

Resolutions of the Contract Deadlock under the Background of the Civil Code: The Persistence and Development of the Theory of "the Right of Termination for the Breaching Party"

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ABSTRACT

The contract deadlock has become increasingly prevalent due to frequent economic activities. Despite originating from Xinyu Co. Ltd. vs. Feng Yumei in 2006, the debates on resolving contract deadlock have persisted even after the promulgation of the Civil Code. The second paragraph of Article 580 in the Civil Code implies support for the theory of "the right of termination for the breaching party", which is further reinforced by Article 59 of the Interpretation by the Supreme People's Court of Several Issues Concerning the Application of General Provisions of Contracts of the Civil Code of the People's Republic of China. Other legislation relating to Article 580, Paragraph 2 have their own scopes of application and cannot substitute the solution of "the right of termination for the breaching party". When these relevant systems alone fail to resolve all instances of contract deadlock, utilizing "the right of termination for the breaching party" as a last resort can establish a comprehensive framework for addressing contract deadlock.

KEYWORDS

Civil Code, Contract deadlock, The right of termination for the breaching party, *Interpretation of Several Issues Concerning the Application of General Provisions of Contracts of the Civil Code*

1 Background and Meaning of Research

Due to the ability of one party to perform the contract, or the change of economic situation and so on, contract deadlock usually occurs in the contract which cannot be performed for a long time. Such the contract needs to be terminated in advance in order to free the parties from the contractual relationship. However, one party of the contract refuses the claim of the other party to terminate the contract for his/her own reasons or interests, resulting in a deadlock in the contractual relationship. From the perspective of trial practice, contract deadlock appears when the contract is difficult to continue to perform, or it is practically impossible to perform¹. Contract deadlock may bring economic losses and legal disputes to both parties, so the study of contract deadlock has important theoretical and practical significance.

First, from the theoretical level, it can be analyzed from the angle of contract theory and contract economics. Traditional contract theory holds that a contract is a voluntary agreement reached by both parties, but in the actual performance process, there may be information asymmetry, risk

¹ Theory of "the Right of Termination for the Breaching Party" On the Contract Deadlock"[J]. Liming Wang. *Law Review*, 2020,38(1): 30.

uncertainty and other problems, leading to contract deadlock. Therefore, the study of contract deadlock can deepen the understanding of contract theory and provide theoretical support for contract design and performance.

Second, it can also be analyzed from the perspective of judicial practice. Since the typical case *Xinyu Co. Ltd. v. Feng Yumei* (shop sales contract dispute) was published in the 6th issue of the *Bulletin of the Supreme People's Court* in 2006, which admitted the breaching party also has the right to terminate contract in level of judicial practice, the problem of contract deadlock has become a hotspot and difficult issue, causing extensive discussion in civil law community. From the perspective of judgements, as of late December 2023, 4,323 public judgements can be found by searching the keyword "contract deadlock " on the website of judgment documents. What's more, from the perspective of time change, the development trend from 2 judgments in 2016 to thousands of judgments every year in the past three years shows that the problem of contract deadlock is becoming more and more common with the frequent economic activities and needs to be adjusted by the relevant legal norms.

Last, it can also be analyzed from the perspective of economic and social development. With the development of economic globalization and marketization, contracts play an increasingly important role in economic activities. However, due to the influence of market environment, system environment and other factors, contract deadlock has become an important problem restricting economic development. Therefore, the study of contract deadlock can provide theoretical support and policy advice to promote the economic and social development, maintain the social economic transaction order better, and build the socialist market economy.

To sum up, the research's significance of contract deadlock involves contract theory, judicial practice, economic and social development, and many other aspects. The in-depth study of contract deadlock not only contributes to the deepening and perfection of theory, but also contributes to the standardization and effectiveness of practice. Therefore, the study of contract deadlock has important theoretical and practical significance, and has great influence for the security and order of the economic transaction order.

