

# A Study on Civil Litigation Fee

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The cost of litigation mainly consists of three parts: litigation fee collected by the courts, lawyer fees, and illegal secret expenses. Among them the litigation fee is the unavoidable and largely fixed litigation cost for the litigant. A Japanese scholar divided “cost of producing justice” into two parts: “trial cost” financed by the government and “litigation cost” shouldered by the litigant.<sup>2</sup> Taking the national policies into consideration, the law usually deals with the trial cost and litigation cost in two ways: one is transforming part of the trial cost to the litigation cost, e.g., collecting litigation fee; the other is transforming part of the litigation cost to the trial cost, e.g., the courts share part of the costs of investigation and evidence collection. Here the problem arises: how to appropriately distribute the “cost of producing justice” between the government and the litigant. On the one hand, free litigation means all the litigation cost would be transferred to the whole society. On the other hand, if the courts charge litigation fee equaling to the its total relevant expenses, it would mean that the government transfers the cost of its executing public functions to the litigant. So a reasonable legal system will always seek a balance between the two above extremes.

In China, in all the litigations concerning property rights, the litigant should estimate in advance the “disputed sum”—the monetary value of the litigation request, and then pay before hand the litigation fee which is in a certain proportion of the “disputed sum”. Since the early 1980s, Chinese courts have been using these fees to make up for their expenditures.

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<sup>2</sup> Yanase Takao, *The Solution of Disputes and Trial System*, trans. by Wang Yaxin, 1994, pp. 283—296.

In the U.S., the federal government provides huge financial subsidies for litigation, and the courts only collect negligible litigation fee. The trial cost is nearly totally financed by the government expenditure. In fact, it is the taxpayers that pay the litigation fee for the litigant. In the 1990s, U.S. federal courts accepted and heard 240 thousand cases every year. If all the litigants had paid full litigation fees according to the law, U.S. federal courts could have collected only 36 million dollars, only 1.5% of their total annual expenditure. In fact nearly all the “poor people” are allowed free litigation, so the actual litigation fee collected by the courts was very low. The U.S. federal courts collect hearing fees according to the sum of cases, not to the “disputed sum” or “litigation fee standard”. In 1999, District Courts charged 150 dollars for each case, Appeals Courts charged 100 dollars for each case, and the Supreme Court charged 300 dollars for each case.<sup>1</sup> The U.S. practices the jury system and in the early 1980s the actual jury cost for every case was already 15,028 dollars. But in 1999, the Federal Appeals Courts charged the litigant only 60 dollars of jury cost for every case. In the U.S. the cost of employing lawyers is very high. In the early 1990s, American lawyers earned about 91 billion dollars each year.<sup>2</sup> American lawyers charge as high as 500 dollars every hour, and it is not rare that a lawyer may earn millions of dollars for just one case. By providing litigation subsidies the American government intends to protect the rights of the litigant, but it seems that it is the lawyer not the litigant who really benefits from this.

China Civil Litigation Act allows the litigant to employ non-lawyers to be their litigation agents.<sup>3</sup> This means lawyers can not monopolize the business of litigation brokage. The litigant is not dependent on lawyers, so lawyer fees make up only a small proportion of the total litigation cost. According to statistics, in 1996, the litigation agents of 84% of the total civil cases were non-lawyers.<sup>4</sup> Another reason for the limited involvement of lawyers in civil litigation cases is that people have little trust on lawyers. The phenomena of lawyers bribing judges, harming the litigant’ interests and lacking professional knowledge are so common that people get the impression that if lawyers function mainly as the bribery intermediators between the litigant and judges, employing them achieves nothing but the increase of the bribery cost.<sup>5</sup> Many foreign experts of China issues also took notice of these phenomena and they believe that the rising lawyer industry in China is troubled by a serious moral

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1 See U.S. C. Sec. 1914, 1913; U.S. S. Cr. R. 38.

2 American Bar Association, Legal Education and Professional Development – An Educational continuum (1992), p. 3.

3 See Civil Litigation Act (1991) Sec. 58.

4 In China, civil cases, economic cases and marine cases are counted separately. In 1996, courts in China accepted 4,858,291 first-hearing and second-hearing cases. (See China Law Almanac 1997, pp. 1056--1057). In the same year, the civil cases and economic cases with lawyers employed amounted to only 770,000 (See Reform, Development and Progress, in Chinese Lawyer, vol. 1, 1998.). It is clear that in 1996, the civil cases with lawyers involved made up less than 16% of the total cases heard.

5 Minutes of Symposium of “Marching into the Age of Rights”, in China Book Review, winter vol., 1995.

crisis, and some Chinese lawyers' illegal conducts of bribery, swindling the litigant and partners, and under-the-table competition concerning license (e.g. the license of providing "legal position paper" for going-public companies) severely damaged the reputation of the whole lawyer circle in China.<sup>1</sup>

The bribery in litigation is part of the secret expenses.<sup>2</sup> These shocking cases and people's common complaints about "legal corruption" show that while the litigation cost is considered, bribery is absolutely not the negligible exception. However, since nearly all the bribes are kept secret forever, and any estimation of bribery is somehow unaccountable. Besides, the influence of bribery on litigation cost is difficult to measure. In some cases, the benefits achieved through bribery are much higher than the cost of bribery. In other cases, bribery and lawyer cost are both avoidable costs.

The paper does not cover all the litigation cost, but focuses on litigation fee—the major and unavoidable part of litigation cost. The paper tries to answer two questions:

First, what is the influence of the present litigation fee system on litigation rights, litigation cost and legal justice?

Second, how is the present litigation fee system related to the tradition of law transfer and to the specific circumstances of the transforming society.

## **Section I:**

### **The Present Litigation Fee Collection System, Litigation Rights and Costs**

#### **I. The History of Litigation Fee Collection Regulations**

Before 1984, the People's Republic of China had no uniform litigation fee collection regulations. In the early 1950s, some regions began to practice litigation fee system, but the continuous political movements afterward called such system to an end. In early 1980s, Shanghai, Chongqing and some regions in Fujian and Shandong provinces resumed such system but with different standards.<sup>3</sup>

In 1982 *the Civil Litigation Act (For Trial Implementation)* began to be

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1 William Alford, *Tasselled Loafers and Barefoot Lawyers*, 141 *China Quarterly*, pp. 33—36 (1995).

2 The following case clearly shows the influence of bribery on civil litigation. In order to disavow the rents of 330,000 yuan, a merchant in Zhangjiakou used 15,000 yuan to bribe 5 judges of three courts of different level: District Court, Intermediate Court and High Court. If in this case with not a big disputed sum judges of three levels could be bribed by so small a sum of money, then what will happen if the case involves high disputed sum. See *The Strange Case in Zhangjiakou Shocked Zhongnanhai*, in *People's Daily*, Dec. 29, 1998.

3 See *The Reference Materials of the Civil Litigation Act*, collection 4, vol. 2, The Law Press, 1981, pp. 280—297.

implemented. In 1984, the People's Supreme Court issued *the Regulations on Civil Litigation Fee Collection (For Trial Implementation)* which is based on *the Civil Litigation Act (For Trial Implementation)* of 1982 and is uniform and applicable in the whole country for the first time. In 1989, the People's Supreme Court issued *the Litigation Fee Collection Regulations of the People's Courts* (hereinafter referred to as *the 1989 Regulations*) to take the place of *the 1984 Regulations*. *The Civil Litigation Act of 1991* has taken the place of *the 1982 Civil Litigation Act*, but *the 1989 Regulations* is still in effect and applicable for both civil and administrative litigation though *the Administrative Litigation Act* began to be implemented in Oct. 1990. Therefore, it can be said that *the 1989 Regulations* is the regulations prepared by the People's Supreme Court for both *the Civil Litigation Act* and *the Administrative Litigation Act*.

Besides *the 1989 Regulations*, the chapter of Litigation Fee in *the Advice on the Application of the Civil Litigation Act of the People's Republic of China (1992)* (hereinafter referred to as *Advice on the Litigation Fee*) issued by the People's Supreme Court is another criterion for the courts to collect litigation fee. The function of *the Litigation Fee* is to make up for *the 1989 Regulations* and to set up fee collection standards for the new litigation processes regulated by *the 1991 Civil Litigation Act* (such as pre-litigation protection, monitor proceeding and notice). If *the 1989 Regulations* sets standards for the fee collection limits, the High Courts and the Marine Courts may set finer standards within the limits. Through answering to the appeals of lower courts and issuing complementary regulations, the Supreme Court further expand and add more details to *the 1989 Regulations* and *Advice on the Litigation Fee*, as the result, in the 1990s the litigation fee collection regulations became more and more diverse and complicated.

*The 1991 Civil Litigation Act* says that the litigation fee regulations have to be enacted otherwise, but it does not clearly authorize the Supreme Court to enact such regulations.<sup>1</sup> It is still unreasonable even this section can be understood as the connotative authorization for the Supreme Court and the term "have to be regulated otherwise" can be regarded as the continued application of *the 1989 Regulations*. The statutes set by the Supreme Court belong to the "judicial review"<sup>2</sup> and *the 1989 Regulations* is a kind of judicial review. The validity of the judicial review and the law itself should be the same. Even if the new law has replaced the old one, the judicial review of the old law by the courts can still be effective and unchallengeable. This indicates that the really effective regulations may not be the same with the regulations

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1 Section 1 of the 1989 Regulations says that the enactment of the 1989 Regulations is based on section 80 of the 1982 Civil Litigation Act (section 80 says that the litigation fee regulations have to be enacted otherwise). Section 107 again says that the litigation fee regulations have to be enacted otherwise. However since the 1991 Civil Litigation Act took effect, the Supreme Court hasn't enacted new regulations to replace former litigation fee collection regulations.

2 The legal bases of the judicial interpretation rights of the Supreme Court are the Section 33 of the Structural Law of the People's Courts (1979) and the Decision on Strengthening the Work of Judicial Interpretation (1981) issued by the Standing Committee of the People's Congress.

expressed in the law.

