

# The Legitimacy and Scope of Application of Continuing Performance of Appointment Contracts

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**Abstract:** From the perspective of content determination, the continued performance of an appointment contract has its legitimacy, which is supported by three main reasons: compliance with the principle of good faith and trustworthiness, irreplaceability, and unsuitability for performance as it does not belong to the subject matter of the debt. In terms of the scope of application for the continued performance of the reservation contract, from the perspective of objective feasibility, based on the content determination theory, typological analysis is adopted to classify the reservation contract into low-level reservation, obstacle reservation, and complete reservation according to the different determinacy of the content. It is further divided into objective obstacle reservation and subjective obstacle reservation based on the different reasons for the obstacles. Analyze the scope of application of appointment contracts under different types of appointment contracts. Among them, low-level reservations and subjective barrier reservations are not applicable for continued performance, while objective barrier reservations and complete reservations are applicable for continued performance.

**Keywords:** Appointment Contract, Continued Performance, Legitimacy, Scope of Application.

## 1. Introduction

In academia, there are different opinions on whether an appointment contract can be applied for continued performance, mainly forming three different views: affirmative, negative, and content determination. Scholars who hold a positive view believe that the contract of appointment should be subject to continued performance. They believe that

continuing to perform the contract of appointment is a manifestation of respecting the will of the parties and can maximize the protection of the interests of the compliant party. Representative scholars include Wang Zejian, Huang Shaokun, etc. Wang Zejian, a scholar, believes that the purpose of the formation of an appointment contract is to enter into this agreement. If one party fails to fulfill its obligations to enter into this agreement, the other party may request the court to require the defaulting party to perform its obligations to enter into this agreement, and the effective judgment can be regarded as an expression of intention made by the parties <sup>[1]</sup>. The negative view holds that the appointment contract should not be applicable for continued performance <sup>[2]</sup>. Some scholars believe that continuing to perform an appointment contract goes against the will of the parties and deviates from their original intention. Some argue that continuing to perform an appointment contract falls under the category of "the subject matter of the debt is not suitable for compulsory performance", while others argue that continuing to perform falls under the category of "legally impossible performance" as stipulated in the Civil Code <sup>[3]</sup>. The content decision theory holds that it is not possible to simply determine whether a pre contract can be applied for continued performance or not, but rather to judge whether it is applicable for continued performance based on the degree of certainty of the pre contract content. Scholars have classified uncertain matters in advance contracts into subjective pending matters and objective pending matters, and believe that only objective pending matters in advance contracts can be subject to compulsory performance <sup>[4]</sup>. The author supports the content determination theory, so this article mainly explores the legitimacy of the application of continuing performance in advance contracts and the scope of application

of continuing performance in advance contracts from the perspective of content determination theory. The author believes that subjectively, the free will of the parties should be respected, so whether to continue to perform the parties' right to choose should be explored. Therefore, this article only explores the scope of application of continuing to perform the pre contract from an objective feasibility perspective.

## **2. The Legitimacy of Continuing to Perform the Appointment Contract**

### **2.1 Adhere to the Principle of Good Faith and Trustworthiness**

The principle of good faith and trustworthiness is known as the "imperial clause" of civil law. In today's modern society, where utilitarianism and efficiency are highly valued, civil law still regards it as the highest guiding principle. According to the principle of good faith, in terms of contract performance, the parties should exercise their rights and fulfill their obligations in a legitimate and comprehensive manner based on the contract agreement, the nature of the contract, the purpose of the contract, and relevant transaction customs. To determine whether the reservation contract should continue to be performed, the purpose and effectiveness of the reservation contract should be clarified first. If the conclusion of an appointment contract is for the purpose of establishing this agreement and has legal effect, and the contract is highly certain and objectively capable of continuing to be performed, the defaulting party should bear the liability for breach of contract and should continue to perform at the request of the other party. However, according to the theory of 'continuing to perform negation', this is not a reflection of the principle of good faith, but rather a violation of the parties' autonomy of will. The author believes that whether it violates the autonomy of will should be considered in the context of entering into an appointment contract. According to relevant provisions of Chinese law, only contracts that have already met the main contents of this contract, such as the subject matter, quantity, and names of the parties, or where one party provides guarantees for this contract, or where one party actually performs and the other party accepts, can be considered as pre contract