2 Presentation of problem

As mentioned above, the contract deadlock caused extensive discussion in the academic community originated from the case published in the *Bulletin of the Supreme People's Court, Xinyu Co. Ltd. v. Feng Yumei*. In the case, the buyer Feng Yumei and the seller Xinyu Co. Ltd. concluded a valid sale contract for a shop owned by Xinyu Co. Ltd. in Times Square. Although the shop has been delivered for use, its property registration has not been transferred to the buyer Feng Yumei. Later, Xinyu Co. Ltd. planned to adjust the operating area of Times Square to revitalize assets, so Xinyu Co. Ltd. terminated the contract relationship with the other owners except for Feng Yumei since Feng Yumei refused to terminate or return the shop, which left tens of thousands of square meters of buildings idle. So Xinyu Co. Ltd. sued to terminate the contract with Feng Yumei.

The district court held that if the court has issued a decree for specific performance, it would affect the overall function of Times Square, go against the will of most other owners, cause damage to the interests of both parties, and cause a waste of social wealth. So, the district court ruled to terminate the contract in accordance with the principles of fairness and good faith. The appeal court affirmed the judgement.

The reason why *Xinyu Co. Ltd. v. Feng Yumei* has aroused hot discussion is that the traditional civil law theory generally believes that only the non-breaching party can enjoy the right to terminate. In the judgment of *Xinyu Co. Ltd. v. Feng Yumei*, the court ruled that Xinyu Co. Ltd., the breaching party

in the contract, had the right to terminate, instead of specific performance. Since there were no legislations which supported the breaching party's right to terminate the contract in Chinese law at that time, the judgment broke through the existing legislations at that time and created a new rule.² The rule titling the breaching party the right to terminate breaks through the traditional civil law theory, and there are many supporters and opponents.

In response, *The Summaries of the National Conference for Work of Courts on the Trial of Civil and Commercial Cases* which issued by the Supreme People's Court in 2019 (hereinafter referred to as the "*Summaries of the National Conference*") had already made relevant provisions. However, even after the promulgation of the *Civil Code*, the community still has not reached a consensus. Therefore, under the background of the *Civil Code*, what position do our legislators hold on the contract deadlock? What is the scope of Article 580, Paragraph 2 of the *Civil Code*? What is the relationship between Article 580, Paragraph 2 and other contract termination systems? This article will explore each of them in the following sections.

3 The Legitimacy of Theory of "the Right of Termination for the Breaching Party"

3.1 The Debates on Breaking the Contract Deadlock in the Pre-Civil Code Era

At the level of judicial documents, before the promulgation of the *Civil Code*, the main judicial document on contract deadlock was the Article 48, *Summaries of the National Conference*. The *Summaries of the National Conference*, as an innovative provision to solve the problem of contract deadlock issued by the Supreme People's Court, is a normative document that can be repeatedly referred to and has certain legal effect. It plays a guiding and normative role in unifying the judgments of the courts at all levels, regulating the discretion of judges, enhancing the openness, transparency and predictability of civil and commercial trials, and improving judicial credibility. However, since the *Summaries of the National Conference* is a judicial guidance document, it does not belong to the legislation, administrative regulation, or judicial interpretation. It does not have the same legal effect as legislations such as the *Civil Code* and cannot be universally applied, so there are still deficiencies in legal effect.

While at the academic level, there are four mainstream views around the solutions of breaking contract deadlock:

First, it advocates the theory of "the right of termination for the breaching party", which is further divided into two main arguments. One, represented by Professor Jianyuan Cui, recognizes that in a contract deadlock, the breaching party has right to terminate the contract and suggests that the right to terminate should be resorted to the litigation or arbitration, but distinguishing from being terminated by judgment.³ The other, represented by Professor Liangguo Sun, argues that the right of the breaching party to terminate the contract is a kind of unilateral termination right whose nature is the right of formation, and the contract should be terminated by notification.⁴

The second approach is represented by Professor Liming Wang's "application for judicial termination theory", which advocates that only the non-breaching party has the legal right to terminate the contract based on fundamental breach. It argues against recognizing the theory of "the right of termination for the breaching party" and maintains a stance that is largely consistent

2 Theory of "the Right of Termination for the Breaching Party" and Its Limitations[J]. Liangguo Sun. *Contemporary Jurisprudence*, 2016, 30(5): 54.

3 *The Way to Solve the Contract Deadlock*[J]. Jianyuan Cui. *Oriental Jurisprudence*, 2020(4): 115.