In the Germany-Japan law system, the litigation fee collection regulations are implemented separately, so they are set up through the parliamentary legislation. In the U.S., the “judicial committee” formed by the chief judges from different levels of federal courts is responsible of setting litigation fee collection regulations for different federal courts.<sup>3</sup> The fee standard is adjusted according to the inflation rate, people’s income and the actual expenses of the court.

In China, before the validity of the present litigation fee collection regulations can be judged, some basic problems should be solved. Whether to set litigation fee collection regulations is under the right of judicial review of the Supreme Court or the right of legislation of the People’s Congress and the Standing Committee of the People’s Congress? If it is under the right of judicial review, how can the litigant restricted by the judicial review challenge the validity of such judicial review when such review deviates from the law it is based on? How to differentiate the rights of legislation, executive and judiciary branches? How to solve judicial disputes? How to identify the right of law, administrative regulations, local regulations, administrative rules and judicial review separately? How to change the errors in law papers from indisputable to amendable? All these problems stand in the way of China who is on its way to nomocracy, and need to be solved.

## **II. Major Integrants of the Litigation Fee: Case Acceptance and Hearing Fee, Property Protection Appeal Fee and Forcible Execution Appeal Fee**

The litigation fee consists of 6 kinds: (1) case acceptance and hearing fee; (2) fees of survey, appraisal, bulletin, and interpretation; (3) the transportation and boarding fees, cost of living and work subsidy of the witness, appraiser and interpreter; (4) property protection appeal fee and the actual expense; (5) fees of executing verdict, arbitration and mediating agreement; (6) other litigation fees that the people’s courts think should be *assumed* by the litigant.<sup>1</sup>

According to Section 107 of *the Civil Litigation Act*, case acceptance and hearing fees should be collected for all civil cases and in cases concerning property other litigation fees besides acceptance and hearing fees should also be collected. In practice, however, the courts collect other litigation fees not only for property cases but also for some other cases.

### **1. The Collection Standard, Prepayment and Reimbursement of Case Acceptance and Hearing Fee**

Case acceptance and hearing fee is the major part of the litigation fee.

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<sup>3</sup> See 28 U.S. C. Sec. 331.

<sup>1</sup> See the 1989 Regulations, Sec 1, Sec. 2.

According to the different categories of cases, *the 1989 Regulations* set different standards of litigation fee. The categories of cases are divided according to multiply criteria. Cases to which *the 1989 Regulations* applies are divided into 4 major categories: civil cases, administrative cases, labor dispute cases and enterprise bankruptcy cases. Civil cases are further divided into property cases and non-property cases. Non-property cases are further divided into 4 kinds: divorce cases, cases of infringing on rights of name, title, portrait, fame or honor, cases of infringing upon patents, copy rights or trademarks, and other non-property cases. *The 1989 Regulations* enclosed no explanation of property cases. In practice, in all litigation cases involving property, no matter whether they are civil or administrative cases, infringement or divorce or contract cases<sup>2</sup>, the litigation fee is collected only according to the disputed sum.

Case acceptance and hearing fees are collected according to the disputed sum between the litigants, such as in the proceedings of plaintiff claiming, defendant counterclaiming, and the appealing after the first instance.<sup>3</sup> The so-called disputed sum actually refers to monetary value of the property right insisted by one party of the litigant. After the court began to charge litigation fee according to the disputed sum, other professional institutions all follow the suit. Now lawyers, accountants, value appraiser, auctioneer, security consignee and security broker are all charging according to the same standard.

If the litigant insists new property right, he should pay additional fee, otherwise his new appeal will not be accepted. Similarly, if the defendant counterclaims new property right, he also should pay additional fee, no matter whether the claimed or counterclaimed property right is the same one. In the cases at the second instance, the court charges the plaintiff and the

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2 Section 5 of the 1989 Regulations set the following standards of litigation fee collection: (1) For divorce cases, 10-50 yuan are collected for each case. If the divorce involves division of property, and the total sum to divide exceeds 10 thousand yuan, the exceeded sum should be collected 1% fee. However the 1989 Regulations did not define whether the total sum refers to the sum acquired by the litigant or the total property value owned by the couple. (2) For the cases of infringing on rights of name, title, portrait, fame or honor or other spiritual rights, 50-100 yuan are collected for each case. If the plaintiff asks for compensation, should the court increase the case acceptance and hearing fee? The 1989 Regulations did not give clear answer. If we understand from the literal meaning of the terms, the answer should be no because the right infringement cases listed by the 1989 Regulations which require additional fee according to the disputed sum do not include the cases of infringing on spiritual rights. In practice, however, the courts charge fee according to the disputed sum if the litigant asks for compensation no matter whether the cases are of spiritual rights infringement or not. (3) 10-50 yuan are collected for each of other non-property cases. In these cases, if the plaintiff asks for compensation, the court will collect fees according to the disputed sum, though the 1989 Regulations did not clearly authorize it to do so. (4) The litigation fees in property cases should be collected according to the disputed value or sum. (Detailed standard is omitted here.) (5) 50-100 yuan are collected for each case of the infringement of patent, copyright, or trademark. If there is disputed sum, the standard of property cases applies. (6) No more than 400 yuan are collected for each of administrative cases. If there is disputed sum, the standard of property cases applies. The standard of administrative cases still prevails even after the Administrative Litigation Act became effective in Oct. 1999. (7) 30-50 yuan are collected for each case of the labor dispute. (8) The standard of property cases applies for cases of bankruptcy, and the disputed sum is the total property value of the bankrupted enterprise.

3 Section 5 of the 1989 Regulations set the standard of case acceptance and hearing fee for property cases.

defendant separately. The fees charged are usually the same with those of the first instance. Even though the compensation decided by the court of first instance is less than the sum required by the plaintiff, or the *appellant* accepts part of the debts and appeals for the rest, the court of second instance will charge according to the disputed sum of first instance.

It is a general principle that the litigant should pay the acceptance and hearing fee. The plaintiff should pay the fee within 7 days he receives the notice of paying litigation fee issued by the court. The defendant should pay the fee when he puts forward the counterclaim. The *appellant* should pay the fee when he submits the appeal paper to the court of second instance.<sup>1</sup> Taking the circumstances into consideration, the court decides the pre-paid sum of other litigation fees other than the acceptance and hearing fees.<sup>2</sup>

If the contract signed by the litigants requires them to pay the order, rents or services in foreign currencies, though they both are Chinese citizens or companies, they may be required to pay litigation fees in foreign currencies.<sup>3</sup> But if the litigant uses its foreign currencies under other items, it may be punished due to its violation of foreign currencies control.

When and only when a civil case is totally transferred to the Attorney Office, the Public Security Bureau or the criminal court as a criminal case, can the litigation fee be reimbursed in full sum.<sup>4</sup> When and only when the plaintiff withdraws the claim, can the litigation fee be reimbursed in part. The acceptance and hearing fee will charged half and other fees will be charged according to real expenses.<sup>5</sup> If the litigation is paused, the court of second instance returns the case to be re-ruled, the court rules to terminate the litigation, or under other circumstances, the court will not reimburse the acceptance and hearing fees.<sup>6</sup> If the compensation ruled by the court is less than the sum claimed by the plaintiff, the court will not recalculate the litigation fee and return the balance. If the plaintiff claims less than normal in order to avoid pointless expenses, the court can estimates the disputed sum by itself and charge litigation fees according to this disputed sum.<sup>7</sup>

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1 See Sec. 12 and 13 of the 1989 Regulations. Only in the following two kinds of cases can litigation fee be paid after the trial: (1) group litigation cases in which one party of the litigant is a group of many people; (2) bankruptcy appeal.

2 See Sec. 5, 15 and 23 of the 1989 Regulations.

3 For example, in the appeal case of China Oriental Renting Co. Ltd. over dispute of financing contract, the litigants counted rents in Japanese yen, so the courts of first and second instance required them to pay litigation fees in yen. Again for example, in the appeal case of Nanjing Broadcast Television Groupware Factory over dispute of financing and renting contract, the litigants counted rents in yen, so the courts of first and second instance charged them in U.S. dollars. See the Collection of post-second instance cases of economic dispute ruled by the Supreme Court, The Press of China Politics and Law University, 1997, pp. 380—393.

4 See Sec. 5, 15 and 23 of the 1989 Regulations.

5 Ibid.

6 See Sec. 7, 16, 17 and 18 of the 1989 Regulations.

7 Ibid.

## 2. Case Acceptance and Hearing Fees and the Litigant's Litigation Rights

Litigants with real financial difficulties may apply for the delay or reduction of litigation fees.<sup>8</sup> But such applications may not be necessarily accepted. In fact *the Civil Litigation Act* does not require the court to help those poor litigants, nor does it set standards to judge whether the litigant is in real difficulty, nor does it require the court to make decision, within a certain period of time, on the applications from litigants. Therefore the litigant never knows whether the court has made decision on his application, and he never has the right or chance to challenge the court's decision on his application.

Section 13 of the 1989 Regulations says that if the plaintiff, defendant and appellant fail to pre-pay litigation fees, their litigation application will be repealed automatically. If the plaintiff does not pay the full sum by the time required, his litigation right will be frozen the time being. Once he pays the full sum, he can *sue* again.<sup>1</sup> If the appellant fails to pay the full sum, he will miss the validity period of appeal and will lose the appeal right for ever. If the defendant fails to pay the full sum, it means he does not have the chance to fully defend himself. However the plaintiff, defendant or appellant who fails to pay the full sum of litigation fee may not wish to withdraw, what really happens usually is that they fall into severe financial difficulty. Under this circumstance, the court seems to withdraw the litigation on behalf of the litigants. For cases of first instance, without receiving the litigation fees, the court will not register the case and no paper records will be left. Therefore the litigant has nothing to prove that he has once *sued*. For cases of second instance, if the appellant submits litigation in paper but does not pay the litigation fee, the court will normally reach the verdict of "automatic withdraw".<sup>2</sup>

A judicial review made by the Supreme Court in 1994 points out: "It is a premise for the court to accept a case that the plaintiff or the litigant pays case acceptance and hearing fee or the litigation fee. If the litigant does not pay or fully pay the above fees, and continues to do so even after his application of delay, reduction or free of charge of the above fees is denied, the court should not accept the case and the case should not be put into proceedings."<sup>3</sup> However this review leads to more puzzles: (1) The review contradicts with *the Civil Litigation Act*. According to *the Civil Litigation Act*, if the plaintiff' sue accords with legal conditions, the court must accept the litigation. The non-acceptance verdict of the court only applies to legal proceedings.

