

On the Promotive Role of “Bearing by Default Party” in System of Court Costs Bearing by the Losing Party in China

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Abstract

The existing court costs bearing system of China, i.e. the court costs bearing by the losing party, has such defects in the legislation thereof as ambiguity in major principles and lack of exceptional provisions, causing some problems in judicial application practices such as results-oriented court costs allocation and difficulties in case handling. However, by virtue of judicial practical experience, introduction of “default”, and consideration of whether the entity or litigation act has or to what extent has any default in the allocation of court costs, the judicial requirements may be satisfied to the largest extent on the currently existing legislative basis, the legal but unreasonable situations caused by rigid judicial system may be improved, and the judicial application of court costs allocation may be standardized.

Keywords

System of bearing by the losing party; exceptional provisions; fault.

1. Problem Posing

Case 1: A and B entered into a House Purchase and Sales Contract, and agreed therein that A will sell the house thereunder to B. B paid RMB 90,000 to A as down payment pursuant to the Contract, upon which A delivered relevant house purchase materials to B while failed to deliver the house. Afterwards, A sold the house to C and completed the online registration and recordation formalities, and C paid the total purchase price of RMB 1,000,000 to A. When B required A to go through house transfer formalities, A refused to sell the house to B. Later, B brought a lawsuit against A and required A to continue to perform the Contract and complete house transfer formalities. Meanwhile, C, as the third party, also required A to complete the house transfer formalities. The court deems that, based on the facts that neither B nor C has completed house transfer formalities with A or legally occupies the house, and C has completed online registration and recordation formalities, and has paid most of the house purchase price, A shall continue to perform the contract signed with C, and B’s claims shall be overruled, and the court costs shall be borne by B.¹

Case 2: Company B went into legal bankruptcy proceedings due to insolvency. Company A declared a debt principal of RMB 50,000,000 and interest thereof to the administrator of Company B, and filed a lawsuit before the court to require Company B to repay RMB 50,000,000 and the interest thereof before the administrator of Company B makes any official opinion on that claim declaration. The administrator, before trial, made the Notice on the Examination of

¹For more discussions about cases similar to this case and the settlement therein, please see “Dual Sale of Second-hand House causing out dispute, judgment made to give priority to obligation performance against paid party” published on China Court website <http://www.chinacourt.org/article/detail/2014/03/id/1235993.shtml>, latest visit on June 1, 2014; Chen Minghua, “Identification of Contractual Relationship in Dual Sales of House in Judicial Practices” published on Guangxi Court website.,

Claim Declaration and delivered such to Company A. Company A changed its claims upon receipt of such Notice and the amount of debt after change is in consistency with the amount identified by the administrator of Company B. Finally, the court orders that Company A shall compensate Company B the principal and interest of the debt and that the court costs shall be borne by Company B.²

In the aforesaid two cases, the judge mainly relies on the principle of “court costs bearing by the losing party” to make orders concerning court costs allocation. However, it is notable after careful deliberation on the orders concerning court costs allocation in the aforesaid two cases that there are defects in reasonability underneath the judgment made in accordance with laws and regulations. The details of the major questions therein will be discussed below.

In case 1, as A carried out dual sale of house, which constitutes a default, B’s claim against A to continue to perform contract is legal. But finally, B loses the case and is ordered to bear the court costs thereof. In fact, the reason that B loses the case is the priority stipulated in laws for different values that shall be protected, rather than that B conducts any violation of law. Therefore, B’s bearing of court costs definitely will not give a positive guidance for litigation acts.

In case 2, after Company A declared debts as a creditor, the administrator of Company B carried out review and made identification of such debt in a timely manner, and Company A acknowledged the identified amount of debt. Therefore, Company A may confirm its claim through debt declaration procedures, and there is no material dispute between Company A and Company B. Hence it is not necessary for Company A to bring a lawsuit for confirmation of its claim. Company A filed a lawsuit for the matter without any dispute, which wastes not only judicial resources but also the time, money and other personal costs of the administrator of Company B, while Company B conducted no fault and are finally required to pay the court costs. Such allocation of court costs does not comply with the requirements of fairness and justice, and cannot guide the litigation acts of potential parties in a positive manner.

Obviously, the indiscriminate application of the principle of court costs bearing by the losing party will burden the innocent losing party with court costs without any due reason, and this is exactly the issue. As people’s consciousness of right improves, the litigation has been increasingly valued as a tool for protection of rights. On the other side, people’s diversified claims and requests also make the allocation of court costs more and more complicated and the frequency of aforementioned problems also gradually increases in judicial practices.

2. “System of Court Costs Bearing by the Losing Party” in China and Restrictions on Its Judicial Application

Legal proceedings are nothing but the process to achieve justice by trial, and the input required for achievement of justice is the judicial cost. The main purpose of court costs bearing system is to guide potential parties’ pursuit of justice through litigation by allocation of costs, and therefore achieve the best balance between judicial costs and output of justice. In accordance with the cost transfer theory, “due to certain policy purposes, part of the judicial costs that shall be borne by the court is transferred to the parties as court costs or litigation costs, or the court costs are transferred into judicial costs, which is the so-called ‘first transfer’. After the first transfer, the costs borne by one party will be transferred to other third party or the opposite

² For the original case, please see the Judgment (Shenzhen Civil First Trial No. 207 (2018)) made by Shenzhen Intermediate People’s Court, Guangdong. This case is the first case filed to Shenzhen Intermediate People’s Court for review of court costs bearing, and it is decided after review that the court costs shall be borne by Company B. For the convenience of discussion, the case referred herein is categorized and changed.

party under certain conditions, and this is the ‘second transfer’.³ To be more specific, there are two cases for second transfer. The first one is the transfer of the costs borne by one party to the opposite party, which mainly involving the “principle of court costs bearing by the losing party” and relevant exceptional provisions, with the reference thereto in this text being “system of court costs bearing by the losing party”. This system is the topic of this text. The second one is the transfer of the costs borne by parties to the third party which mainly involving legal aid, attorney’s fee insurance and otherwise, and this will not be discussed in this text.