4 *Theoretical Disputes, Judicial Practice and Path Design of Termination of the Breaching Party*[J]. Liangguo Sun. *Jurisprudence*, 2019(7): 50-53.

with Article 48, *Summaries of the National Conference*, suggesting that the breaching party should seek judicial termination through applying to the court.⁵

Third, represented by Professor Shiyan Han, also opposes the theory of "the right of termination for the breaching party", believing that the special nature of continuing contracts should be taken into account and legislators should draw on the experience of the *German Civil Code*.⁶

Fourth, scholars like Rui Cai, representing the "absorption theory", advocate solving contract deadlock issues through other alternative rules instead of titling termination right to the breaching party.⁷

3.2 The Right to Terminate of the Breaching Party Cannot Be Replaced by Other Relevant Provisions

The author believes that whether it is the provisions of termination by agreement⁸, termination by operation of the law,⁹ counterplead right for impossibility of performance,¹⁰ or the *rebus sic stantibus*¹¹, none of them are sufficient to replace the right to termination of the breaching party. Some scholars believe that Paragraph 2 of Article 580 would lead to artificial conflicts with other provisions of the *Civil Code*, unavoidably reducing the effectiveness of Paragraph 2 of Article 580 due to overlapping applications.¹² However, the author believes that although on the surface, Paragraph 2 of Article 580 may seem to compete with other relevant provisions, in reality, they have their respective scopes of application.

3.2.1 Termination by Agreement and Termination by Operation of the Law

(1) Contract Deadlock Does Not Exist in the Situation of the Non-Fixed-Term Continuing Contract or Termination by Agreement.

Termination refers to the elimination of the contract according to the intention of the parties when the termination conditions are met. According to the *Civil Code*, the contract may be terminated either by agreement between both parties (Article 562) or by one of the parties exercising the right of termination (Article 563). The right to terminate a contract can be derived from both provisions and the mutual agreement of the parties involved. When both parties mutually agree to terminate the contract, there will be no contract deadlock. In non-fixed-term continuing contracts, according to Article 563(2) of the *Civil Code*, the parties can terminate the contract at any time, thus avoiding any potential contract deadlock.

(2) Contract Deadlock in the Fixed-Term Continuing Contract.

It is worth noting that in the context of fixed-term continuing contracts, when one of the five fundamental breaches specified in Article 563(1) of the *Civil Code* occurs, "the party" may terminate

5 Same as footnote 1, Liming Wang. 28, 33-35.

6 *Termination of a Continuing Contract: Termination by the Breaching Party or Termination for Material Reasons*[J]. Shiyan Han. *Chinese and Foreign jurisprudence*, 2020, 32(1): 115-122.

7 *Absorb or Reject: Reflection on the Theory of "the Right of Termination for the Breaching Party"—An Empirical Study Based on Relevant Judicial Cases*[J]. Rui Cai. *Modern Jurisprudence*, 2019, 41(3): 163.

8 Article 562, *Civil Code*.

9 Paragraph 1 of Article 563, *Civil Code*.

10 Paragraph 1 of Article 580, *Civil Code*.

11 Article 533, *Civil Code*.

12 *Re-justification and Reflection on the Theory of "the Right of Termination for the Breaching Party"*[J]. Songlun Zhang. *Qiu Shi Academic Journal*, 2022, 49(5): 130.

the contract. Comparing with Article 562 of the *Civil Code* regarding termination by agreement, although both concepts use "the party" when referring to those who have the right to terminate, it is not difficult to understand that "the party" in termination by agreement refers to both parties. However, there is a discrepancy in the expression of "the party" in termination by operation of the law of fixed-term continuing contracts. Undoubtedly, as one of the remedies, non-breaching party inevitably has the right to terminate. So, does "the party" refer only to non-breaching party or does it include both non-breaching and breaching party? If it includes both non-breaching and breaching party, then in some contract deadlock, there will be a scenario where one party has constituted a breach but has not met any of the five fundamental breaches specified in Article 563 (1) of the *Civil Code*. In this case, breaching party cannot terminate by operation of the law and thus this situation cannot be effectively resolved by provisions of termination by operation of the law.

The author contends that while Article 580(2) of the *Civil Code* adheres to the principle of "the right of termination for the breaching party" by granting such party the authority to terminate and thereby resolving contract deadlock (as expounded in detail in Part 4.1 of this article), Article 563(1) upholds traditional civil law perspectives, wherein "party" exclusively refers to non-breaching party, and breaching party do not terminate by operation of the law as stipulated in Article 563(1).