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8 See Sec. 107 of the Civil Litigation Act.

1 After the litigant withdraws the litigation, normally he can sue again for the same thing. See Sec. 111 of the Civil Litigation Act and Sec 114 of the Advice of the Supreme Court on the Application of the Civil Litigation Act of the People's Republic of China.

2 8 verdicts by the Supreme Court, such as 1994 No. 100 and 1995 No. 159, are all examples of the "automatic withdraw". These verdicts are among the 76 verdicts, mediatory papers, and ruling papers selectively issued by the Supreme Court from 1993 to 1996. So we can see that "automatic withdraw" is very common. Please see the Collection of post-second instance cases of economic dispute ruled by the Supreme Court, pp. 495, 497, 499, 515, 527, 529, 533, 564, and 627.

3 The Answers to Two Questions about the Litigation Fee, the Supreme Court, 1994.

However the prepayment of litigation fee is not the legal condition of suing, so failing to pre-pay litigation fee is not the legal proceeding for non-acceptance either.<sup>4</sup> (2) The review contradicts with *the 1989 Regulations*. According to *the 1989 Regulations*, failure to pay litigation fee indicates automatic withdraw. According to *the Civil Litigation Act*, withdraw means to withdraw a litigation case being checked by the court,<sup>5</sup> and whether to allow withdraw is decided by the court. Such a decision is the decision of “unallowable appeal”. But non-acceptance is the decision of “allowable appeal”.<sup>6</sup> To take the pre-payment of case acceptance and hearing fee as the premise of case acceptance is an essential amendment of *the Civil Litigation Act* by the Supreme Court.

The judicial reviews of litigation fee by the Supreme Court are always not understandable and even contradict with one another. According to Section 131 of *Advice on the Litigation Fee*, the plaintiff does not need to pay litigation fee for the case ruled non-acceptance. If the plaintiff appeals for the case of non-acceptance, he only needs to pay litigation fee according to the standard of non-property cases. According to a judicial review of 1996, the litigant needs to pay case acceptance and hearing fee according to the standard of non-property cases, though the court of first instance has ruled the case of non-acceptance or rejection.<sup>1</sup> It is really a semantic absurdity to require the litigant to pay acceptance fee for the case not accepted by the court. If we say the court did not accept the case, but it has charged the acceptance fee; if we say the court accepted the case, but it has ruled the case of non-acceptance.

### 3. Case Acceptance Fee and the Litigation Risk

#### (1) The Risk of Overestimating the Disputed Sum

1) The plaintiff, defendant and appellant must convert their compensation appeal into a certain sum of money, and this sum will be the base for calculating and paying the litigation fee. Since the compensation asked by the litigant seldom equals to the final ruling by the court, it is unavoidable that the litigant is always reaching a “wrong number” by estimating the disputed sum, or his compensation appeal, before the court ruling comes out. The litigant pays the money for the court to correct his “wrong number”. It is just like a gambling game in which the litigant makes the bet but the court wins.

Before hearing the case, the court, like the litigant, has no ways to know whether the final ruling will be the same with the compensation asked by the litigant. However it is the litigant, not the court, who must take the risk. If the ruling by the court is less in sum than the compensation requirement, the

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<sup>4</sup> See Sec. 108, 109, 110, 111, 131 and 140 of the Civil Litigation Act.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>1</sup> The Reply to the High Court of Henan Province Concerning the Litigation Fee of Several Kinds of Cases, the Supreme Court.

reimbursement by the defendant to the plaintiff will be reduced according to the ruling and the balance of the litigation fee will not returned to the plaintiff but will be put into the pocket of the court. So it is possible that the compensation finally obtained by the plaintiff exceeds the litigation fee assumed by the plaintiff. Take the following case as an example. The plaintiff asked a compensation of 1.01 million yuan and paid the fee of 15,059.87 yuan. The court's ruling was 10,000 yuan. Thus, the defendant paid the plaintiff only 410 yuan as the case acceptance fee and the uncovered 14,649.87 yuan paid by the plaintiff were pocketed by the court. There are some litigants who, due to their financial difficulties or unwillingness to take the litigation risk, deliberately reduce the compensation requirement. This means they have to give up their legal right of being fully compensated.

2) Another example of litigation fee exceeding compensation.<sup>2</sup> In 1993, a Toyota driven by the plaintiff hit a building and the safety air bag did not expand. Later the plaintiff charged the Toyota Company 1 million yuan for compensation. 1994, the court ruled that the instruction of the air bag was not sufficient and the defendant should pay the plaintiff 13,685 yuan as compensation and 557 yuan as the litigation fee. The result was that the plaintiff paid 14,403 yuan of litigation fee. Besides the plaintiff also paid 25,000 yuan of the lawyer fee. To sum up, if the plaintiff had not gone for the litigation, he would have saved 26,302 yuan.

## (2) The Risk of the Winner Failing to Recover the Litigation Fee

1) According to the Civil Litigation Act, the litigation fee should be assumed by the loser. Therefore the ruling by the court always includes the litigation fee. However the winner of the case can not ask the court to return the litigation pre-paid, he can only appeal to the court to force the loser to reimburse such fee. If the loser has no means to reimburse, or the court has no power to force the loser to do so, or the court does not seriously carry out its ruling, the winner will lose the litigation fee in the end.

There are some problems in the validity of the court asking the winner to recover litigation fee from the loser. If the collection and payment of the litigation fee is a kind of relationship of public law between individuals and the government, after the trial the court should first return the pre-paid litigation fee to the winner, then recover it from the loser. If the litigant who prepays the litigation fee becomes the winner, then he will replace the court as the creditor. However, the transfer of creditor's right from the court to the winner is not only decided through litigation, but also restricted by the relevant regulations of *the General Rules of Civil Law*.<sup>1</sup> If so, the court will be deep in litigation due to its

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2 Zhang Jieting Vs Japanese Toyota Co., in *A Selective Analysis on Some Cases Tried*, ed., the People's Court of Beijing Haidian District, the Press of China Politics and Law University, 1997. pp. 98—104.

1 According to Article 91 of General Principles of the Civil Law of People's Republic of China, the transfer of contract right should be under the agreement of all the parties.

execution of judicial functions. If the litigant who prepays the litigation fee becomes the winner, and a new creditor-debtor relationship is set up between the litigants after the trial, then such questions will rise as what causes such a relationship and whether the litigation fee itself is an independent litigation object. Critics say that by including the litigation fee as part of the forceful enforcement, the court in fact forces the litigants to set up a new debt relationship – the court transfers to the winner the risk of being unable to recover the litigation fee from the loser.<sup>2</sup> After the government rectified the courts in 1998, some courts have adopted the new proceeding, that is, if the litigant wins the court will return the litigation fee pre-paid by him. However this new proceeding has not been adopted by the majority of the courts.<sup>3</sup>

2) An Example of the Winner Failing to Recover the Litigation Fee<sup>4</sup>. In 1994, four companies including Tianci sued Han Chenggang for fame infringement and pre-paid 1,450 yuan. Taiyuan Intermediate Court, the court of first instance, ruled in favor of the four companies. Later Han appealed to the Provincial High Court and pre-paid 1,450 yuan. In 1996, the High court ruled in favor of Han and required the four companies to share all the litigation fees of first and second instance. However in No. 1998, Han wrote to the author saying that the final ruling had been effective for over 2 years, but the loser had not submitted the 1,450 yuan of litigation of second instance to the High Court. So the High Court had not returned the money to him. To get back the money, he had been to the High Court for over 30 times and this cost him more than 1,000 yuan.

#### 4. The Collection of Litigation Fees According to the Disputed Sum and the Shrinking of Non-litigation Procedures

(1) Not all the cases accepted by the court involve litigation. In a substantial number of cases accepted by the court, there is only one side while the other side does not exist or it is impossible or unnecessary to identify the other side of the case. In the cognizance of this kind of cases, it is unnecessary to go through the litigation procedures of two opposing sides and thus this kind of cases are called non-litigation cases. In some countries, there is the independent non-litigation law apart from the civil litigation law while the fees for non-litigation cases are merely around 2% of that of the litigation cases<sup>3</sup>. In Japan and Taiwan China, non-litigation is applied in quite a wide scope such

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2 Jia Hongyin and Li Hongyue, It Is Not Appropriate for the Winner to Pay the Litigation in Advance, in *The People's Court Daily*, Jan., 7, 1998.

3 Leqing Court Changed the Way of Returning Litigation Fee, in *The People's Court Daily*, Jan. 7, 1998.

4 See Beijing Bailong Co. et al Vs Han Chenggang, in *Cases Collection of the People's Court*, (no. 17), pp. 77—83. And see *The Analysis of Right and Wrong of A Case of Mineral Pot*, in *The Legal Daily*, Aug. 20, 1997.

3 In Taiwan China, the litigation fee for a disputed sum of 6 million Taiwan yuan at the first instance stands at 60000 Taiwan yuan while the court fee for a non-litigation case with the same disputed sum stands at only 1113 yuan, 1.8% of the former. For reference at Article 2, Provisions for Civil Litigation Fees and Article 102, The Law for Non-Litigation Cases in Taiwan.

as the enforcement of collaterals<sup>4</sup>, issues involved in company dissolution, liquidation and adjustment<sup>5</sup>, the application of the share-holders opposing the special decision or the merging of the companies for the court to rule about the repurchase price of the shares<sup>6</sup> and the enforcement and confirmation of cashier's checks<sup>7</sup>. The separation of litigation and non-litigation does provide a kind of legal assistance apart from litigation procedure and thus reduces some unnecessary litigation expenses.

In China's legislation and practice on civil litigation, little attention is paid to the separation of litigation and non-litigation cases. According to *the Civil Litigation Law*, the non-litigation procedures include only four kinds of cases involving properties such as the judgment of ownerless properties, supervision of the fulfillment of loans, note loss notice and bankruptcy. Meanwhile, the acceptance and treatment fees in the cases of bankruptcy and liquidation will be collected in accordance with the disputed sum. Consequently, China mainland courts treat most non-litigation cases as litigation cases in fee collection.

