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The justification of the loser-pays principle in civil litigation

Custo de Litigar: Sucumbência, Acesso à Justiça e Equilíbrio Processual

Anastasia DOUKA[1]

ABSTRACT: In civil procedure, there are two main cost allocation rules: the English Rule and the American Rule. The English Rule, also known as the loser-pays principle, stipulates that the losing party must pay all legal expenses. The American Rule states that each party must pay their own attorney fees, regardless of the outcome of the proceedings. This paper critically reviews the primary theories supporting the loser-pays principle in civil litigation, including the theories of strict liability, compensation, procedural risk and policy, and the theory of the initiation of unnecessary costs. According to the teleological approach, which focuses on how litigation costs restrict the right to access to justice, the theory of initiation of unnecessary costs provides the most appropriate foundation for the loser-pays principle. This theory stems from the principle of economy of proceedings, which specifies effective legal protection by identifying the losing party as the party that caused unnecessary litigation costs, which are then logically imposed on that party.

KEYWORDS: litigation costs; loser-pays principle; justification; theory of initiation of unnecessary costs; right to access to justice; economy of proceedings

RESUMO: No processo civil, existem duas regras principais de repartição de custos: a regra inglesa e a regra americana. A regra inglesa, também conhecida como princípio segundo o qual a parte vencida suporta os encargos e custas judiciais, determina que a parte vencida deve pagar todas as despesas do processo. A regra americana estabelece que cada parte deve suportar os próprios encargos com honorários e custas judiciais, independentemente do resultado do processo.

Este artigo analisa criticamente as principais teorias que fundamentam o princípio de que a parte vencida deve suportar os encargos e custas judiciais inerentes ao litígio civil, incluindo

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as teorias da responsabilidade objetiva, da compensação, do risco processual e da política processual, bem como a teoria da iniciação de custos desnecessários. De acordo com a abordagem teleológica — que se centra na forma como os custos do litígio restringem o direito de acesso à justiça —, a teoria da iniciação de custos desnecessários constitui a base mais adequada para o princípio de que a parte vencida suporta os custos e encargos do processo. Esta teoria decorre do princípio da economia processual, que visa assegurar uma proteção jurídica eficaz, identificando a parte vencida como aquela que gerou custos desnecessários do litígio, os quais lhe são logicamente imputados.

PALAVRAS-CHAVE: encargos e custas processuais; parte vencida; justificação; teoria da geração de custos desnecessários; direito de acesso à justiça; economia processual

Introduction

In civil litigation, there are two foundational cost allocation rules: the English rule, also known as the "loser-pays" principle or "costs follow the event" rule, under which the losing party must pay all costs, including court costs, attorney fees and costs of evidence and the American rule, under which each party must pay their own attorney fees and certain costs of evidence.

One criterion for distinguishing between the two rules is mainly the shifting of attorney fees.[2] Under the English rule, all legal expenses (including attorney fees) are shifted from the winning party to the losing party ("costs follow the event"), whereas under the American rule there is no such shifting, as each party irrespective of the outcome of the proceedings continues to bear the burden of paying the attorney fees for their legal representation.[3] The application of the American rule does not alter the initial allocation of attorney fees between the parties, as determined by the obligation of each party to pay them in advance. On the other hand, the application of the English rule changes ex post the initial allocation of attorney fees between the parties depending on the outcome of the legal proceeding.

Even the uniform application of the loser-pays principle by the majority of states worldwide[4] did not prevent the disagreement in the academic literature about its nature

[2] ROWE, Thomas D. The Legal Theory of Attorney Fee Shifting: A Critical Overview. *Duke Law Journal*, September 1982, vol. 1982, nº 4, p. 651. ISSN 00127086.
[3] Federal Rules of Civil Procedure 54 (d)(1): "*Unless a federal statute, these rules, or a court order provides otherwise, costs -other than attorney's fees- should be allowed to the prevailing party*".
[4] REIMANN, Mathias: Cost and Fee Allocation in Civil Procedure: A Synthesis. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 9. ISBN 978-94-007-2262-0.

and place in legal theory.[5] This study aims to determine the most appropriate justification for the English rule by examining four key theories that justify the loser-pays principle and analyzing the practical implications of each.

