to Conclude," the validity of a preliminary contract lies not only in constraining parties to negotiate but also in imposing an obligation to ultimately conclude the main contract. Unless there are justifiable reasons not attributable to either party, if the breaching party refuses to conclude the main contract, they shall bear liability for breach, and the non-breaching party has the right to request compelled contracting. The advantage of this theory is that it fully aligns with the principle of pacta sunt servanta, maintaining the binding force of contracts[15]. However, the problems are: First, this theory universally determines that parties bear an obligation to conclude[16], which can easily lead to improper infringement on parties' freedom of contract. For preliminary contracts that only stipulate preliminary transaction intentions with many core clauses still requiring negotiation[17], forcing parties to conclude a contract may cause courts to overstep their bounds, damaging party autonomy. Second, the existence of this theory can also cause confusion between preliminary and main contracts. If all preliminary contracts produce the effect of mandatory conclusion, there will be no essential difference between a preliminary contract and a main contract with suspended effectiveness conditions.

In fact, these two theories regarding the validity of preliminary contracts are not completely opposed but represent two gradient levels of validity. The boundary of their application actually depends on the completeness of the preliminary contract's content and the intensity of the parties' contracting consensus. The existence of the Content-Determines-Validity theory effectively delineates this applicable boundary. When the content of a preliminary contract is seriously deficient, and parties have only reached consensus on preliminary transaction intentions with a large number of clauses still requiring further negotiation, the preliminary contract can only generate the effect of an obligation to negotiate, leaving no room for the application of specific performance. When the preliminary contract has reached consensus on all essential clauses of the main contract, forming a final consensus, the preliminary contract generates the effect of an obligation to conclude, and liability for continued performance becomes applicable.

3.2. Compatibility of "Specific Performance" with the Principle of Party Autonomy

The core argument against applying specific performance to preliminary contracts is that it violates the principle of party autonomy. While this appears to be an adherence to the spirit of judicial autonomy, it actually possesses certain limitations. Liability for continued performance within the framework of the Content-Determines-Validity theory can align well with the principle of party autonomy.

The obligation to conclude the main contract in a preliminary contract is itself a product of party autonomy; specific performance is precisely the execution of the parties' consensus, not a violation thereof. The core of the principle of party autonomy is that "parties should be responsible for their voluntarily made expressions of intent." If parties voluntarily agree in a preliminary contract to "conclude the main contract within a certain period in the future," it means they voluntarily accept the constraint of this obligation and can foresee the consequences of possible compelled contracting upon breach. Furthermore, freedom of contract should be "decision-making freedom during the contracting stage," not "freedom to regret after breaching." This freedom must be restricted by the principle of good faith. The breaching party's refusal to conclude the main contract is a violation of their prior commitment. At this point, defending based on freedom of contract is essentially an abuse of rights and should not receive legal support. As the German jurist Degenkolb stated: "To maintain legal freedom, the compulsory contracting effect of preliminary contracts should be recognized, because compelled contracting executes precisely the obligations freely set by the parties."

Simultaneously, specific performance operating under the framework of the Content-Determines-Validity theory respects parties' personal freedom and freedom of decision-making even more. For preliminary contracts with complete content, parties have already reached consensus on the core content of the main contract. Concluding the main contract lacks only the formal act of signing and sealing; there are no matters requiring parties to make new decisions of intent, nor does it possess personal exclusivity. When a court forces performance through judgment, it is not forcing parties to make new decisions of intent but legally confirming the decisions of intent they have already made; thus, there is fundamentally no issue of infringing upon personal freedom.

Conversely, for preliminary contracts with subjective undecided matters and incomplete content, the Content-Determines-Validity theory explicitly denies the application of specific performance. Parties only bear the obligation of good faith negotiation, and the final decision on whether to conclude the main contract still depends on the parties' autonomous decision-making. This avoids improper intervention by judicial power into private transactions, achieving a reasonable balance between pacta sunt servanda and party autonomy.

3.3. Practical Feasibility and Value of the "Content-Determines-Validity" Theory

The Content-Determines-Validity Theory not only possesses a solid jurisprudential foundation but also demonstrates strong practical feasibility and value, effectively resolving the current judicial dilemmas regarding specific performance in preliminary contracts and perfecting the liability system for breach of such contracts.

First, the Content-Determines-Validity Theory conforms to the internal logic of judicial practice, providing clear and operable adjudication standards. As seen from the case analysis above, courts exhibit divergence in deciding whether to support continued performance, leading to diametrically opposite adjudication results in similar cases. However, reviewing the reasoning sections of courts regarding liability for continued performance, they are actually considering the completeness of the preliminary contract's content. In cases supporting continued performance, the content of the preliminary contract is often relatively complete; in cases rejecting continued performance, courts usually point out insufficient certainty of content. The "Content-Determines-Validity" theory merely theorizes this adjudication logic that already exists in practice, clarifying the boundaries of judicial intervention. Courts can directly make rulings based on typological rules without wavering between the Affirmative and Negative theories, thereby enhancing the uniformity and predictability of adjudications.

