International Journal of Asian Social Science Research; Vol.3, No.5; 2026
E-ISSN: 3006-2179 P-ISSN: 3005-754X
DOI: https://doi.org/10.70267/ijassr.v3n5.8693
Published by: Zeus Press

On the Compensation for the Loss of Transaction Opportunity in Culpa in Contrahendo: From the Perspective of Chinese Judicial Practice

Jieya Wei*

College of Humanities and Social Development, Nanjing Agricultural University, Nanjing, China

**Corresponding author: Jieya Wei.*

Abstract

The compensability of the loss of transaction opportunity under the doctrine of culpa in contrahendo (contracting negligence) has long perplexed Chinese legal theory and judicial practice. From the perspective of judicial practice, the Supreme People's Court explicitly ruled in the Shenzhen Biaobang case that an 'objectively reasonable loss of transaction opportunity' falls within the scope of compensation. Conversely, many local courts reject such claims on the grounds of the 'uncertainty of transaction opportunities' or their 'exclusion from reliance interests'. These two opposing stances reflect a profound tension between reliance interest and expectation interest, as well as between the requirement of certainty and the compensatory function of damages. Awarding limited compensation for the loss of transaction opportunity can reduce opportunity-capturing costs and deter opportunistic behavior, thereby possessing efficiency justification from a law and economics perspective. In terms of institutional construction, the foreseeability of the opportunity loss by the party at fault should serve as the threshold condition for application. Courts should differentiate among four scenarios involving variables of third-party conduct and comprehensively weigh factors such as the probability of realizing the opportunity, the degree of reliance investment, and the benefits gained by the at-fault party to achieve a flexible and dynamic compensation mechanism.

Keywords

liability for culpa in contrahendo, loss of transaction opportunity, reliance interest, contractual disputes

1. Introduction

Since Rudolf von Jhering introduced the doctrine of culpa in contrahendo, its core function has been to protect parties from losses suffered due to their reliance on the performance of pre-contractual obligations during the negotiation phase. Articles 500 and 501 of the Civil Code of the People's Republic of China carry forward the provisions of Articles 42 and 43 of the former Contract Law. However, the legislation remains silent on the exact scope of damages, particularly regarding whether the loss of a transaction opportunity is compensable.

This legislative omission has resulted in a severe split in judicial practice. In Shenzhen Biaobang Investment Development Co., Ltd. v. Anshan Finance Bureau, an equity transfer dispute, the Supreme People's Court explicitly held that 'the objectively reasonable loss of transaction opportunity suffered by a party should fall within the scope of compensation under the liability for contracting negligence' and discretionarily awarded damages equivalent to 10% of the price differential from the resale of the equity[1]. Conversely, in Ding Yuzhi v. Hubei Xijiang Weiye Real Estate Development Co., Ltd., a commodity house pre-sale contract dispute, the High People's Court of Hubei Province rejected the claim for damages on the grounds that 'the scope of compensation for contracting negligence is limited to the loss of reliance interest (i.e., inherent interest), whereas the loss resulting from real estate price appreciation essentially falls under the category of expectation interest'[2] .

Such inconsistent adjudication of similar cases not only undermines judicial authority but also prevents market participants from forming stable expectations. Compounding the complexity is the inherently high level of uncertainty and aleatory nature of transaction opportunity loss: is it an extension of reliance interest or a variant of expectation interest? Will compensating it open the 'floodgates of litigation' and lead to unbounded liability? These queries urgently demand a theoretical response that transcends the traditional binary framework of 'certainty versus foreseeability' found in legal dogmatics.

This paper posits that the core of the issue regarding compensation for the loss of transaction opportunity is not whether to compensate, but rather under what conditions and how to compensate. To achieve this, it is necessary to first conduct a typological categorization of the diverging stances in Chinese judicial practice; second, analyze the limitations of traditional doctrinal debates; and finally, attempt to construct a dynamic compensation mechanism that balances both the scope of application and the calculation of damages.