*Comments on Litigation Fees* stipulates that the court should collect 100 yuan for each case of loan payment supervision or public notice<sup>8</sup>. However, compared with the disputed sum, the courts are usually dissatisfied with litigation fee of 100 yuan and easily tend to collect additional fees after it accepts such cases<sup>9</sup>.

(2) The Unnecessary Litigation and Litigation Fee - the Litigation on Collateral Enforcement. As *the Guarantee Law* came into effect in October 1995 and *the Auction Law* came into effect in January 1997, the enforcement of collateral has become one of the most expensive kinds of legal assistance.

If the borrower and the creditor agreed at the date of loan issuance that the collateral would be transferred to the creditor if the borrower could not pay the loan at the expiration date of the loan. This kind of agreement would be an invalid agreement<sup>10</sup>. Only it has become the fact that the borrower could not pay the loan at the date of maturity could the creditor and the borrower sign a kind of agreement on the disposition of the collateral. If the borrower could not pay the loan and refused to sign the relevant agreement on the disposition of the collateral at the same time, the creditor would have to go through the

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4 Articles 71, 100 and 101, Law for Non-Litigation Cases in Taiwan.

5 Article 1, Chapter 3, The Procedure Law for Non-Litigation Cases in Japan; Articles 81-96, Law for Non-Litigation Cases in Taiwan.

6 Articles 187 and 317, The Company Law in Taiwan, Article 81, The Law for Non-Litigation Cases in Taiwan; Term 3 of Article 254, The Law of Commerce in Japan, Article 126, The Procedural Law for Non-Litigation Cases in Japan.

7 Articles 71, 100 and 101, Law for Non-Litigation Cases in Taiwan.

8 Articles 132 and 134, Comments on Litigation Fees.

9 For instance, in April 1997, an accountant applied for public notice at the court after he was robbed of two money orders. According to Comments on Litigation Fees, the accountant paid 100 yuan of litigation fee and 600 yuan of notice fee at the requirement of the court. However, the accountant was required to pay 20548 yuan in accordance with a litigation case when the notice expired; otherwise, the court would not thaw the money orders. Thus, the litigation fee in fact hits 200 times of the fee standard stipulated by the law. See Yang Jinwei, The Worry of Some Courts' Illegal Fee Collection and Shanghai Legal Daily, September 30th, 1996.

10 Articles 40 and 53, The Guarantee Law.

litigation procedure rather than apply for the enforcement of the collateral directly<sup>11</sup>. Only when the creditor succeeds in the litigation could the creditor apply for the enforcement of the collateral with the ruling of court<sup>12</sup>. In the enforcement of the collateral, the court could not dispose of the collateral directly by itself. The court must hire a professional valuation company to conduct a valuation of the collateral and therefore entrust the disposition of the collateral to an auction firm. Thus for the enforcement of collateral, the applicant must submit litigation fee, valuation fee, auction fee and enforcement fee. As a result, the cost for the enforcement of a collateralized loan will exceed that of a credit loan to a great extent.

If the collateral is a stated-owned asset, it has to be valued before it is collateralized to the creditor<sup>13</sup> and valued once again before it is auctioned<sup>14</sup>. The procedure of state-owned asset valuation is even more complicated than litigation itself as it involves project setup, approval and confirmation which is related with a network of borrower, the borrower's supervisory authorities, state-owned asset management department and asset valuation institutions<sup>15</sup>. In addition, valuation is a special granted kind of business. The businesses of patent, trade mark, securities and real estate valuation are also granted by special authorities. The fact that one institution may be authorized to value land use right does not mean that the same institution may have the authority to value the building on the land as the valuation businesses of land use right and building are granted by two separate governmental agencies<sup>16</sup>. It is quite common for the applicant to hire more than one valuation institutions for the valuation of one collateral. Certainly, the applicant may have to pay valuation fee for each valuation institution and the fee will be a certain percentage of the disputed sum. Generally speaking, for the valuation of a certain real estate of 1 million yuan, the applicant will have to pay valuation fee of 15000 yuan, which is roughly equal to the case acceptance fee at the court.

The auction-related stipulations in *The Civil Litigation Law* are rather vague. On one hand, it stipulates that auction stands as one of the enforcement measures<sup>17</sup>; on the other hand, it requires that the court should entrust the auction of foreclosed properties to the relevant entities in accordance with the concerned regulations<sup>18</sup>. *The Auction Law* has stipulations only about the form of entrusted auction. Thus, the auction conducted by the court or the administrative entities falls into the category of entrusted auction. Meanwhile, only the auction companies need to go through

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11. Articles 40 and 53, The Guarantee Law.

12. Article 207, The Civil Litigation Law

13. State Council, Article 4, Provisions on the Valuation of State-Owned Assets, 1991.

14. State Council, Article 3, Provisions on the Valuation of State-Owned Assets, 1991.

15. State Council, Articles 12-19, Provisions on the Valuation of State-Owned Assets, 1991.

16. Ministry of Construction, Article 4, Provisions on the Qualification and Grade Management of Real Estate Valuation Institutions, 1997; State Land Management Bureau, Temporary Provisions on the Management of Land Valuation Institutions, 1993.

17. Article 223, The Civil Litigation Law.

18. Article 226, The Civil Litigation Law.

strict approval procedures in order to obtain the approval for the auction of foreclosed properties<sup>19</sup>. As a result of the vagueness in legal stipulation and the emergence of auction as a particular industry which is legally certificated, the court usually avoid conduct the auction by itself but hire an auction firm to conduct the auction with the enforcement fee paid by the applicants ahead. The highest commission fee for the auction will be 10% of the final auction price for which the seller and the buyer will pay half each party<sup>20</sup>. Thus a special structure emerged between the applicant, the court and the auction firm. First, it leads to the fact that the applicant has to pay a substantial amount of money for the court to hire a qualified auction firm while it pays the enforcement application fee. Second, without the peremptory authority to auction the foreclosed property, it becomes difficult for the court to carry out its judgment. For instance, if a third party raises his claim for the property in auction, he can sue the court and the auction for the reason that the court and the auction firm are selling the property of others without prior consent; and if the owner of collateral refuses to turn in its ownership of the collateral or the real estate registration authorities refuses to change the registration of the collateral in accordance with the certificate the auction firm has submitted, the buyer of the auctioned property can equally sue the relevant court and auction firm. Third, under this kind of structure, the auction firm obtains the auction right in collateral enforcement which originally does not belong to it and thus the corresponding business opportunities. On the contrary, if the court has the peremptory authority to auction the foreclosed property, the whole process will be simpler. The auction conducted by the court itself or auction assigned by the court may be much cheaper than the entrusted auction, which will in turn greatly reduce the litigation cost for the applicant. Under such circumstances, if the third party raises his claim on the ownership of the property in auction, he may raise his claim at the court rather than sue the court and the auction firm which are responsible for the conduction of the auction. The court may declare the title of the previous owner over the property invalid and grant the buyer with the certificate of title transfer. Thus the buyer can apply for the title change of the property at the relevant registration authority.

Similar to the process of collateral enforcement, the realization of bankrupted property also has to go through the same procedures of valuation and entrusted auction. The creditor often finds itself in a dilemma. If the creditor applies for the bankruptcy of the borrower, the liquidation proceeds have to be first paid for the liquidation expenses. However, it is in no way an exceptional case that the liquidation proceeds are even larger than the compensated creditor's right. Thus, only the court, law firm, accounting firm, valuation firm and auction firm are the beneficiary parties in the bankruptcy process. Otherwise, if the applicant refrains to apply for the bankruptcy of the borrower, losses may continue with the borrower until all its assets are

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19 Article 9, The Auction Law.

20 Article 56, The Auction Law.

exhausted. An official statistics in 1996 indicates: on one hand, the recovery ratio of bankrupted creditor's rights is quite low, mainly banks' creditor right; in 1995 and 1996, 111 enterprises went to bankruptcy while the creditor for 88 bankrupted enterprises got nothing in return and the creditor for the remaining 23 bankrupted enterprises got insignificant payback with the lowest recovery ratio of 0.0075% and the highest of 8.4%; on the other hand, with such various fees as litigation fee and valuation fee, the insignificant liquidation proceeds fades out in the liquidation process. For example, when Hubei Jianli Chemical Fertilizer Plant went to bankruptcy, a dozen of parties extracted liquidation expenses of over 1 million yuan, which is 17% of the appraisal value of the property while the losses for the ordinary creditors hit 90%<sup>21</sup>.

Some characteristics in China's legal system are often attributed to the impact of the mainland legal system. However, the practice that the collateral enforcement has to go through a litigation process and that the court's collateral enforcement needs the valuation and entrusted auction of the collateral by a third party is a practice which exists solely in China. One non-litigation case is changed into a litigation case, one judiciary authority is changed into a profitable commercial opportunity and one valuation procedure which is of insignificance has brought about a special granted industry which is both time and money consuming. In the 1990s, in the name of formalization and avoidance of losses with state-owned assets, numerous legal documents come up successively. All these regulations maneuvered to strengthen the governmental restriction on one side; on the other side, all these regulations increased the fee terms of governmental institutions such as litigation and litigation fee and led to the emergence of numerous commercial opportunities as specially granted valuation firms, specially granted auction firms and specially granted lawyers. The real effect of these regulations in fact has just resulted in the division of properties among the enterprise, the court, the lawyers and the valuation institutions rather than safeguard the further losses with state-owned assets. We should be aware that legislations that enhance the governmental restriction in disregard of the realistic expenses might be more dangerous than no relevant legislation at all.

## 5. The Application Fee for Property Saving

The application fee for property saving will be calculated in accordance with the saved sum<sup>22</sup>. Whether the applicant applies for property saving before or during the litigation process, the applicant must submit the court the application fee beforehand and otherwise the court will refuse to take any measure in order to save the property. Such expenses as investigation,

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21 State Economic and Trade Commission, People's Bank of China, "An Investigation Report on Merging and Bankruptcy in Some Provinces and Municipalities, 1996", To Optimize the Capital Structure, City Pilot Business Handbook, China Economic Press, 1996, page 291.