Second, the Content-Determines-Validity Theory can compensate for the deficiencies of a single remedy of damages. In transactions involving specific subjects, such as commercial housing sales and real estate transfers, the remedial function of damages is often inadequate when a preliminary contract is breached. On one hand, the scope of compensation for performance interests is difficult to determine. There is significant divergence in judicial practice regarding whether losses of opportunity and price difference losses due to rising housing prices should be compensated and how to determine compensation standards. Most judgments only support the return of deposits and compensation for interest on occupied funds, which fails to fully cover the non-breaching party's losses. On the other hand, the reliance interest in specific transaction opportunities for the parties cannot be compensated through monetary damages at all. The Content-Determines-Validity Theory recognizes that preliminary contracts with complete content can be subject to specific performance, directly realizing the parties' contracting purpose and providing the most sufficient remedy for the non-breaching party[18]. Simultaneously, it can effectively curb dishonest behaviors such as developers maliciously refusing to sign the main contract after housing price increases or engaging in "selling one house to multiple buyers," thereby maintaining transaction order and market integrity.

4. Contract Types and Application Rules for Specific Performance in Preliminary Contracts

Centered on the Content-Determines-Validity Theory and combining the characteristics of judicial practice regarding preliminary contracts, this paper adopts dual subjective and objective standards to conduct a typological classification of preliminary contracts. The objective standard is the degree of completeness of the preliminary contract's content, which serves as the core and foundation of the classification, determining the basic level of the preliminary contract's validity. The subjective standard is the intensity of the parties' contracting consensus, serving as a supplement to the classification to calibrate the boundaries for applying specific performance in different types of preliminary contracts. Through these dual standards, preliminary contracts can be divided into three types: defective preliminary contracts due to subjective reasons, defective preliminary contracts due to objective reasons, and preliminary contracts with complete content. Distinct application rules for specific performance are established for each type.

4.1. Typological Standards for Compelled Performance of Preliminary Contracts

4.1.1. Objective Standard: Degree of Completeness of Preliminary Contract Content

The completeness of contract content is the core objective standard for judging whether a preliminary contract can be subject to specific performance. Its essence lies in judging the degree of certainty of the parties' consensus within the preliminary contract. The more complete the content of the preliminary contract, the higher the certainty of the main contract, the more specific the parties' contracting obligation, and the stronger the operability of specific performance. Conversely, if the preliminary content is seriously deficient and core clauses of the main contract remain undecided, specific performance lacks an executable foundation.

When judging the completeness of a preliminary contract, a distinction must be made between essential clauses and non-essential clauses of the main contract. Essential clauses refer to those that determine the nature of the contract and define the core rights and obligations of the parties; without these clauses, the contract cannot be established. Clauses that do not affect the establishment of the contract and can be supplemented through contract interpretation or gap-filling rules are typically considered non-essential. Article 470 of the Civil Code provides an enumerative regulation of general contract clauses, including the names or titles and addresses of the parties, subject matter, quantity and quality, price or remuneration, time, place, and method of performance, liability for breach, and methods for resolving disputes. However, this article is not a mandatory provision; essential clauses should be judged specifically according to the type of contract. based on the degree of content completeness, preliminary contracts can be divided into three levels, Level 1: Preliminary contracts with seriously deficient content, i.e., those that do not contain all essential clauses of the main contract, with a large number of core matters still requiring negotiation and determination by the parties. Level 2: Preliminary contracts with basically complete content, i.e., those that contain all essential clauses of the main contract, with deficiencies only in non-essential clauses, or where some clauses need to be determined after objective obstacles are eliminated. Level 3: Preliminary contracts with completely complete content, i.e., those that contain all essential and non-essential clauses of the main contract, with content certainty fully consistent with the main contract, requiring no further substantive negotiation by the parties.