2.1. System of Court Costs Bearing by the Losing Party

The principle of court costs bearing by the losing party is the basic principle of court costs allocation system. In judicial practices, this principle is usually interpreted as that the court costs shall be borne by the party whose claim is overruled by the court or the counterparty of the party whose claim is supported by the court. In case that the claim raised by the plaintiff is partially supported, the two parties are both deemed as partially losing the case, and shall bear the court costs of the losing part thereof respectively. Derived from the pre-existing rights theory⁴ applied in the civil procedure law of Germany, the principle of court costs bearing by the losing party believes that the rights and obligations of both parties are pre-existed before the dispute, and it is such dispute and infringement that breaks the pre-existing balance of rights and obligations. Since private remedy is prohibited by the state, it is necessary to procure the infringing party to compensate the costs of the aggrieved party rising out of the litigation, with a view to preventing the value of the pre-existing rights from decrease or erosion. After that, Japanese civil procedure law scholars proposed the “punishment theory”, believing that the bearing of court costs by the losing party is a punishment for the party who initiates legal proceedings recklessly and loses the case, and the “compensation theory”⁵, believing that the bearing of court costs by the losing party is the compensation made by the party who proposes “an claim that even not exists” to the other party. In addition, some Japanese scholars also proposed the “result-oriented liability theory”⁶, believing that losing a case is an objective fact and also one of the litigation consequences, and the bearing of court costs by the losing party is just the fact that the losing party be responsible for the results dispensing with consideration of the intention or negligence thereof, not the investigation of the unlawful act thereof. Whatsoever, the rationality of the principle of court costs bearing by the losing party may be basically concluded as two points: firstly, rights can be protected and realized without any cost, and any party infringing the right of others will be punished with dual court costs burden, which may prevent infringement to civil rights or achieve the protection of rights without litigation⁷;

3 See [Japan] Takao Tanaka, “Settlement of Disputes and Trial System”, translated by Wang Yaxin, China University of Political Science and Law Press, 1996: 284.

4 Wang Yaxin, “Civil Litigation in A Changing Society”, China Legal Publishing House, 2001: 276.

5 See [Japan] Tetsuichiro Ueda, Harunori Inoue, “Annotations to Civil Procedure Law 2”, p434. Quoted from Lin Jianfeng, “Japanese Systems and Theories in Civil Procedure Law”, contained in Zhang Weiping, “Judicial Reform Review (4th volume)”, China Legal Publishing House, 2002:139.

6 See [Japan] Hideo Nakamura, “Explanations on New Civil Procedure Law”, translated by Chen Gang, Law Press, 2001: 256.

7 See [Japan] Takao Tanaka, “Dispute Settlement and Trial System”, translated by Wang Xinya, China University of Political Science and Law Press, 1996: 290.

and on the other hand, the balance between protection of right of action and restriction on abuse of litigation may be achieved⁸.

Since its contribution to the protection of right of action and prevention of abuse of litigation, the principle of court costs bearing by the losing party has been taken as the general rule in the legislation on civil procedural court costs of countries around the world⁹. However, along with the growing complexity of litigation, the uncertainty of interest attribution in cases and the diversity of litigation outcomes, the principle of court costs bearing by the losing party is hard to be applied for settlement of court costs in all circumstances. Therefore, most countries have exceptional provisions in addition to such principle. In accordance with Article 93 of the Code of Civil Procedure of Germany, where the defendant has not given any cause for an action to be brought and acknowledged the claim immediately, therefore rendering the plaintiff's action unnecessary, the court shall have the right to order the plaintiff to bear the costs of the proceedings. In addition, Article 91(1) of the Code provides that the winning party in the dispute is to bear the costs of the legal disputes, in particular any costs incurred by the opponent, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action brought by others. However, there are restrictions on the categories and amounts of costs required to be compensated, and the winning party shall not require the compensation of any cost occurred due to unnecessary proceedings¹⁰. In the United Kingdom, if the court concerned deems that the action brought by the plaintiff is oppressive and excruciating, it may deny the plaintiff's right to require compensation of court costs¹¹. Moreover, pursuant to Article 99 of the Civil Procedure Law of Korea, where the winning party carries out any unnecessary litigation acts for expansion of rights, relevant costs thereof shall be borne by the party carrying such act; if the losing party has no alternative but carrying out certain act, the costs resulting from such act may be borne by the winning party¹². In general, the exceptional provisions of the principle of court costs bearing by the losing party varies from country to country as some are general provisions while the others are more specific, some are positive regulations while the others are negative restrictions.

In China, the currently existing court costs system are operated mainly relied on the Civil Procedure Law of the PRC, the Measures for the Payment of Court Costs (hereinafter referred to as the "Measures") formulated by the State Council and relevant judicial interpretations. In particular, Chapter 5 of the Measures clearly defines the principle and specific mode of court

⁸ See Deng Zhiwei and Xiao Fang, "On Perfection of Court Costs Bearing System in Civil Cases-A Perspective of the Difference in Court Costs Judgment", *Journal of Law Application*, 2012(7): 76.

