

**The Study of Preliminary Contract: Focus on the Development
of Preliminary Contract in German Law and the Relevant
Decisions of the Supreme Court in Taiwan**

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Abstract

The preliminary contract is an independent contract, which serves the actual needs in transactions and provides "preparatory functions" to the contract to make sure that the parties agree to be bound and to enter into the formal contract. As the preliminary contract indicates either the acceptance of the contract or the intent to enter into it, that the parties are under obligation to form the contract is certainly the essential effect of the concept of preliminary contract. Therefore, besides the remedy for non-performance to claim for compensation, the content of a preliminary contract can be independently realized through the compulsory execution. If each party conducts a suit for the performance of the preliminary contract, the conclusive judgment of the court can be substituted for the expression of intent of the other party. Furthermore, to meet the demand of litigation economy, the parties can initiate the action and concurrently assert the claims to constitute the formal contract and to perform accordingly.

A valid preliminary contract requires its content to be sufficient, and to be adequate for the parties to foresee the content of the formal contract. However, as the preliminary contract is recognized only in exceptional cases, a contract in doubt, in which the content is quite sufficient and certain, should be seen as a formal contract. If the content of a preliminary contract is insufficient and as a result to be invalid, then it is possible for the parties to claim for reliance damages as the remedy for breach of a duty prior to the conclusion of the contract (*culpa in contrahendo*). And if the preliminary contract is valid but not

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to be performed (especially in cases related to delay of performance and impossibility of performance, which are quite common in judicial practices in Taiwan), the parties can claim for damages according to the rules of non-performance, and it is just equivalent to the performance interest of the formal contract.

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