agreements. In this case, autonomy of will should be limited. The purpose of making an appointment is to enter into this agreement. Therefore, a relatively complete appointment made in accordance with legal provisions should be protected by law. To some extent, making an appointment is also the result of the parties' autonomy of will. In order to achieve the ultimate goal of making this agreement, it is understandable to continue to perform it objectively. If the defaulting party can break free from the constraints of the reservation contract based on their autonomy of will, it is actually not fulfilling the obligations of the reservation contract and does not comply with the principle of good faith. If the parties can only break free from the constraints of the pre contract by compensating for losses and other means, then the establishment of the pre contract system will lose its original intention.

### **2.2 Irreplaceability**

From an economic analysis perspective, compensation for damages can serve as a remedy in the vast majority of disputes [5]. If this form of responsibility is not continued to be fulfilled, the parties can only choose to bear the liability for breach of contract through compensation for damages, which can easily lead to malicious breach of contract. When one party can obtain higher profits but only needs to bear less compensation, there is a high possibility of malicious breach of contract, and at this time, the compliant party lacks remedies to protect their trust interests. At this point, continuing to fulfill the obligations can better protect the compliant party.

In addition, although more and more competitive and substitutable goods have emerged with the development of the market economy, not all goods are substitutable. For example, for the customization of items that carry special emotions, these items are often spiritual sustenance and cannot be measured by money. Therefore, simple monetary damages cannot compensate for the losses of the compliant party. Continuing to perform at this time has an irreplaceable function of other breach of contract responsibilities.

### **2.3 The Situation Where the Debt Subject Matter Is Not Suitable for Performance**

The "denial of continued performance" theory holds that the continued performance in an

appointment contract belongs to one of the three exceptions to the "continued performance" of non monetary payment debts in Article 580 of the Civil Code: "the subject matter of the debt is not suitable for compulsory performance", that is, the nature of the debt is not suitable for compulsory performance. Professor Cui Jianyuan is a supporter of this viewpoint [6]. This type of object usually has personal specificity and continues to violate the basic values of respecting personality and protecting personal freedom in modern society [7]. In the author's opinion, the phrase 'continue to perform' in the appointment contract does not fall under the aforementioned circumstances. The formation of an appointment contract binds the parties to it, which is also their personal freedom and does not violate their will. Therefore, it cannot be assumed that the freedom of will to enter into this contract takes precedence over the freedom of will to enter into an appointment contract. If one party gains a trust interest through negotiation, while the other party breaks free from the constraints of the pre contract on the grounds of contractual freedom, this violates the principle of good faith and is not conducive to the formation of this agreement.

### **3. Scope of Application for Continued Performance of Reservation Contract**

#### **3.1 The Irreplaceability of the Subject Matter of the Transaction**

When the subject matter of the transaction is irreplaceable, any compensation for losses cannot provide appropriate compensation for the losing party. Therefore, in cases where performance can objectively continue, the principle of good faith should be followed to continue performance. The defaulting party shall not maliciously breach the contract for greater economic benefits. Of course, from the perspective of economic benefits and efficiency, when the subject matter of the transaction is not irreplaceable, compensation for damages or delivery of substitutes can fully compensate for the losses of the parties. Continuing to perform will only increase the burden of litigation [8], and at this time, continuing to perform is not a good remedy.