⁹ Both civil law and common law provide that court costs shall be borne by the losing party in principle, but there are also many exceptions. See Shen Daming, "Contrastive Study on Civil Procedure Law", Beijing, China Legal Publishing House, 2002: 538; Wang Xinya, "Civil Litigation in A Changing Society", China Legal Publishing House, 2001: 286; Lin Jianfeng, "Japanese Systems and Theories in Civil Procedure Law", contained in Zhang Weiping, the "Judicial Reform Review (4th volume)", China Legal Publishing House, 2002:139; David Barnard, "English Civil Procedure Law", translated by Yuan Yue, Chen Weixiong, et all, reprinted by Southwest Institute of Political Science and Law, 1987: 199.

¹⁰ See Shen Daming, "Contrastive Study on Civil Procedure Law", Beijing, China Legal Publishing House, 2002: 453-537.

¹¹ See Tang Weijian, "Study on Foreign Civil Procedure Laws", China Renmin University Press, 2007: 481.

¹² See Liao Yongan, "Study on Court costs—from the Perspective of the Protection of Parties' Right of Action", Beijing, China University of Political Science and Law Press, 2006: 290-291.

costs bearing, which is considered as part of the system of court costs bearing by the losing party in China. To clarify, the regulations and provisions in relation to court costs bearing are categorized and listed as follows:

Table 1. Existing Major Provisions on Court Costs Bearing

Bearing Mode	Main Content	Provisions
Bearing by the losing party	Court costs shall be borne by the losing party, unless the winning party volunteers to pay the costs.	Art. 29(1) of the Measures
	In case of application of setting aside arbitral award or confirming the validity of arbitration agreement, the court costs shall be borne by the party that loses the case.	Art. 38(4) of the Measures
	The transportation fees, accommodation fees, food expenses and other necessary expenses and losses of missed working hours suffered by any witness due to appearance in court for testimony shall be borne by the party that loses the case.	Art. 74 of the Measures
Proportionate burden-sharing	In a case where each party thereto partially loses the case, the people's court concerned shall, in light of the specific conditions of the case, determine the amount of the court costs to be borne by each party respectively.	Art. 29(2) of the Measures
	Where the parties to a joint action loses the case, the people's court concerned shall, based on their respective interest in the object of action, determine the court costs to be borne by each of them respectively.	Art. 29(3) of the Measures
Discretion	In a case where an agreement is reached through conciliation by a people's court, the bearing of court costs shall be determined by the parties concerned through consultation; failing which the bearing of court costs shall be determined by the people's court concerned.	Art. 31 of the Measures
	The bearing of court costs in a divorce case shall be determined by the parties thereto through consultation; failing which the bearing of court costs shall be determined by the people's court concerned.	Art. 33 of the Measures
	Where the parties reach a settlement agreement during the process of execution, the bearing of the application fee shall be determined by the parties through consultation; failing which the bearing of the application fee shall be determined by the people's court concerned.	Art. 38(2) of the Measures
Bearing by wrongdoer	Where a party decreases the amount of the claim after the conclusion of court investigation, the court costs for the portion decreased shall be borne by such party.	Art. 35 of the Measures
	Where, within the time limit for adducing evidence, a party who has failed to adduce an evidence due to the reason attributive to him produces new evidence in the proceedings of the second instance or retrial, which causes the interest of court costs, the costs thus increased shall be borne by such party.	Art. 40 of the Measures

In addition to the provisions listed in the table, there are also some judicial interpretations that reflect the principle of bearing by the losing party, especially the following provisions: 1. Article 54 of the Several Provisions of the Supreme People's Court on Evidence in Civil Procedures, providing that the reasonable expenses incurred from the witness' appearance at court for testimony shall be paid in advance by the party that provides the witnesses and be borne by the party that loses the suit; 2. Article 129 of the Interpretations of the Supreme People's Court on Certain Issues Concerning Application of Enforcement Procedure of the Civil Procedure Law of People's Republic of China, providing that in accordance with Article 55 of the Civil Procedure Law, the court costs of any case where one of the parties has numerous litigants shall not be paid in advance and shall be paid after the closure of the case by the losing party in accordance

with the amount of subject; 3. Article 19 of the Interpretations of the Supreme People's Court on Certain Issues concerning the Application of the Contract Law of People's Republic of China, providing that if the creditor wins an action of subrogation, the court costs shall be borne by the secondary debtor, and shall be paid in priority out of the proceeds from the enforced creditor's rights; 4. Article 26 of the Interpretations of the Supreme People's Court on Certain Issues concerning the Application of the Contract Law of People's Republic of China, providing that the attorney's fee, travel expenses, and other necessary expenses incurred by the creditor in enforcing its rights of annulment shall be borne by the debtor, and if the third person is also at fault, it shall share such expenses appropriately; 5. Article 26 of the Interpretations of the Supreme People's Court on Certain Issues concerning Applicable Law in Civil Cases Involving Copyright Disputes, providing that the people's court may, in accordance with the claims of any third person and the actual circumstances of the case, include the attorney's fee complying with the regulations of relevant national organs in the scope of compensation; and 6. Article 7 of the No. 032 (1999) Document issued by the Supreme People's Court and the Ministry of Justice on April 1, 1999, providing that if the party receiving legal aid claims for all expenses in relation to travel, print, transportation, communication, investigation and evidence collection and other necessary expenses incurred by legal aid personnel in legal aid cases, the people's court may, in accordance with actual circumstances of the case, order such expenses be borne by the non-legal-aid losing party.