2. Divergence in Chinese Judicial Practice

2.1 Affirmative Judicial Stance Welcoming Compensation for Transaction Opportunity Loss

2.2 Shenzhen Biaobang v. Anshan Finance Bureau: A Breakthrough Ruling by the Supreme People's Court

Factual Background: In April 2012, Biaobang entered into an Equity Transfer Agreement with the Anshan Finance Bureau, agreeing to acquire 225 million shares of Anshan Bank at RMB 2 per share. The agreement stipulated that it would 'take effect upon approval by the competent regulatory authorities'. Thereafter, Biaobang paid the deposit and submitted the required materials. However, the Anshan Finance Bureau terminated the transaction on the pretext of 'appreciation of state-owned assets' and subsequently transferred the shares to a third party at RMB 2.5 per share in 2014. Biaobang filed a lawsuit seeking damages for lost expectation interests totaling RMB 112.5 million (the price differential of RMB 0.5 multiplied by 225 million shares).

The court of first instance held that the contract was formed but had not taken effect, and that the Anshan Finance Bureau should bear liability for contracting negligence; however, it supported only direct losses (transaction fees and interest on the deposit) and rejected expectation damages. On appeal, the Supreme People's Court reversed the judgment in part, awarding a discretionary sum of RMB 11.25 million (10% of the price differential) for the loss of transaction opportunity in addition to the direct losses.

The core logic of the judicial summary rests upon three pillars: first, the scope of compensation for contracting negligence is not strictly restricted to direct losses under Article 42 of the former Contract Law, and transaction opportunity loss constitutes an indirect loss; second, since both parties had executed the contract and entered the regulatory approval phase, their mutual reliance had reached an advanced level, making Biaobang's prospect of acquiring the shares a realistic probability; third, the Anshan Finance Bureau maliciously obstructed the contract from taking effect and resold the shares at a premium; thus, failing to compensate for the loss of transaction opportunity would result in a severe imbalance of interests between the parties and violate the principle of good faith[1] .The retrial court subsequently affirmed this ruling.

2.2.1 Zhou Fang v. Xi'an Xincheng Haixiang Eye Hospital Co., Ltd.: Opportunity Loss Compensation in Real Estate Leasing

In a case adjudicated by the Hanzhong Intermediate People's Court of Shaanxi Province, the defendant, Haixiang Eye Hospital, engaged in prolonged negotiations with the plaintiff, Zhou Fang, regarding a commercial lease. Relying on the defendant's repeated assurances and the official address published by the local Health Bureau, the plaintiff turned down multiple other prospective commercial tenants. Subsequently, the defendant unilaterally terminated the negotiations, leaving the property vacant for 13 months.

The court of second instance held that the defendant's behavior was 'sufficient to create a reasonable expectation of reliance in Zhou Fang that the lease agreement would be concluded... thereby causing the plaintiff to forfeit transaction opportunities over a certain period'. Consequently, the court held that reliance damages ought to be compensated. Factoring in the negotiation process, the duration of vacancy, the floor area, the location, and the inherent uncertainty of transaction opportunities, the court discretionarily determined a rental loss compensation of RMB 523,365.60[3].

These two affirmative cases share a salient feature: the at-fault party and the injured party had entered into substantive negotiations or even executed a formal contract. Based on a reasonable reliance on the contract's formation, the injured party engaged in tangible performance or forbearance, such as rejecting third-party offers or leaving the premises vacant for an extended duration. At this juncture, the transaction opportunity has transformed from a purely speculative expectation into a 'reasonable expectation' with a high probability of realization.

2.3 Negative Judicial Stance Rejecting Compensation for Transaction Opportunity Loss

2.3.1 Ding Yuzhi v. Xijiang Weiye Co.: Liability for Contracting Negligence Confined to Reliance Interest

In a dispute handled by the High People's Court of Hubei Province, Ding Yuzhi entered into a commodity house pre-sale contract (essentially an entrustment construction agreement) with a developer. The contract was subsequently declared void because the developer failed to obtain a pre-sale permit and resold the property to a third party. Ding Yuzhi demanded compensation for the loss resulting from the appreciation of the property price (i.e., loss of transaction opportunity).

The retrial court explicitly ruled: 'As the contract involved in this case is void, the at-fault party who caused the invalidity shall bear liability for contracting negligence. The scope of compensation for contracting negligence is strictly limited to the loss of reliance interest (i.e., inherent interest)...' The loss caused by the appreciation of real estate prices actually falls within the realm of expectation interest and does not constitute a loss of reliance interest'[2]. This ruling equated 'transaction opportunity loss' with 'expectation interest loss' and entirely excluded it from compensation on that basis.