Although current laws and judicial precedents recognize the right of the breaching party to terminate a contract under specific circumstances, in accordance with the spirit and intent of civil law, it is generally understood that only the non-breaching party can terminate by operation of the law. The prevailing perspective maintains that termination serves as one of the primary remedies for breach, thus naturally attributing exclusive termination rights to the innocent party for safeguarding their interests. From a comparative law standpoint, numerous countries universally acknowledge that in cases of fundamental breach, the non-breaching party has the right to terminate the contract.¹³ For example, according to the Article 25 of the *United Nations Convention On Contracts For The International Sale Of Goods* (hereinafter referred to as the "*CISG*"), A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. In essence, *CISG* stipulates that in the event of a fundamental breach by the breaching party, it grants the non-breaching party with a right to terminate by operation of the law. Even staunch supporters and representatives like Professor Jianyuan Cui, who advocate for the theory of "the right of termination for the breaching party", argue that according to Article 563 (1) of *Civil Code*, this right of terminating is only applicable to the non-breaching party.¹⁴ This viewpoint also aligns with the notion that in exceptional circumstances where termination rights are granted to the breaching party, corresponding limitations should be imposed to prevent adverse consequences such as incentivizing intentional breaches and reducing contractual obligations.¹⁵

(3) The relationship between the right of termination by operation of the law in fixed-term continuing contract and Article 580(2).

As mentioned above, contract deadlock may occur in fixed-term continuing contract, so the conflict of application between Article 563, Paragraph 1 and Article 580, Paragraph 2 of the *Civil Code* may exist in the non-breaching party. Comparing these articles, they share similarities in that their legal consequences both result in termination, but with different conditions for exercising the right to terminate. When the breaching party commits a fundamental breach and the termination

¹³ Same as footnote 1, Liming Wang. Page 27.

¹⁴ *Contract Law*[M]. Jianyuan Cui. *Beijing University Press*, 2021: 297.

¹⁵ Same as footnote 1, Liming Wang. Page 29.

conditions stipulated in both Article 563, Paragraph 1 and Article 580, Paragraph 2, the non-breaching party can choose to apply either of them. In such cases, it is evident that terminating the contract through notification under Article 563, Paragraph 1 is more convenient and efficient compared to resorting to litigation under Article 580(2). It should be noted that Article 580(2) was introduced precisely because the non-breaching party did not want to exercise the right of termination by operation of the law under Article 563(1). If the non-breaching party is willing to exercise the right of termination under Article 563(1), there would not occur contract deadlock, so it is not necessary to worry that these two provisions will conflict in application. Conversely, Article 580(2) creates some kind of "forcing effect" that encourages the non-breaching party to break contract deadlock timely by exercising right of termination under Article 563(1).¹⁶ Therefore, although it appears that there is a conflict between Article 580(2) and Article 563(1), they actually have respective scope for application.

3.2.2 Counterplead Right for Impossibility of Performance Cannot Sufficiently Replaced the Right to Terminate of the Breaching Party

Following the promulgation of the *Civil Code*, oppose opinions have emerged regarding Article 580(2), with some arguing that if any of the three situations of Article 580(1) exist, the breaching party can invoke the counterplead right for impossibility of performance and defend the specific performance request of the non-breaching party. In such case, why the breaching party still sue for terminating contract by judgment? Therefore, opponents claim that legislator should stipulate that only when the breaching party is unable to invoke counterplead right for impossibility of performance, they may sue for terminating contract by judgment.

However, the author believes that this viewpoint does not comprehensively analyze the problem of contract deadlock. As mentioned earlier, taking the case of *Xinyu Co. Ltd. v. Feng Yumei* as an example, although Xinyu Co. Ltd. meets the conditions of Article 580(1)(2) "the cost of performing the obligation is excessively high" and can invoke counterplead right for impossibility of performance, it cannot change the fact that Feng Yumei already has possessed the shop and it is impossible for Xinyu Co. Ltd. to regain possession of the shop since Xinyu Co. Ltd. has already delivered the subject matter (the shop) to Feng Yumei. Therefore, a contractual deadlock is formed.