22 Article 8, '89 Provisions on Litigation Fee stipulates the collection standard on application fee for property saving.

foreclosure, storage and search for guarantor which may occur during the process of property saving should be shouldered by the applicant. Comparably, the application fee constitutes only a insignificant part of the total cost of property saving.

## 6. The Enforcement Application Fee

The enforcement application fee is collected in line with the enforced sum<sup>23</sup>. For the collection of enforcement application fee, there are two conflicting principles. Article 12 of '89 Provisions on Litigation Fee stipulates that the applicant should submit application fee beforehand for the enforcement of operative judgment, arbitration result, creditor's right with public notarization and the penalty decision of administrative departments. However, the supreme court pointed out in Reply to Two Requests on Litigation Fee 1994 that for the enforcement of legally operative court judgment, arbitration and coordination, no application fee should be collected apart from the real expenses that occur during the enforcement process. In practice, some court require that the applicant should submit enforcement application fee beforehand while the others require that applicant should submit enforcement fee after the completion of enforcement. Anyway, if the enforcement involves property valuation and auction, the applicant will have to submit valuation fee and auction fee. Similar to property saving, the real expenses in enforcement are usually much higher than the enforcement application fee.

### III. Case Study of Litigation Fee Responsibility

1. If the applicant attempts to go through all kinds of legal assistance procedures such as indict, property saving before litigation, counter charge, appeal and application for enforcement, he must prepare a substantial amount of case acceptance fee. The larger the losses the applicant has suffered are, the more desirous he is to seek full compensation, the larger the expenses for the litigation will be. Now let's see the following case study.

Assume: A is suing B for goods payment of 1.01 million yuan which is also mature. B countercharges A for the compensation of 1.01 million yuan for the unqualified goods. When the case is accepted by the court at the first instance, A applies for saving of B's property of 1.01 million yuan. After the first instance, both sides appeal respectively. At the second instance, the court rules that the contract is invalid, that B should return the goods while A has no right to the goods payment and that the two sides should be responsible for their respective litigation fee. When the second instance comes into effect, B

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<sup>23</sup> Article 12, '89 Provisions on Litigation Fee stipulates the collection standard on application fee for property saving.

refuses to return the goods and thus A applies for enforcement at the court.

In the above case, the court can collect the following fees. 1) A shall submit indict fee of 15059.87 yuan at the first instance, 2) B shall submit countercharge fee of 15059.87 yuan at the first instance, 3) A shall submit property saving application fee of 5570 yuan, 4) A shall submit appeal fee of 15059.87 yuan at the second instance, 5) B shall submit appeal fee of 15059.87 yuan at the second instance, 6) A shall submit enforcement application fee of 3010 yuan.

Therefore, the cost for two sides stands at 68819 yuan at least assuming the courts follow the fee collection standard accurately. Meanwhile the enforcement also takes place under a kind of ideal circumstance without the procedure of valuation and auction. In view of the fact that the court rules that the contract is invalid and the original status should be restored. Apart from the court, the litigation caused severe economic losses to the two sides.

2. The First Instance of 13 Cases Sued by GD Company During the Period of 1997-1998 and the Relevant Litigation Fees<sup>24</sup>. GD Company is a state-owned financial institution. During the period of 1997-1998, GD Company sued 20 borrowers and here the author obtained the litigation files for 13 cases at the first instance. Among the 13 cases, 8 cases involved the payment of principal and accrued interests while the creditor and the borrower had no dispute over the existence of the loans, principal and accrued interests and the maturity date of the loans. Therefore, the creditor could apply for the enforcement of non-litigation cases for the loan payment rather than pay litigation fee and initiate the litigation process. However, the court refused to send an enforcement decree to the borrowers. If the court had sent the enforcement decree to the borrowers, the creditor would have been able to save 99% of the litigation fees in the 8 cases.

As a matter of fact, the total expenses for GD Company have far exceeded the total amount indicated in figure 1. The lawyer's fees paid by GD Company roughly equal to the case acceptance fees in column 3. If GD Company chose to appeal at a higher court, GD Company would have to pay the same amount of case acceptance fees as at the first instance. In addition, the judges sometimes went to other provinces for affairs related with the cases and, for that, GD Company had to pay beforehand and the judges just canceled the expenses from the account with the invoices. And the author can do nothing with amounts related with the judges' tour to other provinces.

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24 Here the author would like to thank one employee of GD Company who provided the relevant material for the completion of this case study.

**Figure I. Litigation Fees GD Company Paid in 13 Cases at the First Instance from 1997 to 1998**

Court	Disputed Sum (unit: 1000 yuan)	Case Acceptance Fee (unit: 1 yuan)	Property Saving Litigation Fee (unit: 1 yuan)	Enforcement Fee (unit: 1 yuan)
1. No.1 Intermediate Court	28217	151100	164450	486500
2. See above	5148 USD	223670		
3. See above	834 USD	44640	35160	
4. See above	58338	301710	292220	
5. See above	21485	117440	107950	
6. See above	2840	24210	14720	
7. See above	12299	75510		
8. See above	6746	43740	34250	
9. See above	5061	35320		
10. See above	14856	84300	74810	
11. No.2 Intermediate Court	2965	24839		
12. Xicheng District Court	649	11510		
13. Municipal Intermediate Court	18176	100892		
Total		1238881	723560	486560

The combination of case acceptance fees, property saving litigation fees and enforcement fees amounts to 2449001 yuan.

What is worth particular attention is the enforcement fee in case 1. When the court has initiated the enforcement process of case 1, the court considered that the borrower's assets should be valued in accordance with the procedures stipulated by the law. Thus, GD Company paid enforcement fee of 486560 yuan beforehand. According to the employees of GD Company,

the court hired an asset valuation institution with the enforcement fee which GD Company paid beforehand. Meanwhile the valuation institution would be paid at 8% of the asset appraisal value while the payment would come from the auction proceeds. However, as of January 1999, the court has not yet found a buyer for the asset. In the opinion of the employees of GD Company, even no one is willing to buy the assets of the borrower, it is impossible for the court to refund the enforcement fee.

GD Company succeeded in all the loan litigations. However, it is hardly possible for GD Company to fulfill its creditor's rights through loan enforcement by the court as most borrowers are state-owned enterprises with high liability burden and nothing to realize the creditor's rights. By the time that the author finished this article, the court had completed the enforcement of 7 cases in Figure 1 including case 1-5, 8 and 12. The enforcement application fee amounted to 17170 yuan and the combination of case treatment fee and enforcement fee amounted to 1380310 yuan while the recovery from the enforcement totaled 430000 yuan. Thus if GD Company had given up the litigation, the Company could have saved the expenses of 950310 yuan. As a matter of fact, the litigation cause for GD Company was not to realize its creditor's rights but to obtain a kind of legal certificate with which GD Company could legally offset its bad loans. In such a way, GD Company endeavored to certify that GD Company was free from the losses in the loans. The significance of the litigation lay in the fact that GD Company had made all necessary efforts in loan enforcement rather than if the loans were in fact enforced effectively. If GD Company was a private company, the company would not have paid such expensive costs for the obtainment of a kind of certification.

So far, with the emergence of high litigation fees which is in line with the disputed sum, even some large companies can not bear the heavy burden of litigation<sup>25</sup>. The skyrocketing litigation fees have the following implications: 1) will the fact that litigation fee is calculated in line with the disputed sum lead to the fading out of cheap non-litigation cases? 2) while court enforcement could not produce any economic achievements, has the litigation increased or reduced the losses?

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25 In the 1990s, it is in no way exceptional that total litigation expenses would exceed dozens hundreds of thousands of yuan and millions of yuan. A case study by the economic section of the People's Supreme Court indicates that civil litigation has become a kind of capital-consuming activity. 1) In the indict by Hainan Haixiu General Company about dispute over real estate purchase, the combination of case acceptance fee and property saving fee at the first instance and the case acceptance fee at the second instance hit 600,000 yuan. In view of the lawyer's fee, travel expenses and other costs, the total litigation fee might have exceeded 1.5 million yuan. 2) In the indict by the Allied Lease Company over a funded lease contract, the litigation fees at the two instances hit 570,000 yuan while the countercharge fee 241,059 yuan. 3) The indict by South Security Limited Company over bond issuance brokerage was rather a simple case. However, with the disputed sum of 27 million yuan, the total litigation fee hit 999,440 yuan. Please refer to pages 331-335 and page 433 of A Selection of Second or Final Instance Economic Cases at the People's Supreme Court.

#### **IV. How Could the Applicant Challenge the Court's Decision of Litigation Fee Collection**

The collection of litigation fee is an inalienable part of the court's decision<sup>26</sup>. However, the side which disagrees with the collection of litigation fee cannot appeal solely for the reason of the dispute over litigation fee collection<sup>27</sup>. If the litigant disagrees over the collection of litigation fee, the litigant may require the same court to re-examine the calculation of the litigation fees and the court may recognize the mistake after its re-examination and correct the mistake<sup>28</sup>. If the litigant disagrees over the fee calculation before fee submission, the litigant has to apply for the same court to re-examine the fee calculation and it is up to the same court to decide if there is any mistake with fee calculation while the litigant can't further appeal over the final decision of the court. After the submission of litigation fee, unless the litigants disagree over the general decision over the case apart from the litigation fee and submit appealing fee of the same amount as the case acceptance fee at the first instance, the court at the second instance will not re-examine the calculation of litigation fees. In another word, the decision over the collection of litigation fee is an exceptional item at the second instance and the final instance. Therefore, the litigants who disagree with the court over litigation fee collection can challenge the court's decision only in a limited scope.