2.3.2 Beijing Chengda Co. v. Green Co.: Failure to Execute a Contract Post-Winning a Bid; Indirect Losses Unsupported

In a case adjudicated by the Beijing Third Intermediate People's Court, Green Co. had won a bid for a wood veneer project issued by Chengda Co. Although Chengda Co. had confirmed the successful bid (which remained in an unreleased status), Green Co. structured its production plan accordingly and declined other potential projects. Chengda Co. subsequently refused to execute the formal contract due to internal personnel changes.

The court of first instance held that the scope of damages for contracting negligence 'shall be strictly limited to the loss of reliance interest... restoring the party to the position they would have occupied had the contract never occurred', thereby rejecting indirect losses such as transaction opportunity loss. The court of second instance affirmed the judgment[4] .

The underlying logic shared by these negative cases is that the scope of compensation under contracting negligence should, in principle, be restricted to reimbursing actual out-of-pocket expenditures and should not extend to speculative opportunity interests. Allowing otherwise, they argue, would render the calculation of damages boundless and overwhelm the judiciary.

2.4 Preliminary Reflections on the Conflict of Judicial Stances

Behind these two diametrically opposed camps lies a divergence in understanding the fundamental function of the doctrine of culpa in contrahendo. The affirmative approach emphasizes the proactive protective function of the good faith principle, maintaining that when an advanced level of trust is established, compensating for opportunity loss serves to penalize bad-faith conduct and restore equitable equilibrium. Conversely, the negative approach strictly adheres to classical doctrinal boundaries, asserting that liability for contracting negligence aims to restore the injured party to the position they would have enjoyed ‘had the contract never been contemplated’, rather than the position ‘had the contract been fully performed’. Thus, opportunity loss, which is essentially a type of ‘profit that could have been obtained’, is deemed uncompensable.

The crux of this debate lies in whether the loss of a transaction opportunity falls within reliance interest or expectation interest, or whether it constitutes an independent, intermediary form of interest. Traditional conceptual jurisprudence fails to provide a satisfactory resolution, necessitating the introduction of an external lens, an efficiency analysis rooted in law and economics to re-examine the dilemma.

3. Theoretical Disputes and Law and Economics Analysis

3.1 Focus of Traditional Doctrinal Controversies

Chinese academia is similarly fractured over the status of transaction opportunity loss. Proponents of the affirmative view argue that the compensatory scope of contracting negligence encompasses both direct and indirect losses, the latter including losses resulting from the forfeiture of alternative contracts with third parties[5] . Conversely, proponents of the negative view maintain that protection is strictly limited to direct out-of-pocket expenditures, namely negotiation expenses, preparatory costs, and interest[6] .The debate between the two sides has long remained at the doctrinal level of ‘certainty-foreseeability’: the negative view argues that opportunity loss is too ‘aleatory’ and compensation will open the floodgates of litigation; the affirmative view emphasizes that practical operational difficulties should not become a reason for refusing protection. However, neither side has fully responded to a fundamental question: is the judicial cost saved by refusing compensation inevitably greater than the resulting increase in other social costs?

3.2 Efficiency Analysis from the Perspective of Law and Economics

From the perspective of law and economics, whether a specific type of damage should be compensated depends on whether the social benefits of doing so exceed the social costs. Some commentators (such as William Bishop) argue that the loss of a transaction opportunity is merely a ‘transfer payment’, where Party A’s lost opportunity equals Party B’s gained opportunity, and thus creates no net social loss, rendering compensation economically inefficient[7] .

However, this assertion suffers from two fatal flaws.

First, it overlooks the opportunity-capturing costs incurred by market actors. When negotiations collapse due to a party’s pre-contractual negligence, the counterparty must seek an alternative transaction partner. If other market participants are already operating at peak capacity, satisfying this sudden demand requires additional capital investment (such as expanding storefronts or hiring more personnel). These supplementary investments represent real and deadweight social costs, rather than a mere redistribution of wealth[8] .