In the event that the breaching party is unable to perform the contract, according to Article 580(1) of the *Civil Code*, although the breaching party has the right to invoke the counterplead right for impossibility of performance against the counterparty's specific performance claim, the contract still exists and do not be discharged. On one hand, non-breaching party have the option to terminate contracts, but the party refuse to exercise based on certain considerations for his/her own interests. On the other hand, breaching party is not legally entitled to apply for termination. Consequently, a contractual deadlock may arise where continuing with the contract serves no purpose. It is important to recognize that civil law aims at resolving disputes rather than punishing parties. Therefore, granting breaching party with termination rights would help break contract deadlock, enhance market dynamics, achieve substantive justice and promote market economy development. For transactions that cannot be performed, forcing performance in name only does not truly encourage transactions and increase breaching party burden unfairly. Instead, allowing breaching party to sue for contract termination should be permitted.

¹⁶ *The Impossibility of Performance and Termination of Contract—An Analysis of Article 580, Paragraph 2 in the Civil Code* [J]. Jiayou Shi. *Modern Jurisprudence*, 2021, 43(4): 36-37.

3.2.3 The Rebus Sic Stantibus Cannot Replace the Right to Terminate of the Breaching Party

Some scholars who are opposed to the theory of "the right of termination for the breaching party" believe that the application of Article 533 of the *Civil Code* (rebus sic stantibus) is sufficient to solve the problem of contract deadlock. The author believes that although the legislation about rebus sic stantibus has been supplemented and improved after entering Civil Code era, its application in solving contract deadlock still has limitations and cannot replace the right of termination for the breaching party.

Rebus sic stantibus means, after valid establishment and during the period of performance, the basis conditions of the contract occur major changes which were unforeseeable for parties when they entered into contract. As a result, it is impossible to perform the contract or results of performance are obviously unfair. Therefore, according to the principle of good faith, the party can claim to modify or terminate the contract. Article 533 of the *Civil Code*, based on previous judicial interpretations and reference to comparative law, introduced the legislation of the rebus sic stantibus for the first time. Based on this, Article 59 of the *Interpretation by the Supreme People's Court of Several Issues Concerning the Application of General Provisions of Contracts of the Civil Code of the People's Republic of China* (hereinafter referred to as the "*Interpretation of General Provisions of Contracts*") further clarified the application of the legislation of rebus sic stantibus.¹⁷ After the introduction of this legislation, notable changes include no longer distinguishing between force majeure and rebus sic stantibus¹⁸ as well as stipulating the obligation to renegotiate, which allows legislation of the rebus sic stantibus to resolve some of the contract deadlock.

However, it should be pointed out that, it is very hard to reach conditions of legislation of the rebus sic stantibus, especially for the court when it seldom and cautiously applies this legislation in judgement. Breaking contract deadlock through this way should be only limited in the loss of the basis of the contract resulted by drastic changes that are not caused by the parties.¹⁹ Furthermore, looking at real life, the probability of applying legislation of rebus sic stantibus is very small, and more often than not, the reason for the contract deadlock, is due to the parties themselves, so attempts to replace "the right of termination for the breaching party" through the system of rebus sic stantibus does not work.

4 Construction of the Comprehensive Framework for Breaking Contract Deadlock under the Background of the Civil Code

4.1 The Persistence and Development of the Theory of "the Right of Termination for the Breaching Party"

As mentioned before, the judgement of *Xinyu Co. Ltd. v. Feng Yumei*, for example, recognized that the breaching party could also have right to terminate the contract long before the promulgation of the *Civil Code*. However, the *Civil Code* is ambiguous as to whether the breaching party has the right of termination. When the *Civil Code* was promulgated, perhaps to balance different views of scholars, legislator did not explicitly support or oppose any of the doctrine in Article 580, Paragraph 2, but by analyzing the provisions and relevant legislation, we can still analyze the legislator's

17 Important Improvements in Judicial Application of the Legislation of the Rebus Sic Stantibus [J]. Jiayou Shi. *Application of Law*, 2024(3): 79.

18 Corona Virus Disease 2019, Force Majeure and Rebus Sic Stantibus [J]. Yi Wang. *Jurisprudence*, 2020(3): 38.

19 Reassessment of the Paths to Breaking the Contract Deadlock Under the Background of the Civil Code [J]. Ye Tian. *Social Sciences in Chinese Universities*, 2021(4): 105.

implicit attitude.