It is notable from the table above that, China adopts the court costs bearing by the losing party as the major principle supplemented by exceptional provisions, which is similar to the practices of other countries. Considering the interpretations made by lawmakers, the proportionate burden-sharing mode listed in the above table shares the same value pursuit with that of the principle of court costs bearing by the losing party and is, in fact, an extension of the latter¹³. The discretion mode and bearing by wrongdoer mode are the exceptional and supplemental provisions applicable to certain cases where the principle of bearing by the losing party shall not apply. Here again, decisions on court costs bearing in the two cases mentioned herein are all made in accordance with the principle of bearing by the losing party.

2.2. Current Status and Restrictions on Application of the System of Court Costs Bearing by the Losing Party in China

The principle of bearing by the losing party, as the major principle in the court costs bearing system of China, is widely applied in judicial practices. Currently, in handling of issues in relation to court costs, judges will take "losing of case" as a static litigation results, namely, they will determine on which party to bear the court costs merely based on the judgment in most cases. Essentially, there are two significant justifications for such situation. First, the wide application of semantic interpretation. Given almost all texts in relation to court costs in China contain direct reference to the phrase "losing of case", the understanding of "losing of case" in making of judicial decision will directly affect the bearing of court costs. However, no basic meaning of the "losing of case" is found in the Civil Procedure Law and other substantial laws. In accordance with the legislative interpretation in the Measures, court costs shall be borne by the losing party due to that "where the party concerned has fault and liability for losing the case in regardless of the reason thereof, such costs incurred due to litigation shall be borne by such party¹⁴." Though this interpretation is slightly arbitrary and assertive on the reference to

13 See Lv Xiwei, "Interpretations on the Measures for the Payment of Court Costs", China Legal Publishing House, 2007: 79.

14 See Lv Xiwei, "Interpretations on the Measures for the Payment of Court Costs", China Legal Publishing House, 2007: 79. Lv Xiwei is the Director of the Administrative Review Division of

“regardless of”, it is obvious that Chinese lawmakers prefer to understand the principle of bearing by the losing party in accordance with the “pre-existing rights theory” and “compensation theory”, acknowledging that the pre-existing rights are infringed due to the dispute concerned and that court costs are the compensation for such default. Nevertheless, the issue here is that the reference to “losing of case” cannot accurately reflect the original legislative intention of “court costs borne by the party who loses the case due to the fault on his or her own side.” The fault of either party is not the requirements for losing of case, and the losing of case is not caused due to the fault or liability of either party in all cases, and it might be caused due to other complicated reasons, for instance, impossibility for achieving any legitimate claim, achievement of any claim in early proceedings, imperfection of legal regulations, choice among protectable values made under laws, or even the misconduct of the opposite party. Since such reference is not in consistency with the legislative intention, and there is few approach for achieving such legislative intention¹⁵, judicial personnel will, in application of the bearing by the losing party, first come into the literal meaning of the text rather than the lawmakers’ intention and regards the losing of case as an objective result of litigation. In addition to the difference in literal interpretations, the judicial personnel’s mental motivation for pursuit of effective and simple judicial proceedings is other cause of great significance. Under the pressure of long-term intensive work, judges are in strong desire for simple judicial proceedings. Therefore, considering there is no clear orientation in legislation, most judicial personnel would spontaneously choose the “result-oriented liability theory”, which is relatively easy to apply, in the application of bearing by the losing party in the “minor issues”—court costs-- of a case, and consider the losing of case as a litigation result. Besides, judges have an internal logic conversion for such consideration, where the fact whether claims are supported or not will be taken as an essential factor for judging a losing of case. Namely, “the party whose claims are wholly supported by the court wins the case and shall bear no court costs, while the party whose claims are partly supported shall bear part of the court costs in proportion to the claims overruled”. The effective and simple rule resulted from this logic conversion satisfies the requirements of judicial efficiency to a large extent and therefore becomes the prevailing rule in judicial practices.

A claim is the demand for any substantial right raised to the court accepting the case in the manner of litigation by the plaintiff against the defendant¹⁶. As the focus of both parties, the court’s decision on the support or overruling of claims will undoubtedly exert a great effect on the interests of the parties. However, the conversion of losing of case into overruling of claims, though simple and easy to apply, is essentially the further extension of the “result-oriented liability theory”. Notwithstanding the advantages of “result-oriented liability theory” in clear judgment on allocation and efficiency in practical application, it is inevitable that the isolated static result-oriented theory will make the impartial judge unable to reveal the purposes and motivations in litigation of both parties. Moreover, there is a high possibility for the occurrence of difficulties in judicial application and unreasonable judgment in cases where it is unable to make judgment on the litigation results, or there is any improper or unconventional purpose or litigation act. The aforesaid limitations are common in judicial practices for three reasons.

the Legislative Affairs Office under the State Council and the vice leader of the Work Team for Improving the Measures for the Payment of Court Costs.

¹⁵ As reviewed by the authors, there is no document other than the Interpretation on Measures for the Payment of Court Costs edited by Lv Xiwei that mentions the original legislative intention of the principle of bearing by the losing party. Since the Interpretation on Measures for the Payment of Court Costs is not a normative document, there are reasons to believe that most judicial personnel has no knowledge of the original legislative intention.