Second, a blanket refusal to compensate fosters opportunistic behaviors and moral hazards. In Shenzhen Biaobang, for instance, the Anshan Finance Bureau maliciously broke off negotiations due to asset appreciation and resold the equity at a premium. If the legal framework does not compel the at-fault party to internalize the opportunity loss, they face no penalty and instead capture the entire windfall of the price differential. This structures a pernicious incentive for market actors to exploit information asymmetries or negotiation intervals to hold out for better bids . The systemic consequence is a collapse of pre-contractual trust, a surge in monitoring costs, and a sharp spike in aggregate transaction costs across the economy.

Consequently, awarding limited compensation for lost transaction opportunities, despite incurring some judicial administrative costs, is economically efficient because it suppresses opportunism and reduces total social costs. The pivotal inquiry is not whether to compensate, but rather under what parameters and to what extent, meaning the formulation of precise threshold conditions and calculation metrics to prevent speculative or excessive claims.

4. Structuring a Dynamic Compensation Mechanism

4.1 Scope of Application: A Foreseeability-Centric Standard

Not all losses of transaction opportunities warrant compensation. Liability should attach only when the at-fault party could have reasonably foreseen that its conduct would cause the counterparty to forfeit a specific transaction opportunity. Borrowing the analytical framework from the English landmark case Allied Maples Group Ltd. v. Simmons & Simmons, variables regarding third-party conduct can be categorized into four distinct typologies to ascertain the presence or absence of foreseeability:

Category 1: Scenarios where the third party's volition is effectively constrained, such as by established trade usages, commercial customs, or robust historical empirical data. In these circumstances, the at-fault party is deemed to have foresight, and damages are due.

Category 2: Scenarios where the third party's behavioral variables align with its own economic self-interest (e.g., executing a substitute transaction in a buyer's market). Such outcomes are reasonably foreseeable and compensable; conversely, if the variation cuts against the third party's economic rationale (e.g., selling at an anomalously depressed price), it is unforeseeable and non-compensable.

Category 3: Scenarios where, despite the absence of an explicit behavioral track record, the third party's conduct can be reasonably inferred via objective systemic factors (e.g., standard claims-settlement practices in the insurance industry). Under such conditions, foreseeability is legally presumed.

Category 4: Scenarios where the third party’s conduct is completely unconstrained and devoid of any objective predictable parameters, typical in illiquid markets like fine art or antiquities. Here, foreseeability is entirely lacking, and compensation must be denied.

Under this taxonomy, Shenzhen Biaobang falls within a compensable tier (lying between Categories 1 and 3 due to the executed contract and pending regulatory approval), whereas in Ding Yuzhi, the real estate appreciation was a product of broad market volatility. It cannot be established that the developer could ‘specifically foresee’ the exact future price surge at the time of negotiation; thus, the court’s rejection of expectation damages retains a degree of doctrinal rationality.

4.2 Factors Governing the Calculation of Damages

Once the compensability of transaction opportunity loss is established, the central difficulty shifts to quantifying the exact award. Unlike direct losses, opportunity losses cannot be precisely calculated via documentary receipts or invoices. Accordingly, courts must weigh multiple factors to exercise a flexible and contextual discretion on a case-by-case basis. Drawing from judicial practice, the critical parameters are structured below.

4.2.1 Degree of Maturity in the Negotiation Phase

The stage reached in negotiations directly determines the intensity of the injured party’s ‘reasonable reliance’. A higher level of negotiation maturity enhances the justification for the injured party’s forbearance from alternative dealings, corresponding to a higher percentage of supported compensation. The metrics for assessing maturity comprise:

Completeness of the negotiations: This analyzes whether the parties have achieved consensus on essential terms such as subject matter, price, quantity, and method of performance. In Shenzhen Biaobang, the parties had executed a formal contract detailing the transfer target, consideration, payment schedules, and breach clauses, exhibiting an exceptionally high degree of maturity. In Zhou Fang, although no formal lease was signed, consensus was reached on core terms including location, rental rates, and preparatory milestones, and the defendant formally appointed the plaintiff as the project director, pushing the maturity to an advanced stage. By contrast, in Beijing Chengda Co., although Green Co. had won the bid’, it was kept in an ‘unreleased’ status without a formal contract, demonstrating low maturity.

Actual reliance expenditures or performance investments: This checks whether the injured party has paid deposits, sought regulatory permits, or injected capital/labor. Biaobang paid an RMB 13.5 million deposit and submitted approval files; Zhou Fang repeatedly coordinated with the Health Bureau and turned down alternative tenants; these substantive inputs fortified the reasonableness of their reliance.