Before the formal promulgation of the *Civil Code*, Prof. Jiayou Shi and Dr. Limei Gao who were the supports of the theory of "the right of termination for the breaching party", claimed that a paragraph should be added in the draft that "in any of the above case, the court or arbitration can terminate the contract at the request of the parties, but it does not influence liability for breaching"²⁰, since Article 580, Paragraph 1(counterplead right for impossibility of performance) of the *Civil Code* was not sufficient to solve the problem of contract deadlock. Compared to the Article 580(2), legislator did not or tried to avoid using the similar expression or terminology of "the breaching party's right to terminate" in the legal provision but expressed it as. No matter what the considerations are, it is no doubt that so-called "requesting the termination of rights and obligations" is in essence the termination of the contract. It is just that "termination of rights and obligations" is less rigid than "termination of the contract" and less offensive to people's moral instincts.²¹

However, even though the legislator's hidden attitude could be found by analyzing the provisions of Article 580(2), it was too subtle, and therefore, the controversies in the academic community have not stopped after the promulgation of the *Civil Code*. There were still many scholars who opposed theory of "the right of termination for the breaching party". Subsequently, *Interpretation of General Provisions of Contracts*, which was promulgated in 2023, added Article 59 based on relevant provisions about contract deadlock in the *Civil Code*, which further clarified and consolidated the position of the "the right of termination for the breaching party" of the *Civil Code*.

The provision of the first half of Article 59 of *Interpretation of General Provisions of Contracts* supplements the time of termination of the contract in the application of Article 580(2) of the *Civil Code*. According to Article 59 of *Interpretation of General Provisions of Contracts*, if the plaintiff requests to terminate the contract in accordance with Article 580(2) of the *Civil Code*, the court should generally take the time when the copy of indictment reached to the defendant as the time of termination. In connection with the provision of Article 565, Paragraph 2 of the *Civil Code*²², it is found that its procedure for the termination of the contract is very similar to the one in Article 59 of *Interpretation of General Provisions of Contracts*.

Termination by notification or by litigation which can produces the effect of a change in the legal relationship is unilateral declaration of intention, which is undoubtedly right of formation. The right of terminating contract is also right of formation. Article 59 of *Interpretation of General Provisions of Contracts*, which is similar to the mode of termination by litigation, in fact supports the position that the breaching party enjoys the legal right of termination and favorably echoes the position of "the right of termination for the breaching party" in Article 580(2) of the *Civil Code*.

In addition, if Article 580 (2) of the *Civil Code* upholds the position of "application for judicial termination theory", in other words, the breaching party does not have right of termination, but should terminate the contract by applying to the court. If so, such litigation should belong to action of formation, which changes the legal relationship through the judgment. By contrast, if Article 580 (2) of the *Civil Code* upholds the position of "the right of termination for the breaching party" which allows the breaching party to terminate the contract, then also take the example of suing to the

20 *The Right of Termination for the Breaching Party:Controversies and Responses* [J]. Jiayou Shi, Limei Gao. *Comparative Law Research*, 2019(6): 52.

21 *Doctrinal Construction of The Right of Termination for the Breaching Party* [J]. Bohan Xu. *Jurisprudence of Nanjing University*, 2021(1): 73.

22 Article 565(2) of the *Civil Code*: "one party requests to terminate the contract resorted to litigation or arbitration without notifying the other party and the court or arbitration confirms the claim, the contract is terminated when the copy of indictment or application for arbitration reached to the other party. "

court by the breaching party, the judgment at this time is only to confirm whether the legal relationship claimed by the breaching party exists, and will not result in any creation, changes or elimination of the legal relationship. Therefore, such litigation should belong to action of confirmation. According to the first half of Article 59 of *Interpretation of General Provisions of Contracts*, the legislator stipulates that the court should generally take the time when the copy of indictment reached to the defendant as the time of termination. If the provision regulars that the court should take date of judgement as the time of termination, the litigation will be action of formation. So, such litigation does belong to action of confirmation, which confirms that Article 580(2) of the *Civil Code* upholds the position of "the right of termination for the breaching party".