¹⁶ See Jiang Wei, “Principles of Civil Procedure Law”, China Renmin University Press, 1999: 593.

Firstly, for some non-dispute cases, it is hard to draw a clear boundary between winning and losing the case based on the results. Therefore, such logic conversion is inapplicable. Secondly, sometimes the losing party is not the one to blame for losing of case, so it is improper and unreasonable to order such party to bear court costs. Thirdly, considering the complex legal relations involved in modern litigation, especially commercial cases, as well as the complicated procedures, the results of some cases involving large amount of subject are uncertain, which might cause the bona fide party being afraid to protect legitimate rights by litigation due to the dual cost burden.

Exceptional provisions are also a significant part of the system of court costs bearing by the losing party. Compared with other countries, China only has exceptional provisions for settlement of certain cases through negotiation and bearing by wrongdoer through enumerative provisions, which further narrows the application scope of such. The rigid application of the principal of bearing by the losing party and deficiency of exceptional regulations result in the gap in the court costs bearing system of China and impossibility to satisfy practical judicial demands. What makes things worse is that such gap has been widened due to the diversified development of litigation interests. According to incomplete statistics, there are at least four types of cases that the currently existing court costs bearing system of China cannot cover, therefore difficulties in judicial application of such system are unavoidable in practices.¹⁷ Firstly, the non-dispute cases. In Case 2 stated in this thesis, there is no material dispute between Party A and Party B as both parties recognize relevant contents in the Notice on Examination of Claim Declaration. Secondly, the misperception cases. For example, when the defendant fails to file a lawsuit within the agreed or legal time limit upon receiving the notice on termination of contract, the contract is in fact terminated. However, the plaintiff, due to misperception, brings a lawsuit to the people's court for termination of contract. Thirdly, the bigotry cases. For example, there is evidence to prove that the defendant has already agreed to compensate the plaintiff for the damage suffered thereby before the case is filed and has carried out active performance thereof, but the plaintiff, for purposes such as damage of the defendant's reputation and account verification and cancelation, insists on bring a lawsuit against the defendant, which objectively increase the unnecessary lawsuit burden of the defendant. Fourthly, the exclusive-type cases. It refers to the case where there are multiple claims over one object and the court, in order to realize the optimal value, can only support one claim and overrule all others, for example, the Case 1 stated in this thesis.

3. The Replenishment Role of “Bearing by the Default Party” in System of Court Costs Bearing by the Losing Party in China

3.1. Introduction of the Concept of “Bearing by the Default Party”

The “result-oriented liability theory” of bearing by the losing party, though having certain limitations, “not only satisfies the requirements for semantic interpretation but also is broadly accepted by such countries as Japan and Korea as it interprets the basic rule of ‘bearing by the losing party’ ideas as a result-oriented liability irrelevant to the reasons for losing the case”.¹⁸ However, it is found that such countries as Japan and Korea have all stipulated a lot of

¹⁷ See Liao Senlin, “Study on Court Costs Bearing by the Winning Party in Civil Cases—A Case Study of the First Court Costs Review Case Heard by Zhenzhen Intermediate People's Court”, *Journal of Henan University of Economics and Law*, 2013 (4): 172-175.

¹⁸ See [Japan] Hideo Nakamura, “Explanations on New Civil Procedure Law”, translated by Chen Gang, Law Press, 2001: 286; Liao Yongan, et al. “Study on Court costs—from the Perspective of the Protection of Parties' Right of Action”, Beijing, China University of Political Science and Law Press, 2006:290.

exceptional provisions in addition to the principle of “bearing by the losing party”, with a view to filling the gap in court costs bearing system caused by adoption of result-oriented liability method. Besides, in the wording of exceptional provisions, such countries as Japan and Korea often adopt the form of principle provision or typed provision. For example, in accordance with Article 99 of the Civil Procedure Law of Korea, where the winning party carries out any unnecessary litigation acts for expansion of rights, relevant costs thereof shall be borne by the party carrying such act 19. Unlike China’s separate enumeration of specific circumstances, the legislation of such typed provision provides a wider application of the exceptional provisions²⁰. Therefore, in order to address the rigidity caused by adopting the principle of “bearing by the losing party” in current practices and the gap resulted from the narrow application of exceptional provisions, we could, on the one hand, supplement the exceptional legislative provisions, or, on the other hand, reinforce the result-oriented liability of losing a case through certain concepts or methods while maintaining the existing system. In practice, the author prefers the second method as the supplementation of legislation can be complex and complicated in procedure with relatively high costs and may be time-consuming as well. The concept of “fault” referred to in the original legislative intention inspired us in a good way and the author noticed that the consideration for fault has been introduced into the determination of court costs in current judicial practices. 21

“Bearing by the default party” refers to that the judge shall, when applying relevant court costs bearing provisions, appropriately consider the default degree of each party’s contribution to the initiation of substantive legal relationship, result of losing the case and the litigation acts and then determine the bearing of court costs. The typical fault principle falls within the scope of tort law. Civil fault refers to an intentional or negligent state of mind showed in the actor’s violation of laws and moral codes which causes damages to others. Therefore, the fault itself is a subjective and psychological concept.²² As the science of civil law evolves, modern civil law usually combines fault with civil acts to evaluate the existence of subjective fault and the degree thereof through objective acts. Civil litigation act refers to the act with procedure law effect carried out by the subject of legal relationship of civil litigation act in accordance with provisions of law²³. Such act stems from private law act²⁴. As civil litigation act may be well connected with fault with respect to the “act”, such theories concerning intention, negligence, degree of fault and burden of proof for fault may, under certain circumstances, be reflected in the system of “bearing by the default party” through civil litigation act. It should be noted that the application of such concept shall not be deemed as reconstruction of current court costs bearing system in China, but as the replenishment and reinforcement thereof. Comparing with the legislative interpretation of the Measures which arbitrarily provides that “where the party concerned has fault and liability for losing the case in regardless of the reason thereof, such

19 Liao Yongan, et al. “Study on Court costs—from the Perspective of the Protection of Parties’ Right of Action”, Beijing, China University of Political Science and Law Press, 2006:291.