Subjective state of the at-fault party: Courts look to whether the party maliciously delayed negotiations to hold out for a better price, or whether performance collapsed due to objective hurdles (such as the developer's failure to secure a pre-sale permit in Ding Yuzhi). The more flagrant the bad faith, the more inclined the court should be to award a higher proportion of damages.

4.2.2 Reality and Evidentiary Proving of the Opportunity Loss

Although transaction opportunities are inherently contingent, they are not entirely incapable of proof. Courts must scrutinize whether the injured party can proffer evidence demonstrating the existence of a 'real and substantial' alternative transaction opportunity. In Zhou Fang, the plaintiff conclusively proved that 'during the relevant period, multiple prospective tenants contacted the plaintiff to execute lease contracts, all of whom were rejected due to the prior engagement with the defendant'. This proves the alternative opportunity was tangible, not hypothetical. Conversely, in Ding Yuzhi, the plaintiff submitted only promotional brochures and screenshots of chat logs, failing to establish the existence of any concrete substitute buyer, which justified the court's refusal to compensate for real estate appreciation.

In Shenzhen Biaobang, although the plaintiff did not identify a specific alternative transaction it passed up, the fact that the Anshan Finance Bureau immediately resold the equity to a third party at a premium established that the underlying asset possessed higher market value, indirectly proving that Biaobang lost the opportunity to capture that value at the original price. The Supreme People's Court leveraged this exact baseline to benchmark the award at 10% of the resale price differential. Thus, the specificity of the injured party's burden of proof directly dictates the quantification of damages. Where a concrete alternative offer can be proven, the court can calculate the price differential; where no specific substitute offer is recorded, estimation can proceed by reference to the at-fault party's subsequent actual resale price or the prevailing market average price.

4.2.3 Assessment of the Probability of Realizing the Opportunity

Even a proven alternative opportunity is rarely an absolute certainty. Courts must evaluate the mathematical probability of the opportunity's ultimate realization and utilize it as a discount coefficient to adjust the quantum of damages. In Shenzhen Biaobang, even if the equity transfer contract had been approved, Biaobang faced a five-year lock-up period restricting share transfer, and any subsequent transfer remained contingent upon regulatory clearance. Consequently, Biaobang could not immediately liquidate the equity at market value; the realization of the price differential was subject to significant temporal delay and regulatory headwinds. The Supreme People's Court's decision to peg damages at 10% represents a balanced compromise reached after discounting for this realization probability.

In Zhou Fang, real property functions as a standard commodity with a broad pool of prospective alternative lessees, making the probability of executing a substitute lease significantly higher than that of a heavily regulated equity transfer. Although the court did not explicitly detail its mathematical formula, the awarded sum closely approximated the full rental loss for the 13-month vacancy, indicating that the court assessed the realization probability as highly elevated. Factors relevant to this assessment include the fungibility of the subject matter, market liquidity, the injured party's own financial capacity and credentials, the presence of third-party competition, and macroeconomic or regulatory risks.

4.2.4 Gains Realized by the At-Fault Party

Where the at-fault party derives an actual economic windfall from its unconscionable conduct, referencing its unjust gains not only aligns with the principle of equity but also serves as a pragmatically convenient proxy to measure the lost opportunity. In Shenzhen Biaobang, the Anshan Finance Bureau resold the shares at RMB 2.5 per share, clearing a premium of RMB 0.5 per share over the contract price. The Supreme People's Court explicitly noted: 'the price differential gains derived by the Anshan Finance Bureau from selling the equity were obtained at the cost of Biaobang forfeiting the opportunity to purchase said equity... failing to compensate for the loss of transaction opportunity would precipitate a severe imbalance of interests between the parties'. Consequently, the court adopted the resale profit as the calculation baseline and applied a 10% ratio.

In Zhou Fang, the defendant hospital reaped no direct financial gain from breaking off negotiations (as it ultimately left the premises unused); hence, the court bypassed the 'gains of the at-fault party' metric and measured damages against the plaintiff's actual rental loss from vacancy. Thus, the at-fault party's gains constitute an important reference parameter but not an exclusive benchmark. When the breaching party derives no actual profit, assessment must remain tethered to the objective opportunity loss sustained by the injured party.