As mentioned before, theory of "the right of termination for the breaching party", can be further divided into two main arguments. One believes that the breaching party should terminate the contract by notifying the non-breaching party, the other argues that the breaching party should terminate the contract by litigation or arbitration. The words "terminated by the court or arbitration according to the application of the party" in Article 580(2) of the *Civil Code* confirms that the position of "the right of termination for the breaching party" refers to terminate the contract by litigation or arbitration.

4.2 Relationship Between Article 580(2) of the *Civil Code* and Other Relevant Legislations: Convergence, Association rather than Overlap

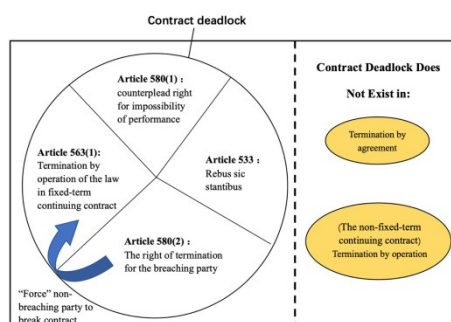


Figure 1 Construction of the Comprehensive Framework for Breaking Contract Deadlock

As mentioned before, it seems that Article 580(2) may compete with other relevant provisions, but they have their respective scopes of application. Contract deadlock may occur in fixed-term continuing contracts, but there is no conflict between Article 580(2) and Article 563(1). Furthermore, the system that entitles termination right to the breaching party in Article 580(2) creates some kind of "forcing effect" that encourages the non-breaching party to break contract deadlock timely. The conditions of *rebus sic stantibus* are hard to achieve and the system of counterplead right for impossibility of performance is not a weapon that can be actively invoked to terminate the contract. It just an only a passive defensive tool. However, both of them have their respectively scopes of applications, which can solve some part of the problem of contract deadlock.²³ Thus, Article 580(2) does not appear in a confrontational position with other relevant provisions and the effect of other legislations will not be derogated after the promulgation of Article 580(2).

The author believes that, as shown on the left side of Picture 1, the relationship between Article

²³ Same as footnote 19, Ye Tian. Page 106-107.

580(2) and other relevant provisions is a state of union, which becomes an organic whole. theory of "the right of termination for the breaching party" can solve the problems that cannot be solved by the existing legislations such as *rebus sic stantibus* and counterplead right for impossibility of performance, etc., and it is a new system that is independent of the other existing rules in terms of the scope of application.²⁴ It should be noted that, in the contract deadlock of the fixed-term continuing contracts, only in the case of fundamental breach caused by the breaching party will Article 580(2) force the non-breaching party to terminate the contract by operation of the Law. By contrast, counterplead right for impossibility of performance can only be performed passively instead of positively. Furthermore, *rebus sic stantibus* is applicable to strict conditions, whose probability of occurrence is very small and scope of application is limited. Therefore, there is still a kind of contract deadlock that the above systems cannot be applied, and this part of the contract deadlock should be categorized under the scope of adjustment of "the right of termination for the breaching party" stipulated in Article 580(2), as a backstop way to solve the contract deadlock.

5 Conclusion

By reviewing the judgement of *Xinyu Co. Ltd. v. Feng Yumei*, the debates on breaking contract deadlock as well as the legislative and judicial documents in the pre-*Civil Code* era, this paper, based on Article 580(2) of the *Civil Code*, analyzes the provision itself and draw a conclusion about the legislator's implicit "the right of termination for the breaching party" position. The reason why the legislator did not explicitly state his/her position in support of the breaching party's termination right in the provision is that the theory of "the right of termination for the breaching party" is not unanimously approved in the academic community, and there are still a lot of opponents. In any case, other related legislations can solve part of the contract deadlock but cannot replace the right of termination for the breaching party, which furtherly proofs justification of it. In addition, in conjunction with Article 59 of *Interpretation of General Provisions of Contracts*, the legislator's position of "the right of termination for the breaching party" has been called out. Given the background that *Civil Code* adhere to "the right of termination for the breaching party" position, Article 580(2) of the *Civil Code* and other relevant legislation, instead of competing, have their own space of application and construct an integrated framework for breaking contract deadlock. The author believes that future research on contract deadlock should be based more on this framework and improve the contract deadlock resolution system.

24 Same as footnote 3, Liangguo Sun. Page 48, 54, 58.