In 1997, Jinan Sanzhu Pharmacy Industry Company sued Han Chenggang for trespassing over the plaintiff's reputation and claimed for compensation of 500,000 yuan. At the first instance, the court ruled that Han Chenggang should compensate the plaintiff 10,000 yuan and that Han Chenggang should be responsible for the litigation fee of 10460 yuan<sup>29</sup>. Han appealed at the higher court over the collection of the litigation fees. Han's appeal was based upon the following reasons: 1) The case acceptance fee for a reputation infringe case collected by the court should not exceed at most 100 yuan each case. Thus, the litigation fee of 10460 yuan collected by the court in line with a property dispute case was legally unfounded. 2) Even if it is acceptable for the court to collect litigation fee over a reputation infringe case in line with a property dispute case, the litigation fee collected by the court in this case has exceeded the proper limit. 3) Even if the litigation fee had not

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26 Article 138, The Civil Litigation Law.

27 Article 29, '89 Provisions on Litigation Fee. The civil litigation laws in Germany, Japan and China Taiwan all limit the appeal over the dispute of litigation fee collection. "The reason lies in that litigation fee collection is an offspring of the court decision while it does not have any independent characteristics. If the litigant is allowed to appeal over the collection of litigation fee, the final decision over the fee collection may differ from the general decision of the case." (Please refer to The Interpretation of Newly Edited Six Laws, by Lin Jidong, etc.. 1988, page 477). However the reasonableness of this principle cannot be justified. Why should the litigant be deprived of the right to appeal if he disagrees only with the collection of litigation fee while having no disputes with the court decision over the case itself? In view of the fact that the decision over the collection of litigation fee may be a mistake independent from the case itself, why should the law prohibit the litigant from correcting the mistake by appealing to a higher court?

28 Article 32, '89 Provisions on Litigation Fee.

29 Shangdong Jinan Intermediate People's Court, Jiminchu No.119 Civil Judgment, 1997.

yet exceeded the proper limit, the court's decision that Han Chenggang should shoulder all the case acceptance fee is rather unfair as the final compensation ruled by the court was only 2% of what the plaintiff had asked for<sup>30</sup>. Although Han Chenggang failed in challenging the court's decision over litigation fee collection by way of appealing, he did raise some issues which was well worthy of attention.

**V. Other Alternatives: the Comparison Between Litigation Fee and Arbitration Fee. Arbitration fee consists of two parts including case acceptance fee and case treatment fee<sup>31</sup>.**

Case acceptance fee is the most important funding resource of the arbitration institution. While the government requires that the arbitration institution should be self-sufficient<sup>32</sup> and the arbitration institution uses the maintenance of the operation of arbitration institution as an excuse for the collection of case acceptance fee<sup>33</sup>, the arbitration institution is equally concerned with the case acceptance fee as the court.

The case acceptance fee should be submitted by the arbitration applicant in line with the disputed sum beforehand<sup>34</sup>. Different from the court, the arbitration institution shall accept the arbitration application before the case acceptance fee is submitted<sup>35</sup>. The applicant shall submit the case acceptance fee within 15 days after it has received the notice of acceptance. Otherwise, the arbitration institution shall consider that the applicant has voluntarily withdraw his application. Generally speaking, the arbitration institution will not assemble the arbitration committee before it receives the arbitration case acceptance fee.

The arbitration treatment fee covers all the factual costs occurring in the arbitration process, which will also be collected in accordance with the disputed sum<sup>36</sup>, while the arbitration applicant has to submit part of the treatment fee ahead<sup>37</sup>. In Beijing, the Arbitration Committee requires the applicants to submit all the treatment fees ahead and the Committee will

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30 Han Chenggang's letter to Shandong High Court of October 8th, 1998. The author has obtained the consent of Han Chenggang for the quotation here.

31 The general office of the State Council, Article 2, Provisions on the Arbitration Fees Collected by the Arbitration Committee, 1995.

32 The general office of the State Council, Article 4, Scheme on the Reestablishment of Arbitration Institutions, 1995.

33 The general office of the State Council, Article 3, Provisions on the Arbitration Fees Collected by the Arbitration Committee, 1995.

34 The general office of the State Council stipulates the collection standard of the acceptance fee of arbitration cases in the Provisions on the Arbitration Fees Collected by the Arbitration Committee. According to that standard, the arbitration applicant should submit at most case acceptance fee of 18600 yuan for an arbitration case with the disputed sum of 1.01 million yuan.

35 The general office of the State Council, Article 4, Scheme on the Reestablishment of Arbitration Institutions, 1995.

36 In accordance with the collection standard of arbitration treatment fee at Beijing Arbitration Committee (1996), for a case of disputed sum of 1.01 million yuan, the arbitration applicant should submit arbitration treatment fee of 18550 yuan ahead.

37 The general office of the State Council, Article 7, Provisions on the Arbitration Fees Collected by the Arbitration Committee, 1995.

make the relevant adjustments with realistic expenses<sup>38</sup>. The collection standard for arbitration treatment fee is jointly stipulated by Beijing Price Bureau and Beijing Finance Bureau.

For a case with the disputed sum of 1.01 million yuan, the applicant should pay the “case acceptance fee” and the “case treatment fee” totaling 37150 yuan, which is 1.2 times the combining acceptance fees of the first and second instances of the same case at the court. However, the applicant possibly has to apply for the enforcement of the arbitration result by the court for which the applicant has to submit the “enforcement application fee”. Consequently, arbitration is in no way cheaper than litigation.

## Section II:

### A Century-Old Embarrassing Problem----Object of Action

Charging the parties with court costs is a system introduced to China from the west in late times. In ancient China, there was no court costs charged by yamen according to the decree not only because there was no classification of civil case and criminal case, but because it was deemed unseemly if the king and the officials in the name of “people’s parents” charged the people appealing for justice through lawsuit with court costs<sup>39</sup>. Admittedly, the lawsuits in ancient China were absolutely not free of charge, “if you don’t have money, you shouldn’t lodge a complaint”. Because yamen and the officials charged people illegally, they were accused that yamen was directed by money, for example, there was no regulation on court costs or stamp tax according to the Decree of Qing Dynasty before 1907, however, it is unarguable that yamen, officials and factotums charged people with all sorts of illegal court fees<sup>40</sup>.

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38 According to the collection standard of the treatment fee at Beijing Arbitration Committee (1996), the applicant should submit treatment fee of 18550 yuan ahead for a disputed sum of 1.01 million yuan in an arbitration case.

39 There is a viewpoint that the court costs have been charged since the Dynasty of West Zhou: the parties should respectively pay 100 arrows as court costs, otherwise, the party that didn’t pay the arrows would fail.( refer to “legal history of West Zhou Dynasty” published by Shanxi People’s Publishing Company, 1988 edition, Page 289). However, there wasn’t the division of the civil action and criminal action in West Zhou Dynasty, so it is impossible to have the rule of the court costs in civil action, if such rule indeed existed, why it can only be found in “Zhouli” and “Guoyu” and can not be found in other historical data? Why did it disappear after West Zhou Dynasty? The author believes that it may be a form of the popular “Pledge Trial” in ancient times. Rendering arrows for trial may be pledge with arrow to express the verity of their presentations.

40 “System for the Trial of State and County Yamen in Qing Dynasty”, published by Art, History and Philosophy publishing company, 1981 edition, Page 33-34, Page 63. Two important facts can be found from it: (1) the law of Qing Dynasty didn’t acknowledge the validity of court costs, so the sum of the court costs had no relationship with the statute law, it was a problem of the management of the officials, if the officials were clean handed, the items to charge the court costs would be lesser, otherwise, the causes for the court costs would become more; (2) the government of Qing Dynasty didn’t pay salary and remuneration to the judicial officials, so the judicial officials had to extort money from the parties, and the illegal court costs included: seal fee, registration fee, delivery fee, surety fee, paper and brush fee, conclusion fee, confirmation fee, note fee, trial fee, attendance fee, yamen fee and so on”, “perambulation fee, check fee, shoes and socks fee, fare, food fee, fee for

In 1905, Mr. Dong Kang and some other persons were sent to Japan to study the Japanese trial and jail system by Law Revision Institution presided by Mr. Shen Jiaben<sup>41</sup>. In 1907, they translated “Collection of Japanese Law” into Chinese; in the same year, simulating the Japanese Law, the government of Qing Dynasty put forward “Experimental Statute of Trial Institution in All Levels”(hereinafter “Experimental Statute”) trying to separate the trial institution from Administrative System; at the same time, the government began to implement the system of court costs imposition in the trial<sup>42</sup>. Undoubtedly, Experimental Statute was the beginning of China court costs imposition.

After the crackdown of Qing Dynasty, Civil government continued using Experimental Statute until the enactment of “Regulation of Court Costs” in 1922<sup>43</sup>, which become the existing “Court Costs Law in Civil Action” implemented in China Taiwan after several times revision<sup>3</sup>.

After the thorough review of all kinds of court costs regulations from 1907 to 1989, we can find that, in spite of the change of name, object of action was always the basement in calculating court costs. That was a system that employed the theory of object of action as its basement and support for its reasonability.

China introduced the system of court costs from Japan and Japan learnt that from Germany. Object of action is the key word employed by Germany Civil Procedure Law and other relative laws: it is a count of law suit that can be transformed into money, what's more, it is the basis that determines judicial control and the necessary requirement and content of a lawsuit, the common interests in the same object of action among the parties are the necessary requirement for colitigation<sup>1</sup>. Of course, object of action is the foundation of court costs imposition both in France and Germany<sup>2</sup>.

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undo string, fee for unlocking, acceptance fee, responsibility fee, courtroom fee, panel fee, fee for entering jail, fee for bailment, mediation fee, conclusion fee, confessing fee and so on”.

41 Please refer to “prelude of the structure of Japan trial organization” written by Shen Jiaben.

42 “Experimental Statute of Trial Institution in All Levels(1907)” sixth section “court costs”, quoted from “Selected Data of Legal System History in Modern China”(3rd collection), P21-23 edited by Legal System History Research Center Northwestern Politics and Law College.

43 In 1914, “Experimental Statute of County Trial Institution” prescribed that the calculation of court cost should base on “Experimental Statute of Trial Institution in All Levels” Article84-96. “Experimental Statute of Trial Institution in All Levels” (1907) section six “court costs”, quoted from “Selected Data of Legal System History in Modern China”(3rd collection) edited by Legal System History Research Center Northwestern Politics and Law College.

3. “New Edited Collection of Six Laws (according to the explanation of decree and rule)”, P.585-587.