1. The theory of strict liability (*Erfolgshaftungstheorie*)

The theory of strict liability is based on the notion that the winning party should not suffer any damage or loss from the litigation.[6] A victory for the winning party would be incomplete if they were not entitled to the costs of litigation,[7] considering that the courts have the competence to fully adjudicate the right in question.[8] In other words, the loser-pays principle reflects the view that a victory in civil litigation is incomplete when substantial costs are not covered.[9] In this respect, the winning party deserves full "compensation", and recoverable costs include not only court fees and related costs, but also attorney fees and other incurred expenses.[10]

Every right is a net right, and the state should not diminish this right by referring the parties to the courts in the event of a dispute.[11] In this regard, a party should not suffer financial loss because of their choice to access justice and defend their rights. Not reimbursing the winning party for litigation costs in an expensive judicial system

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[5] PFENNIGSTORF, Werner. The European Experience with Attorney Fee Shifting. *Law and Contemporary Problems*, Winter 1984, vol. 47, no. 1, p. 43. ISSN 0023-9186.

[6] **CHVOSTA, PETER.** *Prozesskostenrecht. Wien: Manz Verlag, 2001, p. 13 et seq.* ISBN 978-3-214-07967-3.

[7] KOHLER, Josef. *Der Prozess als Rechtsverhältnis: Prolegomena zu einem System des Zivilprozesses*. Mannheim: J. Bensheimer, 1888, p. 81.

[8] KOHLER, Josef. *Der Prozess als Rechtsverhältnis: Prolegomena zu einem System des Zivilprozesses*. Mannheim: J. Bensheimer, 1888, p. 81, BOKELMANN, Erika. „Rechtswegsperre" durch Prozeßrecht. *Zeitschrift für Rechtspolitik*, 1973, vol. 7, p. 169 with further references to the Italian theory. ISSN 0514-6496.

[9] PFENNIGSTORF, Werner. The European Experience with Attorney Fee Shifting. *Law and Contemporary Problems*, Winter 1984, vol. 47, no. 1, p. 83. ISSN 0023-9186, **DAVIS, W. Kent.** *The International View of Attorney Fees in Civil Suits: Why Is the United States the Odd Man Out in How It Pays Its Lawyers. Arizona Journal of International and Comparative Law*, 1999, vol. 16, p.405. **ISSN** 0743-6963, ROOT, David A. Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the American Rule and English Rule. *Indiana International and Comparative Law Review*, January 2005, vol.15, no. 3, p. 589. ISSN 1061-4982.

[10] PFENNIGSTORF, Werner. The European Experience with Attorney Fee Shifting. Law and Contemporary Problems, Winter 1984, vol. 47, no. 1, p. 44. ISSN 0023-9186, **DAVIS, W. Kent.** *The International View of Attorney Fees in Civil Suits: Why Is the United States the Odd Man Out in How It Pays Its Lawyers. Arizona Journal of International and Comparative Law*, 1999, vol. 16, p. 405. **ISSN** 0743-6963, ROOT, David A. Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the American Rule and English Rule. *Indiana International and Comparative Law Review*, January 2005, vol. 15, no. 3, p. 589. ISSN 1061-4982.

[11] BOKELMANN, Erika. „Rechtswegsperre" durch Prozeßrecht. *Zeitschrift für Rechtspolitik*, 1973, vol. 7, p. 169 with further references to the Italian theory. ISSN 0514-6496. PAWLOWSKI, Hans-Martin. Zur Funktion der Prozeßkosten. *Juristenzeitung*, April 1975, vol. 30, nº 7, p. 198. ISSN 00226882.

would constitute a denial of legal protection.[12] A successful claimant whose rights were infringed upon should be entitled to reimbursement for the costs incurred in protecting their rights. Similarly, the financial position of a successful defendant whose rights have not been infringed should not deteriorate due to the legal action taken against the claimant.[13] The loser-pays principle genuinely restores the winning party's financial position.[14] The majority of continental law countries, including Austria,[15] Switzerland,[16] and France[17] adopt the theory of strict liability. The same justification is found in Brazil,[18] Portugal,[19] Canada[20] and Australia.[21] A variant of the theory of strict