#### **3.2 Feasibility of Continuing Performance**

##### **3.2.1 The feasibility of this agreement**

Although an appointment contract has an independent and special status, its purpose is to enter into this agreement, which is closely related to this agreement. Therefore, when exploring whether an appointment contract is applicable for continued performance, consideration should also be given to whether this agreement is applicable for continued performance. If the contract that the parties intend to enter into in the future is not applicable for continued performance, then exploring whether their pre contract is applicable for continued performance has lost its practical significance. Even if the appointment contract can continue to be performed, the ultimate party cannot force the defaulting party to continue to perform the contractual obligations of this agreement, and the purpose of the contract is ultimately frustrated.

If the reservation contract refers to a contract such as a sales contract, lease contract, etc. that requires the delivery of the subject matter as a performance obligation, then the obligation to continue to perform is to continue to deliver the subject matter according to the contract agreement. This obviously has less personal compulsion on the parties, and continuing to perform can effectively achieve the purpose of the contract. Therefore, the author believes that when this type of appointment contract can objectively continue to be performed, the remedy of continued performance can be applied. However, there is an exception to this type of appointment contract, which is the gift contract. Although the gift contract also requires the delivery of the subject matter as a performance obligation, the law stipulates that the donor has the right to revoke it at will, except in some special legal circumstances where it must be fulfilled. After all, the gift contract has its particularity. It is not an equivalent exchange, and in general, the recipient does not have any obligations due to the gift. Therefore, when the donor revokes the gift, the recipient will not suffer any losses. Therefore, before the actual transfer of rights to the subject matter of the gift, the donor shall not be compelled to fulfill the obligation of delivery. Given that this gift contract does not yet have compulsory performance, according to the principle of "lifting the weight clearly and lightening the weight", the pre arranged

gift contract should respect the wishes of the donor. Except for public welfare gifts or notarized gifts, the application of compulsory performance remedies is generally excluded.

If the appointment contract refers to a contract with personal specificity such as a labor contract or an employment contract, then the application of continuing to perform remedies should be excluded. This type of appointment contract, even if it can continue to be performed, will lose its meaning because its original contract cannot be continued to be performed. The provisions of this agreement have personal specificity and cannot be replaced by others for performance. If the defaulting party is unwilling, forcing them to perform will only infringe on their personal freedom and cannot guarantee the ultimate realization of the contract's purpose after continuing to perform. In practice, such appointment contracts have been implicitly excluded from continued performance. The tripartite employment agreement signed by college graduates is a typical example. This contract is an appointment contract for the labor contract. Such appointment contracts often include compensation for losses as a way of assuming breach of contract liability in the agreement, while excluding continued performance.

### 3.2.2 Certainty of the contract

The stronger the certainty of an appointment contract and the more agreed upon matters between the parties, the more worthy it is to protect the trust interests generated by the contract<sup>[9]</sup>. In order to clarify and efficiently sort out under what circumstances the reservation contract can be applied for continued performance, individual case analysis cannot be conducted. The author believes that the reservation contract can be classified according to the degree of certainty of the reservation contract, and whether continued performance is applicable to the reservation contract can be discussed under different types to better balance the rights and interests of the parties. The author believes that based on the degree of certainty of the appointment contract, it can be divided into low-level appointment, obstacle appointment, and complete appointment. Low level appointment refers to the situation where the parties only have the intention to enter into this agreement, have only determined the

transaction intention, have a simple discussion of the content of this agreement, and have not negotiated the necessary content for the conclusion of this agreement, resulting in extremely low contract certainty. Obstacle reservation refers to the situation where both parties have reached an agreement on some of the contract terms, but due to objective or subjective reasons, they have not reached an agreement on some of the terms, which needs further discussion. In this case, the contract is generally certain. Therefore, according to the different reasons for obstacles, they can be divided into objective obstacle reservations and subjective obstacle reservations. Objective barrier appointment refers to the situation where both parties have already reached an agreement on the main terms, but due to objective barriers, further negotiations are required before entering into this agreement on some of the terms. Subjective barrier appointment refers to the inability of both parties to reach an agreement on certain terms subjectively. From this, it can be seen that subjective and objective obstacle reservations do not have a strong willingness to enter into this agreement. Therefore, the applicability of continuing to perform under the exploration of obstacle reservation types should be discussed separately. Complete reservation, as the name suggests, refers to the agreement reached by both parties through good faith negotiations on the terms of the reservation contract, and both parties agree to enter into this agreement within a certain period of time. At this point, both parties voluntarily agree to be bound by the appointment contract, with a strong desire to enter into this agreement and the greatest certainty in the contract.