1. Germany “Procedural Law”, translator Xie Huaishi, Law Publication Company, 1984 edition, Article 2-9, 253, 59.

2. Based on the “procedural Law” in Germany, in the bill, the plaintiff “must put forward the price of the compensation, but in the case of personal injury, the number of the compensation put forward by the plaintiff is only the lowest compensation money, it is important because it can determine the court costs, the object of action, counsel fees and so on.” Please refer to Stephen O'Malley and Alexander Layton, European Civil Practice (1989) P. 1298.

**Chart Two: “the sum of the object of action” and the evolution of the regulation of court costs: 1907-1999**

The promulgation bureau and the time of the enactment of the decree	Name of the decree	The basis of the calculation of Court costs
Qing Dynasty 1907	Experimental Statute of Trial Institution in All Levels	The sum of the object of action
Civil Government 1922	Direction of court costs in civil action (old name: the regulation of Court costs)	The worth or price of object of action
The 2nd Administrative District of Mid-Su 1943	Experimental Direction of Court Costs Imposition	The worth or price of object of action
The administrative Commission of the Revolutionary District of Jin-Cha-Ji 1946	The Experimental Direction of Petition and Court Costs	The worth or price of object of action
Shanghai Municipal Government 1954	The Experimental Direction in Court Costs Imposition of Civil Action and Non-litigation case	The price of object of action
Shandong Province Superior People’s Court, 1980	The Experimental Direction of Court Costs on Economic Cases	The sum of the object of disputes
The Supreme People’s Court, 1984	Court Costs Rule of Civil Action	The sum and the price of the object of action
The Supreme People’s Court, 1989	Court Costs Rule of People’s Court	“The sum and the price of the object of action” and “ the sum of dispute”

“Object of action” regulation in Germany was built on the basis of a confusing theory, this theory includes a group of nonfigurative concepts. According to the theory of Germany, the content of debt shall be “performance”, the essential of debt shall be “ application right”, “debt”, “performance” and “application right” all have the corresponding “object” , count of lawsuit corresponds to the application right in law, therefore, object of action is the application right in substantive law derived from the lawsuit<sup>44</sup>.

The laws during the Minguo period inherited the theory of “ object of debt” and “object of action”<sup>4</sup>. Although the People’s Republic of China abolished all the laws during the Civil Government in 1949, the method and theory that can replace and assimilate the German Law did not come into being ----the basic model of legal thinking was still consistent with that of Germany under

44 Please refer to “Theory of the Civil Action Procedure And Object of Action” (1977) written by Chen Rongzong, P326-449; “Explanation for the Civil Procedure Law”(1987) written by Shi Ziquan and Yang Zhihua, P.3-4. “ General Discuss of Debt Law” (1978) written by Shi Shangkuan, P223.

4 In 1929, the “Code of Civil Law” drawn by Civil Government used “object of action” as the name of the second section of the second chapter of the second edition. Based on the draft of this Code of Civil Law, the object of debt can be simply called the performance or non-performance of the debtor. Based on the understanding of the jurisprudence circle, the concept of the object of the debt is the same as the “ content of debt” in Germany Civil Law. (please refer to “ General Discuss of Debt Law” (1978) written by Shi Shangkuan). In 1930, the “ Civil Procedure Law” of Civil Government stipulated in item 224 that the “ object of action” is the necessary part of the petition.

the context of great changes in ideology.

The veracious concept of "object of action", however, was always in dispute and cannot be settled. First, whether the cause of action can gain support in civil law belongs to the field that the courts should examine, not the condition the parties should have while going to court; Second, litigation can be divided into action of affirmation, action in rem and action of presentation, application right of performance can not include all the forms of action, for instance, action of affirmation usually requires the court to identify the real right and the identity right, action in rem usually requires the formative right in civil law without requiring performance; Third, an application right in substantive law can produce many application rights in procedural law, so the concurrence of the application rights will come into being, for instance, there are four application rights on the occasion that the watch of the plaintiff was stolen by the defendant: the application right for the payment of damage on the basis of infringement act, the application right for the reversion of the watch based on the ownership; the application right of the reversion of undue enrichment based on debt law, the application right for the reversion of the watch based on the identity of the holder. Whether the application right of the plaintiff because the watch was stolen can constitute four objects of action (four application rights)? Can the plaintiff prosecute different actions successively based on the same matter? Whether the court should make four sentences on the same matter? Therefore, the object of action is not very consistent with the object of debt according to the procedural law.<sup>45</sup>

Metaphysics is a theory that can reproduce, a metaphysics question can generate many more metaphysics questions. The most simple method to avoid metaphysics is to consider a simple question before trapping into it, for instance, if the object of debt or object of action is not available, will the science of civil law and the science of civil procedure law collapse or break away from the wrong area? If the former is true, we will continue discussing; if the later is true, we have to forget the conception of the object of debt and the object of action.

## **Section III:**

### **Conclusion**

#### **I. Critics on the Implantation of Legal System**

From the systems of court costs of Qing Dynasty, Beiyang Government, Minguo Government and the People's Republic of China after 1980, we can

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45 Please refer to "Theory of the Civil Action Procedure and Object of Action" (1977) written by Chen Rongzong, P.326-449.

find something consistent with each other: employing “the price of the object of action” as the basis of court costs imposition keep unchanged after the change of regime. How to explain the fact that the governments of different political, economic and legal systems all accepted the court costs system introduced from Japan by Qing Dynasty.

At the beginning of last century, China legal system with a history of two thousand years was in a dangerous situation, Qing Dynasty government put forward the project of legal graft hastily with the purpose of recovering the discontinuity of law by introducing some foreign laws. As a result, the foreign laws were introduced into China legal system after escaping the old close legal system----a close system that was unfamiliar and can not be improved and criticized using native experience, which limited the development by itself.

The greatest negative influence of the legal graft at the end of Qing Dynasty is that the foreign laws first introduced into China “took a superior position” over the native law. In recent 100 years, the great social reforms in China were always accompanied by legal graft in certain field. From the Reform Movement at the end of Qing Dynasty to the Code System of Civil government period, from the introduction of administrative and legal system of Soviet model after 1949 to the laws trying to merge into international conventions promulgated after 1980, the aim to realize ambitious social reform with the help of legal graft, however, was not a realistic notion notwithstanding the contents of every reform were different. The essential of legal graft is that foreign law must be introduced to replace the old native laws because the conventional social order doesn't tolerate social development. Asian Development Bank investigated the relation between law and the development of economy from 1960 to 1995 in China, India, Japan, Korea, Malaysia and China Taiwan, although those country all introduced some foreign laws, the conclusion is that the laws introduced from the west didn't put in practice for a long time notwithstanding they were effective ostensibly. During the development of Asia economy, it was not the laws grafted from foreign countries but the national policy that play a key role<sup>1</sup>. So the opinion that legal transplantation, especially the systemic legal graft, can be positively effective is still a hypothesis with practical proof after more than 100 years experiment.

After the legal graft at the end of Qing Dynasty, China law was always in its original point concerning introduction, copy, interpretation and prevalence lacking the necessary creative idea in accepting, criticizing and improving foreign laws, as a result, the law, jurisprudence and legal method that first came into China at the beginning of last century could not be replaced. There is a tag in china legal field “some rule was stipulated in this way because it comes from continental legal system, China belongs to continental legal system, so we have to stipulate in that way”, that can be used in

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1. K. Pistor, P. A. Wellons, *The Role of Law and Legal Institution in Asian Economic Development: 1960-1995*(1997)

discarding meditation, blocking discuss and answer all the doubt unmindfully. In practice, China jurisprudence circle was content with the omnipotent explanation that China belongs to continental legal system without considering the following issues: whether China truly belongs to continental legal system? Whether continental legal system can be transplanted into China as a convention? Does there exist a invariable and unified continental legal system? American jurist Jerome Frank once said in the 1930s last century: whether the law can grow mature from infancy depends on the imagination of jurisprudent that can break away from dogma, in this sense, only grand judge Holmus in America is a “mature” jurisprudent<sup>46</sup>. When China becomes a nation that introduces law system from other countries, it will be more difficult for China jurisprudence to grow up, language itself becomes the barrier to have access to the new theory, legal document and legal practice, let alone creative ideas. In my view, only if the jurisprudence circle breaks away from the reliance on the continental legal system can the experience, wisdom and creative spirit of China be fused into law.

## **II. Court Costs Imposition and the Phoniness and Overspread of Law**

Professor Folidman argued that the process of leaking water itself becomes a balance when water fluids through the pipe full of little hole, just like the process that law turns into the decree from document<sup>47</sup>.

In China, however, the fact that can better elucidate the difference between legal document and regulation than “water leakage” comes from two extremities: the phoniness and overspread of law. There is an example of “leakage-irrigation poll” in Yuncheng, Shanxi Province, which can be used to explain the phoniness of law. In the 1990s, local government asked the peasants to build “leakage-irrigation poll”, a technology to replace irrigation, it also came from Germany just like civil law. The peasants knew that “leakage-irrigation poll” didn’t match the rainfall and soil there, but they did not dare to defy local government’s order, so they built some “leakage-irrigation pools” in the farm at the lowest price to cope with the visit of officials: without using cement to block out the bottom of “leakage-irrigation poll”, without laying out the subterranean water pipe, therefore, the “leakage-irrigation polls” could neither reserve water nor irrigate the farm, the only effect of them was to keep up a phony, which made the visitors have wrong expression that there happened appreciable changes indeed. Some laws are such kind of “leakage-irrigation poll” practically, they only existed in written form without coming into effect, so the phenomenon of “water leakage” Folidman said will never happen.

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46 Please refer to “The world of Benjamin Cardozo (1997)” by Richard Polenberg. P. 159

47 Please refer to “Legal System” by Flidman, China Politics and Law University, 1994 edition, P. 104-105, translated by Li Qiongying and Lin Xin.