4.1.2. Subjective Standard: Intensity of Parties' Contracting Consensus

The intensity of the parties' contracting consensus refers to the degree of finality of the intention to conclude the main contract in the future as expressed by the parties through the preliminary contract. It is the core basis for judging whether undecided matters in the contract stem from objective obstacles or whether the parties subjectively reserved space for final decision-making. The judgment of contracting consensus intensity is comprehensively determined mainly through the following aspects:

First, Semantic Expression of the Preliminary Contract: If the contract explicitly stipulates that "both parties must conclude a formal contract within the agreed period, and if any party refuses to perform, the non-breaching party has the right to demand continued performance," it indicates that the parties' contracting consensus possesses finality. If the contract merely stipulates that "both parties will further negotiate relevant matters, and the final contract content shall be subject to the text of the formal contract signed by both parties," it indicates that the parties' consensus stops at negotiation, and the intensity of contracting consensus is low. Second, Nature of Undecided Matters: If undecided matters are temporarily undeterminable due to objective obstacles, such as the subject matter awaiting administrative approval or the temporary lack of pre-sale permits, this does not affect the finality of the contracting consensus. If undecided matters are core clauses where parties explicitly reserve the final decision-making power, it indicates that the parties have not formed a final contracting consensus. Third, Performance Behavior of the Parties: If parties have made actual preparations for concluding the main contract, such as paying a substantial portion of the funds, abandoning other transaction opportunities to perform the main contract, or having actually accepted the subject matter, it indicates a high intensity of contracting consensus. Fourth, Subjective Fault State of the Breaching Party: When the breaching party fails to conclude the main contract on schedule merely due to negligence, and objectively the conditions for performance still exist, the application of specific performance may be considered.

4.2. Typological Analysis of Compelled Performance of Preliminary Contracts

4.2.1. Preliminary Contracts with Complete Content

Preliminary contracts with complete content refer to situations where parties have reached a complete and clear consensus on all clauses of the main contract, including both essential and non-essential clauses. They agree to separately sign a formal main contract at a specific future date only due to formal requirements, statutory procedural restrictions, or transaction arrangements. The content of the preliminary contract has fully reached the degree of certainty of the main contract. This type of preliminary contract represents the highest intensity of contracting consensus and the most complete content. Its core distinction from the main contract lies solely in the fact that parties explicitly agree that a formal main contract needs to be signed separately, with the main contract becoming effective upon signing, rather than producing performance effects directly.

For preliminary contracts with complete content, liability for specific performance should be applied. The reasons are: First, parties have reached a final consensus on all content. Forcing them to sign the main contract does not exceed the scope of the parties' consensus and complies with the principle of party autonomy. Second, the content of the preliminary contract is completely determined, with no matters requiring further negotiation. Specific performance is operable. In such preliminary contracts, courts do not need to create any clauses for the parties, avoiding issues of excessive judicial intervention. Third, specific performance can most fully protect the performance interests of the non-breaching party and effectively curb malicious breach behaviors. By realizing the parties' contracting purpose, it fundamentally eliminates the motivation for malicious breach, maintaining transaction integrity and market order. Fourth, specific performance respects the institutional boundary between preliminary and main contracts. Parties enter into preliminary contracts usually based on multiple considerations such as statutory procedures, approval requirements, and financial arrangements. The law should respect the parties' transaction arrangements. Therefore, even for preliminary contracts with complete content, they should not be directly identified as main contracts but should be recognized as preliminary contracts subject to liability for specific performance.

4.2.2. Defective Preliminary Contracts Due to Subjective Reasons

Defective preliminary contracts due to subjective reasons occur when parties have only reached a preliminary consensus on some basic clauses of the main contract, with a large number of subjective undecided matters related to the core interests of the parties still existing. The contracting consensus is low, and the core purpose of the preliminary contract is merely to solidify preliminary negotiation outcomes rather than to finally lock in contracting obligations. The core feature of this type of preliminary contract is that the undecided matters do not stem from objective obstacles but from the parties' subjective unwillingness or temporary inability to make a final decision, thus retaining the final decision-making power over core clauses.

For defective preliminary contracts due to subjective reasons, liability for continued performance is inappropriate. Regardless of whether the breaching party refuses to conclude the main contract due to intent or negligence, the non-breaching party has no right to request the court to compel contracting. They can only request the breaching party to bear liability for damages for violating the obligation of good faith negotiation. First, the function of such preliminary contracts is to secure negotiation opportunities and protect reliance on contracting costs. Damages are sufficient to achieve the remedial purpose. In such preliminary contracts, parties usually have not formed reasonable reliance on final contracting; losses of contracting costs and opportunity costs can be fully covered through damages. Second, since the parties' consensus stops at good faith negotiation and they have not promised mandatory conclusion, compelled contracting at this point exceeds the scope of the parties' consensus and violates the principle of party autonomy. Third, due to the serious deficiency in preliminary contract content, with a large number of core clauses in a state of subjective indecision, specific performance lacks an executable foundation. If courts attempt to determine these via gap-filling rules, it easily leads to intervention in private decision-making. Even if a court rules for continued performance, both parties may still fail to conclude the main contract due to an inability to reach consensus on core clauses, rendering the judgment a piece of paper and failing to achieve the institutional purpose of specific performance.