20 See similar provisions in Article 98 to 102 in Civil Procedure Law of Korea and Article 62 to 64, Article 67 (1), Article 68 and Article 69 (1) in Civil Code of Japan.

21 In practice, the court costs bearing in cases where part of the court costs is determined through discretion shows that some judges have consciously incorporated the fault of parties concerned into the consideration for court costs bearing. See further explanation in the following sections.

22 See Wang Liming, “On the Principle of Fault in Civil Liability”, Law Review, 1983(2).

23 See Shao Ming, “Law of Civil Procedure”, China Renmin University Press, 2007:109.

24 With respect to development of theory of litigation acts, see Shao Ming, “Law of Civil Procedure”, China Renmin University Press, 2007 (6).

costs incurred due to litigation shall be borne by such party”, we are more inclined to consider the concept of “bearing by the default party” as an expansion of “fault-based” thinking mode and handling concept.

3.2. The Reinforcement Role of “Bearing by the Default Party” in System of Court Costs Bearing by the Losing Party in China

3.2.1. The Concept of “Bearing by the Default Party” Can Be Conductive to Address the Rigidity of Result-Oriented Liability Borne by the Losing Party

The static and rigid result-oriented theory in practice can be optimized through addition of determination and consideration of fault on the basis of applying the principle of “bearing by the losing party”. By identification of the fault in litigation acts and the determination on intention and negligence of fault in litigation acts, it will be easier for the judge to find the status quo of the original rights and therefore reduce or eliminate court costs of the party with due rights to such costs. The identification of fault will inevitably lead to comprehensive investigation and verification on the litigation acts of both parties, for example, tracing the compliance of the parties concerned with the behavioral intention before litigation, determining the rationality of a particular issue claimed or objected by the parties concerned, evaluating whether the parties concerned have unduly exaggerated the claims and otherwise. Such identification process itself displays three-dimensional tension and promotes the expansion of the original static thinking to motives of actor, which to certain extent facilitates the realization of the good faith principle, protects the bona fide party and mitigates the bona fide litigation that may be constrained by rigidly application of the principle of “bearing by the losing party”. In addition, in respect of public power, this positive direction also prevents the improper expenses that may incur and promotes the rational allocation of judicial resources.

3.2.2. The Principle of “Bearing by the Default Party” Can Be Conductive to the Uniform Application of “Proportionate Burden-Sharing Mode”

As one of the exceptional provisions stipulated in the Measures of China,²⁵ the proportionate burden-sharing mode refers to that “as for case with partial victory and partial loss, the amount of court costs borne by the party concerned shall be determined in accordance with specific conditions”. The empirical researches show that there is no uniform application of such mode in current judicial practices and the allocation of court costs is mainly implemented by the following two methods: firstly, calculating the court costs to be borne by the losing party in accordance with the proportion of the claims of the party supported by court and such mode is adopted in 40% of the cases; secondly, calculating the court costs in accordance with each party’s substantive liability to the dispute and such mode is adopted in about 20% of the cases.²⁶ The two allocation methods have led to different handling of court costs in the same case. As mentioned above, the proportionate burden-sharing mode in fact shares the same theoretical basis with the principle of “bearing by the losing party” and is the extension of the “bearing by the losing party” rule.²⁷ To go beyond the influence exerted by the primary meaning of the “specific conditions” and explore the underlying reasons for the inconsistency among different results of such mode, it is of fundamental significance to understand the connotation of the principle of “bearing by the losing party”, which is, 40% judges consider “bearing by the losing party” as a pure result-oriented liability and “the court’s support of

²⁵ See the second bearing mode in Table 1.

²⁶ See Deng Zhiwei and Xiao Fang, “On Perfection of Court Costs Bearing System in Civil Cases—A Perspective of the Difference in Court Costs Judgment”, *Journal of Law Application*, 2012(7): 77.

²⁷ See Lv Xiwei, “Interpretations on the Measures for the Payment of Court Costs”, China Legal Publishing House, 2007: 79.

claims” as the standard for judgment while, 20% judges consider the proportion of substantive liability of both parties, that is, the degree of fault,²⁸ proving that the consideration of fault has owned relatively broad application basis in practice.