[12] R v. Lord Chancellor Ex parte Child Poverty Action Group [1998] EWHC Admin 151 [37]: "*The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful part*".
[13] FOLKARD, Joshua. Extending Jackson's Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule. *Civil Justice Quarterly*, April 2015, vol. 34, nº 2, p. 175. ISSN 0261-9261.
[14] ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013, no. 27.49. ISBN 9781847039606.
[15] FASCHING, Hans Walter. *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis*. 2nd ed. *Wien: Manz Verlag, 1990, no. 464. ISBN 3214046977, FUCIK, Robert. In: RECHBERGER, Walter. Kommentar zur ZPO. 3rd ed. Wien: Springer, 2006,* § 41 no.1. ISBN 3211838880, *RECHBERGER, Walter, SIMOTTA, Daphne. Grundriss des österreichen Zivilprozessrechts: Erkenntnisverfahren. 8th ed. Wien: Manz Verlag, 2010, no. 435. ISBN 3214157493. See the opposing opinion in BYDLINSKI, Michael. Kostenersatz im Zivilprozess: Grundfragen des Kostenrechts und praktische Anwendung*. Wien: Manz Verlag, 1992, p. 59 and p. 62. ISBN 978-3-214-05927-9, which argues in favor of the theory of the initiation of unnecessary costs.
[16] GULDENER, Max. *Schweizerisches Zivilprozessrecht*. 3rd ed. Zürich: Schulthess,1979, p. 406. ISBN 3725519641.
[17] ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 152. ISBN 3896497391.
[18] DE BARROS, Alexandre Alcino, DE MIRANDA, Sílvia Julio Bueno. Major Shifting: The Brazilian Way. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 89 with further references. ISBN 978-94-007-2262-0.
[19] ANTUNES, Henrique S. Portugal. In: HODGES, Christopher, VOGENAUER, Stefan, TULIBACKA, Magdalena. *The Costs and Funding of Civil Litigation: A Comparative Perspective*. 1st ed. London: Hart Publishing, 2010, p. 469. ISBN 9781849461023.
[20] GLENN, Patrick. The Irrelevance of Costs Rules to Litigation Rates: The Experience of Quebec and Common Law Canada. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 100. ISBN 978-94-007-2262-0.
[21] CAMERON, Camille. The Price of Access to the Civil Courts in Australia – Old Problems, New Solutions: A Commercial Litigation Funding Case Study. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 60. ISBN 978-94-007-2262-0.

liability[22] is the prevailing in Spain[23] theory of objective victory.[24] This theory links the losing party's obligation to pay costs to the mere fact of their defeat.[25] As a result, defeat and the consequent award of costs to the losing party appear to be a natural consequence of assuming the procedural risk of access to justice. In contrast, the theory of strict liability focuses exclusively on the winning party and their recovery of the financial loss incurred for taking the procedural risk of litigation, either as claimant or as defendant, against the losing party.

The theory of strict liability is not an appropriate basis for the loser-pays principle because it focuses on the outcome of the proceedings, which determines the allocation of procedural risks between the parties. Using objective defeat as the sole criterion for equally sharing economic risks between the parties disregards the individual responsibility of each party and answers the question of how to allocate litigation costs.[26]

2. The theory of compensation

2.1 Overview

The theory of compensation is based on the premise that the losing party is responsible for paying the winning party's litigation expenses because they caused

[22] ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 167. ISBN 3896497391.

[23] For more information on other theories that have been supported under Spanish procedural law, see ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 157, fn. 114 with further references to the Spanish bibliography. ISBN 3896497391).

[24] The same view is supported by a part of the theory in Italy, which treats the losing party's obligation to pay costs as a mere objective consequence of the defeat, which results from the discrepancy between the claims made and the operative part of the judgment (ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 154, fn. 97 with further references to the Italian bibliography. ISBN 3896497391).

[25] ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, pp. 157-158
with further references to the Spanish bibliography. ISBN 3896497391.

[26] BREYER, Michael. *Kostenorientierte Steuerung des Zivilprozesses. Das deutsche, englische und amerikanische Prozesskostensystem im Vergleich*. Tübingen: Mohr Siebeck, 2006, p. 106. ISBN 3161489845.

them.[27] It is based on fault and requires an assessment of the losing party's motives for engaging in litigation.[28]

This blame-based approach is rooted in Aristotle's doctrine of the corrective function of justice. According to Aristotle, the corrective dimension of justice is manifested in people's voluntary and involuntary transactional relations[29] and is exercised by the judge. The judge's task is to equate the winning side with the losing side by taking something from the "gain" of the person who committed the unjust act.[30] Thus, the damage unjustly inflicted by the losing party on the winning party -which lies in the winning party's obligation
to appear in court and incur costs- is redressed by an award of costs in the winning party's favor.