4.2.3. Defective Preliminary Contracts Due to Objective Reasons

Defective preliminary contracts due to objective reasons occur when parties have already reached consensus on all clauses of the main contract, forming a final contracting consensus, but due to objective obstacles, they are temporarily unable to sign the formal main contract. Thus, they enter into a preliminary contract, leaving room for negotiation on some non-essential clauses or clauses that need to be determined after objective obstacles are eliminated.

For defective preliminary contracts due to objective reasons, specific performance is neither universally applied nor excluded. Instead, it should be judged by distinguishing between intentional breach and negligent breach based on the subjective fault state of the breaching party:

First, Exclusion of Specific Performance for Intentional Breach: Intentional breach here refers to the breaching party maliciously obstructing the fulfillment of objective conditions, or knowing that objective obstacles have been eliminated yet still refusing to conclude the main contract without justification, or even causing factual impossibility of performance through acts such as “selling one house to multiple buyers” or disposing of the subject matter to others. For such intentional breach behaviors, even if the preliminary contract content is basically complete, the application of specific performance should principally be excluded. This is because, on one hand, intentional breach usually leads to factual or legal impossibility of performing the preliminary contract (e.g., the subject matter has been transferred to a third party, seized, or mortgaged), fitting the exclusionary circumstances for specific performance prescribed in Article 580 of the Civil Code. On the other hand, even if objective conditions for performance still exist, the malicious breach behavior of the breaching party largely causes a rupture in the mutual trust foundation. Even if the main contract is forcibly concluded, subsequent performance of the main contract is highly likely to generate new disputes. From the perspective of litigation economy and resolving disputes in one go, the remedy of damages should be prioritized. Of course, excluding the application of specific performance does not affect the non-breaching party’s right to request the breaching party to bear liability for damages covering performance interests, thereby curbing malicious breach behaviors.

Second, Applicability of Specific Performance for Negligent Breach: If the breaching party, due to negligence or laxity, failed to eliminate objective obstacles in time or failed to conclude the main contract with the non-breaching party on schedule, but objectively the conditions for contracting can be achieved and there are no circumstances of impossibility of performance, liability for continued performance may be applied. For example, in the case of Nantong Qiwan Construction Labor Service Co., Ltd. vs. Tianjin Yuefu Real Estate Development Co., Ltd. Commercial Housing Preliminary Contract Dispute, the court held that “litigation requests such as delivering the house and handling relevant property registration procedures face obstacles in performance and can be resolved separately after the obstacles are eliminated.” In scenarios where a developer negligently failed to obtain a pre-sale permit in time but obtained it during the litigation, or a transferor negligently failed to submit approval materials in time leading to the failure to conclude the main contract on schedule, once the approval obstacles are eliminated, the court should support the non-breaching party’s claim for continued performance. The court should order the breaching party to conclude the main contract with the non-breaching party within a specified period. Non-essential clauses not agreed upon in the preliminary contract can be supplemented according to gap-filling rules. The rationale for allowing specific performance in this case is threefold: Parties have reached consensus on all essential clauses of the main contract, and the contracting consensus possesses finality; thus, compelled contracting fully complies with the parties’ party autonomy; The content of the preliminary contract is basically complete; undecided clauses are merely non-essential and can be supplemented. The breaching party committed only a negligent breach; the mutual trust foundation has not completely ruptured. After the main contract is forcibly concluded, there are no realistic obstacles to its performance, which can most fully protect the non-breaching party’s contracting reliance and realize the contract purpose.

5. Conclusion

Based on the normative gaps and practical divergences regarding specific performance in preliminary contracts, this paper systematically reviewed different theoretical propositions at the doctrinal level. Combining empirical analysis of judicial adjudication samples, it clarified the current adjudicatory dilemmas and core contentious points in such disputes. Through comparative analysis of different validity determination paradigms, this paper established a validity determination framework centered on the “Content-Determines-Validity” theory. By utilizing the objective standard of the completeness of preliminary contract content and the subjective standard of the intensity of contracting consensus, it achieved a typological differentiation of preliminary contracts. Distinct application and exclusion rules for specific performance were established for different types of preliminary contracts, realizing a balance between the two fundamental principles of contract law: pacta sunt servanda and party autonomy. This typological rule can not only provide clear operational guidance for judicial adjudication but also offer theoretical references for the improvement of subsequent legislation and judicial interpretations. In the future, the application standards of this rule can be further refined through judicial interpretations, and supporting adjudication and enforcement mechanisms can be perfected to fully leverage the normative function of the preliminary contract system, thereby maintaining transaction integrity and market order.

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