As applied in many other countries, with the introduction of the concept of “bearing by the default party” and identification of the influence of the party’s fault on court costs bearing, the “proportion” applied the proportionate burden-sharing mode will be related to the fault liability of the party concerned to the substantive legal relationship. It stands to reason that the court costs bearing shall be calculated in accordance with the “different degree of fault of each party concerned and the corresponding liability thereof” with respect to cases with partial victory and partial loss. This can help the judge achieve relatively consistent results by following the proportionate burden-sharing mode in a uniform manner and straighten out the logical relationship between the principle of “bearing by the losing party” and the proportionate burden-sharing mode. For example, there is no express provision in the U.S. Federal Rules of Civil Procedure on the court costs bearing in cases with partial victory, but such court costs shall, in accordance with general legal principles, be borne by both parties in accordance with their substantive liability thereto.²⁹ The Civil Procedure Law of Korea provides that the method of court costs bearing in cases with partial loss is not determined in accordance with the proportion of victory against loss but determined by the court in accordance with actual situations in an impartial manner.³⁰

3.2.3. The Concept of “Bearing by the Default Party” Can Standardize the Exercise of Discretion

The Measures of China stipulates the discretion mode³¹ for such specific type of cases as divorce, mediation and execution reconciliation, which empowers the judge of discretion in deciding the court costs bearing when no agreement can be achieved through negotiation. There are similar provisions in other countries and such provisions adopt the form of principle other than listing specific cases. For example, it is provided in Article 695 of Nouveau Code De Procedure Civile that the court has the right to order the parties concerned to bear the court costs. Even if there is a sole losing party in the litigation, the judge can still order the opposite party to bear part or whole of the court costs and shall, in case of making such order, explain the reasons therefor. The U.K. Civil Procedure Rules stipulates that the court has discretion in deciding whether one party should bear the court costs of others, the amount thereof and the time of payment.³² However, the discretion cannot be exercised without limitation. Then, can fault be detected in the judicial practices influencing the exercise of discretion? More specifically, can fault causing loss of affection be treated as one factor in consideration of court costs bearing in divorce cases with a precondition of “loss of affection”?

In order to figure out the above-mentioned questions, the author divides the divorce cases into two categories, which are divorce “without default party” and divorce “with default party responsible for loss of affection”, randomly selects 50 cases “with divorce judgment and no fault causing breakdown of marriage” and 50 cases “with default party responsible for breakdown

²⁸ Here we may find that, in the proportionate burden-sharing mode extended from the principle of “bearing by the losing party”, 20% of judges have consciously introduced the fault as a factor for consideration, reflecting the practice-based judicial wisdom of judges.

²⁹ See Liao Yongan, et al., “Study on Court costs—from the Perspective of the Protection of Parties’ Right of Action”, Beijing, China University of Political Science and Law Press, 2006:332.

³⁰ See Article 101 of Civil Procedure Law of Korea.

³¹ See the third bearing mode in Table 1.

³² See Chang Yi, “Comparative Civil Procedure Law”, China University of Political Science and Law Press, 2002:490.

of marriage” from the divorce disputes in the first instance tried by the local courts and intermediate courts of a specific municipality for the past five years, carries out statistics on the court costs bearing situations of the above-mentioned 100 cases,³³ and intends to explore the thinking and method adopted by the judges in exercising discretion in allocation of court costs in practice by means of comparison.

Table 2. Statistics on court costs bearing in divorce cases without default party

Cases(50)	Allocations & Reasons
21	Borne by the plaintiff
1	Borne by the defendant
26	Borne by the plaintiff and the defendant in equal share
2	Borne by both the plaintiff and the defendant without express reason for allocation. Such allocation method of one party bearing part of court costs in an integral number while the other party bearing the remaining part may be adopted purely for the convenience of calculation.

Table 3. Statistics on court costs bearing in divorce cases with default party responsible for loss of affection

Cases(50)	Allocation & Reasons
14	Borne by the default party (cases where the defendant is the default party: 8; cases where the plaintiff is the default party: 6)
2	Borne by the innocent party (cases where the plaintiff is the innocent party: 1; cases where the defendant is the innocent party: 1)
21	Borne by the plaintiff and the defendant in equal share
2	Allocation of property and bearing of court costs in strict accordance with the fault rate
11	Borne by both the plaintiff and the defendant without express reason for allocation. Such allocation method may be adopted purely for the convenience of calculation. Among the 11 cases, there are 6 cases where the allocation is obviously in favor of the innocent party, 3 cases where the difference of allocation between the two parties is no more than 10% and 2 cases where the allocation is obviously in favor of the default party.

By comparison of the data listed above, the following features can be captured: (1) in the divorce cases without any fault affecting the relationship, “bearing by the plaintiff and the defendant in equal share” and “bearing by the plaintiff” are two general methods adopted for allocation of court costs; (2) in cases involving fault, the method of “bearing by the plaintiff” will no longer be representative and the method of “bearing by the plaintiff and the defendant in equal share” will no longer have overwhelming superiority. From the perspective of fault, the methods of “bearing by the default party” and “allocation in accordance with the degree of fault” account substantial percentages therein, which reflects that, in such cases, the fault causing loss of affection has become an important factor in consideration of court costs bearing; (3) though fault has become a factor of great significance in the allocation of court costs in certain cases, there still has no uniform method for practical implementation; and (4) the allocation of court costs of certain cases shows a relatively high degree of arbitrariness. In cases involving fault,

³³ None of the written judgment analyzed by the author makes explanation for the decision of court costs bearing. All reasons for allocation in the thesis are deduced adversely by the author based on the results of court costs allocation.

when the judge tries to reflect the influence of fault, such arbitrariness becomes more obvious due to lack of uniform method for practical implementation.