Folidman ignored another extremity during the process that law turns into the regulation from document: there may be an extension of law as the proliferation of cells. The unusual production of law becomes the barrier of personal development and social advancement while breaking the reasonability of law. There are many phenomena of such extension of law in China society: imposing various fees, stipulating many occasions to make the contracts invalid, implementing the business license system in security, valuation, auction, brand and patent, those all belong to the rampant extension of law. In this aspect, court costs is only a little part of extension of law. When we complain the breach of law, we often neglect the fact of another aspect, i.e. the extension of law. The extension of law and the breach of law are always connected with each other.

As for the legal document, the main aberrance of the imposition of court costs from transplantation to localization can be seen as follows: non-contentious procedures become shrink, court costs aids become more infrequent, however, the scope of the court costs imposition based on the object of procedure becomes highly expanded. As for the legal practice, such regulations of court costs imposition are never difficult to be executed, they are always executed excessively: an important aspect of the liquidation of judicial corruption in 1998 was that the courts excessively charging court costs not based upon relative regulations, the courts all over the country returned about 8,270,000 Yuan court costs `that were overcharged<sup>2</sup>, but the true number of the overcharged court costs is unknown just like an iceberg that will never float out.

### **III. The Imposition of Court Costs and the Judgment of the Policy.**

The imposition of court costs is an issue of the judgment of policy that has no relation to the theory of “ object of procedure”. There is no theory, except the judgment of policy, that can support or neglect the reasonability of the regulation of court costs imposition, therefore, we should not base on certain theory but on the judgment of policy in valuing “ the *The 1989 Regulations*” and seeking the methods to improve it.

The first aspect of the judgment of policy: the reasonable share between the imposition of court costs and the cost of action.

The past ten years practice of “ ’89 Provisions of Court costs” has proved that permitting court to supply the shortage of the budget by charging inquisition cost impertinently shift the cost that government should undertake to the parties of action. That not only charges the parties with excessive court costs but hurt the judicial justice because the courts have their own interests isolating from the public interests and the judicial power of the courts was abused to pursue commercial interests.

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2. Xiao Yang: “ To Clear Away the Corruption of Judicial Officials and Maintain Judicial Justice”, People’s Court Daily, January 30,1999.

Not all the judicial sentences can produce justice, but every judicial sentence will consume social resources. Even though every regime determined to realize social justice at any cost, the ability for the regime to realize the aim is confined by the social resources, the number of the court and the judge is limited, the financial budget to maintain and increase the number of the judge and the court is also limited.

“The 1989 Regulations” unintentionally influences the distribution between “the cost of inquisition” and the cost of action. First, the inquisition cost government should undertake is impertinently shifted to the parties, especially the parties of high dispute sum; second, inquisition cost is shifted from “non-property lawsuit” to “property lawsuit” of high dispute sum, in other words, the parties of “property lawsuit” of high dispute sum are providing subsidiary to the parties of “non-property lawsuit”, the former are usually the enterprises and institutions, however, the later are mainly individuals.

Even though the party that acquires more benefits should be charged with relatively more inquisition cost, maybe it is not reasonable if the court costs are charged on the basis of “dispute sum”: first, “dispute sum” is only a lawsuit plea, the interests that the party of the lawsuit gains may not be equivalent to the “dispute sum”. Second, the lawsuits of high “dispute sum” unnecessarily consume more judicial resources, the attention from the judges should not be determined by the amount of the “dispute sum”. Third, the lawsuits of relatively high “dispute sum” are usually related to enterprises, the expenses of lawsuits are listed as the cost of the enterprise, the more expenses of a lawsuit the enterprise has to pay, the less tax it have to pay; the more inquisition cost was shifted to enterprises, the less competition ability they will have. Fourth, inquisition cost was charged on the party losing the lawsuit, but the winner of a lawsuit that has acquired benefit from the lawsuit doesn't share the inquisition cost.

We can take the following measures to improve such situation: a little amount of court costs should be charged symbolically beforehand in lawsuit, counterclaim and appeal; when the court has decided the indemnity, we can adjust the court costs that should be paid by the lost party; if the prevailing party get some economic interests from the final judge (above 500,000 Yuan, for example), some taxation of a fixed proportion shall be imposed on it.

The second aspect of the judgment of policy: court costs imposition and the legal aid to the needy party.

Providing legal aid to the needy party is the intrinsic meaning of social justice. Although nation is not responsible to provide free lawsuit to all the needy parties, lawsuit, in special occasion, becomes the only way to settle down their dispute for the parties or choice after using up all the non-litigation measures, refusing to provide judgment service to needy parties would break the principle of fairly protection. In this case, only if the parties could prove that they are hopeful to win the litigation but they can't afford the court costs, the court, I think, would not be able to provide judicial service just because

they don't pay the court costs. Providing legal aid to the needy party is one of the intrinsic meanings of judicial function, of course, court should have the right to select feasible methods of the judicial aid of court costs, for example, exemption, suspended payment, installment and guaranty from the third party and so on. It is worth meditating and needs improving that "Civil Procedure Law" and "The 1989 Regulations" are short of feasible rules on court costs aid and procedures the parties to appeal the problem of court costs aid.

In the United States, court costs aid even becomes a problem connected with constitution, a poor party charged the State of Connecticut of breaching the constitution, claiming that the State Court charged him 50 dollars, he can not bring a divorce case to court because he can not afford such money. As a result, the state government deprived him of the right to get fair legal protection. Harlan, Federal Judge of Supreme Court of the United States, pointed that refusing to hold court trial because the party can't afford the court costs breaches the proper procedure when lawsuit becomes the only legal path to settle down the disputes. " Courts monopolize the path to relieve the marriage relation, so the parties of divorce have to resort to the courts, that the courts refuse to relieve their marriage relation because the parties can't afford the court costs is forbidden by the proper procedure set by the Constitution."<sup>1</sup>. In another case that the plaintiff charged the state government against the Constitution, Supreme Court of the United States believed that it constitutes the breach of proper procedure if the plaintiff lose the chance to get the evidence just because the plaintiff can't afford money through authenticating the relation between the parents and the child which is the main evidence for the plaintiff against the state government.<sup>48</sup>

The second aspect of the judgment of policy: court costs inquisition and the effective use of judicial resource.

Abuse of lawsuit makes others bear the burden of lawsuit and, on the other hand, consumes judicial resource in vain. The regulation that charge ¥30-50 court costs on every "non-property case" and additional court costs on the basis of " sum of dispute" respectively lead to two extremities, indulging abuse of lawsuit and limiting legitimate lawsuit. On the one hand, the low court costs of " non-property lawsuit" can not make sure the plaintiffs to sue deliberately, the courts have to trial many needlessly and spiteful lawsuits. On the other hand, those who hope to be compensated through lawsuits give up the action just because the high court costs or low legal compensation ( the highest compensation for damages in the medical incidents, in Beijing and Shanghai, is respectively ¥6000 and ¥4000<sup>1</sup>), at the same time, the judges lose the opportunity to express their concern about the society through the trials.

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1. Boddie v. Connecticut, 401 U.S. 371 (1971).

48 Little v. Streater, 452 U.S. 1 (1981)

1. Beijing Municipal Government: " Detailed Rules of Beijing Regulation in Dealing with Medical Accident"(1990), Article 26; Shanghai Municipal Government: " Detailed Rules of Shanghai Regulation in Dealing with Medical Accident"(1989), Article 30.

Court costs is an obstacle that can be easily overcome, they can't prevent the abuse of lawsuit. Maybe the limitation measures after the lawsuit are more effective than such prevention, for example, stipulating the malicious accusation as the legal cause of payment of damage, sentencing against the party of malicious accusation to bear the counsel fee and other damages; charging the court costs on the plaintiffs that won the lawsuit----if the defendant have acknowledged the debt and put forward the reconciliation agreement mainly consistent with the final sentence, the plaintiff still prosecute an unnecessary action.

Under the existing system, the practical power of the courts is relatively limited. Exaggerating the effect of the courts and expecting the courts to deal with those affairs beyond their abilities can only produce the ineffectual lawsuit and waste judicial resources. When accusing "the local protectionism" of courts and inefficiency of the execution of the judicial sentence, maybe we should consider the following things: if the courts have the necessary independence and authority under the existing legal system? which difficulties cannot be overcome by the courts themselves? In the transformation period, many disputes, such as bankruptcy, the debtor's right of the bank, merger of enterprises, are connected with not only the parties of a lawsuit but the whole system. American professor Fuller once pointed out that the courts cannot judge the lawsuits concerned with the benefits of "many parts". " We may call this a spider web, if one string is touched, the tensile force produced by that touch will expand to the whole web through a complicated transmittal model; if we touch the same string again, then another kind of tensile force different from the former will be produced."<sup>49</sup> Having such disputes that should be settled through administrative adjudication, conciliation and consultation between the parties handled by the courts will inevitably increase the costs of lawsuit and " the cost of trial". The non-litigation paths to settle down the disputes are more needed in China than any time in history at the beginning of the new century, we should encourage the parties to settle down their disputes through all kinds of intermediation, and we need the arbitration that is more diversified, feasible, economic and nongovernmental than that of trial (the arbitration presided by the government machinery are useless).

Finally, if we can modify some procedural regulations and intensify the power of the courts, the unnecessary inquisition cost and cost of trial can be saved greatly, for example: not having to sue, the mortgagee can apply

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49 Lon L. Fuller, *The Forms and limits of Adjudication*, 92 HARV.L.Rev. 353, 1978. Professor Fuller try to employ the following case to clarify the embarrassment that the court face when judging the multi-extremity problems. One women once made a will about the lots of canvases she collected: New York City Museum and National Art Gallery shall halve her canvas collections, but she didn't specify the ownership of every canvas, the problem out of that is that a canvas can be "halved", however, halving all the canvases was related to the ownership of every canvas, deciding the ownership of every canvas was related to the deuce of all the canvases. In this case, professor Fuller held the following position: any judge who was responsible for this case can only resort to mediation, or the conventional method in dealing with heritage disputes that the elder brother is responsible to halve the heritage and the younger brother has the priority to select.

forcible execution of the hostage; not having to submit to the auction institution, the courts may take forcible execution measures such as forcible auction; the courts can decide the share of the court costs and the counsel fee based on the principle of encouraging compromise, preventing malicious lawsuit and avoiding unnecessary lawsuit.