Low level appointments are not applicable for continued fulfillment. The low-level appointment did not negotiate the necessary terms of this agreement, indicating that both parties do not have a strong willingness to enter into this agreement. If continued performance can be applied at this time, it would interfere too much with the parties' free will and not be conducive to achieving the purpose of the subsequent contract.

Objective barriers to appointment can be applied for continued performance. In the objective obstacle appointment, if the parties have already reached an agreement on the main terms, and have only reached an

agreement on some of the terms due to objective reasons or have not yet negotiated, it can be seen that there is no disagreement between the two parties on the content of the contract. For contracts that are temporarily unable to be concluded due to objective reasons, they can be achieved through the agreement of this contract with conditions attached or with a deadline to take effect. Alternatively, it can be supplemented by the relevant rules of contract interpretation<sup>[10]</sup>. In this type, both parties have a high willingness to enter into this agreement and continuing to perform it will not go against their will.

Subjective barriers to appointment should not apply to continued performance. In this type of appointment contract, the parties cannot reach an agreement on some terms due to subjective reasons such as the uncertainty of the negotiation content, whether to sign an exclusive agreement, and other binding clauses. It can be seen that the willingness of both parties to enter into this agreement is not high. During the negotiation process, both parties did not have a high level of trust in each other, and it is still unknown whether this agreement has been signed. At this time, the will of both parties bound by the appointment contract is not as strong as the objective obstacles mentioned above, and it is obviously unreasonable to continue to perform.

Complete reservation can be applied for continued fulfillment. In the process of completing the reservation, both parties have reached an agreement on the terms of the contract. At this point, the contract is only a reservation contract and not this contract, which is entirely due to the will of the parties. In the case of a housing sales contract dispute between a limited company in Chengdu and a limited company in Sichuan, it can be seen that the court fully respects the parties' intentions when determining whether it is an appointment contract or this contract, even when the content of the appointment contract is highly consistent with this contract. Scholar Wang Lizhi believes that the completeness of an appointment contract can be based on the following four criteria: firstly, commercial transaction habits or various contract models; The second is the rules related to contract terms in typical contracts, such as referring to Article 596 of the Civil Code for sales contracts; Thirdly, refer to the general terms of

the contract as stipulated in Article 470 of the Civil Code; The fourth is to refer to the general terms of contracts in relevant administrative regulations and rules, such as referring to Article 16 of the "Measures for the Administration of the Sale of Commercial Housing" for commodity sales contracts<sup>[11]</sup>. In the process of complete appointment, a high degree of trust interest has been formed between the two parties, and the law should protect it. Therefore, the application of complete appointment for continued performance has its legitimacy.

#### 4. Conclusion

With the continuous development of the social market economy, the form and content of appointment contracts are also constantly changing and becoming increasingly complex. Therefore, the above typological analysis is only an incomplete solution and cannot fully cover all appointment contracts. For example, in complex commercial transactions, multiple terms with varying degrees of difficulty are often designed, and the negotiation ideas of the transaction parties are different. Some parties tend to start negotiating from simple terms that are easier to reach consensus on, while others tend to start negotiating from more complex transaction terms and then resolve relatively simpler terms. Under these two different solutions, both parties have reached an appointment, but there are differences in the difficulty of subsequent negotiations, and the solutions should also be different. Therefore, for some special appointment contracts, case analysis is more reasonable. In case analysis, appropriate relief measures can be selected by considering the principles of good faith, voluntariness, efficiency, and compensation for damages, in order to balance the interests of both parties.

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