In conclusion, the Measures of China empowers the judge with discretion but fails to stipulate the principles to be followed and the factors to be considered or impose the obligation of explanation on the judge, leaving relatively large discretion space for court costs bearing in specific case. However, the judges still voluntarily explore the internal standards of discretion and actively consider the factor of fault, showing the great efforts made by judges for the pursuit of impartial result of specific case. But at the same time, we should also recognize that, due to the confusion caused by lack of corresponding principle and inherent limitation of efforts for specific case, there still exists obvious arbitrariness in discretion. The author believes that, though discretion is reflected in the trial of specific cases and the distinctiveness of each case makes it impossible to establish specific rules for exercise of discretion, we can still provide direction for exercise of discretion by conceptual guidance. Introducing “bearing by the default party” into the court costs bearing system and expressly providing the degree of fault of acts conducted by the party concerned as a factor required to be considered in the exercise of discretion would standardize the exercise of discretion to some extent and comply with the basic legal value requirements for fairness and justice.

3.2.4. The Role of the Concept of “Bearing By the Default Party” in Filling the Gap in System of Court Costs Bearing by the Losing Party in China

The author has repeatedly stated that some cases have no applicable court costs bearing mode due to the application limitation on the principle of “bearing by the losing party” and the inherent defect of the enumeration method of exceptional provisions in the system of court costs bearing in China. Therefore, how do judges deal with such cases in judicial practices? In order to discuss this question, the author has randomly selected 50 cases of adoption termination without identification of fault by any party in the first instance tried by the local courts of a specific municipality since 2008 and compared the court costs bearing in such cases with that of the divorce cases without fault in Table 2.34

Table 4. Comparison of court costs allocation between adoption termination dispute and divorce dispute

Allocation	Divorce dispute (50 cases)	Adoption termination dispute(50cases)
Borne by the plaintiff	21	12
Borne by the defendant	1	27
Borne by the plaintiff and the defendant in equal share	26	7
Unequal share without explanation	2	4

By comparison of data stated in Table 4, it can be found that, as there is no express provision in law on applicable court costs bearing rules in adoption termination disputes, judges are more inclined to allocate the court costs to the losing party in adoption termination disputes compared with the divorce disputes. In the meanwhile, the percentage of “court costs bearing by the plaintiff and the defendant in equal share” is relatively low. Such result may not be

³⁴ The legal character of cases involving adoption termination and divorce is basically the same. The Measures of China formulates the enumerative provisions for the mode for discretion in court costs with respect to divorce cases but fails to do the same for the adoption termination cases, therefore such cases comply with the author’s assumption of problem.

optimistic, but it at least proves that: (1) for the discretion mode with express basis in Measures, judges can get rid of the limitation on the principle of “bearing by the losing party” and make relatively full application of exceptional provisions; (2) in handling cases with similar legal relationships, initiative showed by judges in analogy application of court costs bearing is apparently insufficient due to absence of explicit legal basis; (3) in the blank field of court costs bearing mode, judges’ will to challenge the principle of “bearing by the losing party” is under significantly decrease; and (4) the proportion of arbitrary allocation of court costs increases. Therefore, it is necessary to introduce the concept of “bearing by the default party” into the blank field of court costs allocation to make up for the defects, complete the court costs allocation system and avoid disorder in court costs allocation.

How to design the specific path for introduction of the concept of “bearing by the default party”? As mentioned above, victory or loss in judicial practices of China means support or overruling of claims. In accordance with such logic, the author believes that we can, based on the concept of “action”, introduce the rule of fault consideration respectively into the action for payment, action for confirmation and action for alteration, connect such rule with judicial practices and realize the optimal integration of the concept of “bearing by the default party”. In fact, considering each party’s contribution to the fault causing substantive legal relationship, degree of fault for the results of losing the case and degree of fault for litigation acts in the decision of court costs bearing with respect to action for payment can cover most of the issues. For example in Case 1, A constitutes a fault by dual sale of house and it is more reasonable for A to bear the court costs thereof. In Case 2, Company A files a lawsuit for the matter without any dispute and it shall bear the court costs for its unreasonable act.

In practice, the blank field of court costs allocation occurs predominately in special action for confirmation and action for alteration. The author has also made principle assumptions for introduction of the concept of fault into court costs allocation with regard to such two types of action. In action for confirmation, the existence of legal relationship between the parties in dispute is still pending. Where there is no default party, the declaratory judgment is the restoration of the unstable legal relationship between the parties and it is proper to let both parties bear the court costs in equal share. However, where there is one party or multiple parties having fault for the dispute of legal relationship, then the court costs shall be allocated in accordance with the actual default thereof. For example, in cases for confirming the determination of contract, the determination itself involves negative assessment of law for the contract. If such determination is caused by acts of one party or both parties, then the court costs shall be allocated in accordance with the actual degree of fault thereof. With respect to action for alteration, both parties have dispute over the alteration of existing legal relationship and the reason for such alteration may involve the acts of such parties, thus the court costs shall be allocated in accordance with the reason for alteration of legal relationship, the typical case of which is divorce. Where there is no default party, the court costs shall, in principle, be borne by both parties in equal share with the benefits obtained by each party being considered. Where there is a party having fault for the alteration of legal relationship, the court costs of such cases shall be allocated mainly based on the degree of fault thereof.

4. Conclusion

The issue concerning court costs exists in each and every case and may directly affect the parties’ perception of justice. Though of minor significance, it will not be easy to find a perfect solution. This thesis attempts to introduce the conception of “bearing by the default party” and conduct preliminary discussion on the rationality and feasibility thereof. This may not achieve impressive effect, but it may facilitate the transition of court costs allocation system. In the long run, the fundamental path to solve such issue is to establish a complete court costs bearing

system with explicit rank requirements for application and complete specific rules. The aim of this thesis is to attract more attention to and discussions on such issue.

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