4.2.5 Interplay Between Direct Losses and Opportunity Losses

When computing the total award, care must be exercised to prevent double recovery. The direct losses already indemnified, such as negotiation expenditures, interest on deposits, and preparatory costs, are inherently the costs incurred to capture the transaction opportunity in the first place. Overlap may occur between these historical costs and the value of the opportunity itself.

In Shenzhen Biaobang, the Supreme People's Court awarded RMB 11.25 million for opportunity loss alongside separate compensation for transaction costs and deposit interest. These items coexist harmoniously because the transaction costs and interest constitute 'sunk costs' already incurred out-of-pocket, whereas the opportunity loss represents compensation for a 'future expectancy interest'. Because their legal natures differ, no double counting occurs. However, if the opportunity loss claimed by the plaintiff already captures or absorbs those historical expenditures (for instance, if deposit interest is embedded as a sub-component of the opportunity valuation), such sums must be netted out to respect the rule against double recovery.

5. Conclusion

The issue of compensating transaction opportunity loss under culpa in contrahendo superficially manifests as a doctrinal puzzle of distinguishing reliance interests from expectation interests; at a deeper level, it represents a challenge of legal engineering: how to afford certain remedies within an inherently uncertain framework. Chinese judicial practice has accumulated an array of conflicting judgments. Although the Supreme People's Court carried out a groundbreaking exploration in Shenzhen Biaobang, this breakthrough has yet to crystallize into a stable and uniform rule of adjudication.

This paper concludes that, on the basis of recognizing the 'limited compensability' of transaction opportunity loss, the legal system should establish a remedial mechanism balancing both efficiency and equity, using foreseeability as the threshold condition and multi-factor contextual balancing as the primary methodology. This framework honors the affirmative camp's commitment to the principle of good faith while absorbing the negative camp's rational anxiety regarding the 'floodgates of litigation', thereby facilitating a meticulous and flexible equilibrium of interests in individual cases.

Naturally, the framework of parameters advanced in this paper remains subject to verification and refinement through broader judicial practice. A more fundamental question lingers: where exactly should the boundary be drawn between pre-contractual opportunity damages and contractual expectation damages? This awaits further research leveraging empirical analysis of larger datasets to proffer a more precise delineation.

References

[1] Supreme People's Court of the People's Republic of China, *Shenzhen Biaobang Investment Development Co., Ltd. v. Anshan Finance Bureau*, Civil Judgment (2016) Zui Gao Fa Min Zhong No. 802.

[2] High People's Court of Hubei Province, *Ding Yuzhi v. Hubei Xijiang Weiye Real Estate Development Co., Ltd.*, Civil Ruling (2019) E Min Shen No. 2846.

[3] Hanzhong Intermediate People's Court of Shaanxi Province, *Zhou Fang v. Xi'an Xincheng Haixiang Eye Hospital Co., Ltd.*, Civil Judgment (2022) Shan 07 Min Zhong No. 706.

[4] Beijing Third Intermediate People's Court, *Beijing Chengda Company v. Green Company*, Civil Judgment (2022) Jing 03 Min Zhong No. 6364.

[5] Cui, J. (2011). General theory of contract law. Renmin University of China Press.

[6] Han, S. (2011). General theory of contract law (3rd ed.). Law Press.

[7] Bishop, W. (1982). Economic loss in tort. *Oxford Journal of Legal Studies, 2(1)*, 1–29. https://doi.org/10.1093/OJLS/2.1.1

[8] Yang, W., & Feng, S. ([Year]). Compensation for loss of transaction opportunity in contracting negligence: Based on the perspective of law and economics. *Civil and Commercial Law Review, (1)*, 69–91. https://kns.cnki.net/kcms2/article/abstract?v=wGRGwcz8A0ewa_ykuEU7FQaiyFKGgId04dTqM4T7pMO7I1RK6PTMJLgxBkQUiSCQ7gKIDkKFfehKuOKtHtqcQE9obXaNoIKojAC3s42MDhBhiiAalX32ymFWsyGpUh5zposTz7f3mP57rZMcw9syHHKAdJkyrsLDPF3Akt8y4UAujnwN2uHkJQ==&uniplatform=NZKPT&language=CHS

Funding

This research received no external funding.

Conflicts of Interest

The authors declare no conflict of interest.

Acknowledgment

This paper is an output of the science project.