The theory of compensation prevailed as the dogmatic basis of the loser-pays principle in German law during the 18th century. According to the procedural law at the time, the obligation to reimburse costs was a procedural penalty imposed on the losing party for causing costs to the opposing party through presumptively frivolous litigation. Ultimately, only those responsible for a futile lawsuit were obliged to reimburse costs. This included those who knew or should have known their legal action or defense was unjustified and brought the legal dispute in vain, causing costs to be incurred by the opposing party. Conversely, those who seriously pursued or defended their rights in good faith should not be burdened with the opposing party's costs simply because they were unsuccessful in the proceedings.[31]

The theory of compensation overlooks the fact that conducting legal proceedings

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[27] ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013, no. 27.51. ISBN 9781847039606.
[28] ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013, no. 27.51. ISBN 9781847039606.
[29] Aristotle's Nicomachean Ethics, Book V, Chapter 10 (1131b).
[30] Aristotle's Nicomachean Ethics, Book V, Chapter 10 (1132a).
[31] EHRIG, Hans-Georg. Kostenerstattung – Erfolgsprämie oder Prozeßtrafe? *Zeitschrift für die Rechtspolitik*, 1971, vol. 11, p. 253. ISSN 0514-6496. Historically, this German doctrine influenced the creation of the Dutch Code of Civil Procedure in 1838 (see HAARDT, W.L. *De veroordeling in de kosten van het burgerlijk geding*. 's-Gravenhage: Martinus Nijhoff, 1945, p. 16 and VRENDENBARG, C.J.S. *Proceskostenveroordeling en toegang tot de rechter in IE-zaken: regelingen over proceskosten getoetst aan het EU-recht*. Deventer: Wolters Kluwer, 2018, p.110, ISBN 9789013148084) as well as Greece's 1834 Civil Procedure. The latter was drafted by the Bavarian jurist G. L. von Maurer and in effect from January 25, 1835, to September 15, 1968. During this time, the loser-pays principle was based on the defeated party's fault for causing the litigation (Article 210 of the Greece's 1834 Civil Procedure). In other words, the losing party was presumed responsible for the damage caused by the proceedings to the opposing party and was required to compensate them [see DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 206 with further references. ISBN 978-960-648-407-0].

cannot inherently be unlawful. It presupposes guilt, which must be proven in each case and cannot be assumed. Furthermore, facts often come to light during the proceedings that would have prevented one of the parties from initiating the litigation had they been known prior to the litigation.[32]

Nowadays, most courts explicitly reject the compensation theory as the doctrinal basis for the loser-pays principle.[33] Instead, this theory primarily supports exceptions to the loser-pays principle.[34] At the European level, one example is Article 12(3) of the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers. For the first time, European law explicitly exempts individual cases in which the consumer's intentional or negligent actions caused the litigation costs from the loser-pays principle. This provision demonstrates that certain exceptions to the loser-pays principle are based on the theory of compensation in the mind of the European legislator. According to the Directive, individual consumers must pay for litigation costs incurred due to their abuse of procedural possibilities, such as prolonging proceedings through unlawful conduct (see recital 8 of the Directive).[35]

2.2 The shift of English jurisprudence from the theory of strict liability to the theory of compensation

In 2005, English jurisprudence[36] moved away from the theory of strict liability and adopted the theory of

[32] HARTOGH, A.F.K. In: *Handeling der Nederlandsche Juristen-Vereeniging*. 's-Gravenhage, 1875, p. 117-118.
[33] Dutch Supreme Court (Hoge Raad) HR 18 februari 2005, ECLI:NL:HR:2005:AR6164, par. 5.3.2, available at rechtspraak.nl, DE TEMMERMAN, Bart. Rechtsvergelijkende variaties op een heikel thema: de verhaalbaarheid van kosten van verdediging. In: EVERS, Freddy, LEFRANC, Pierre. *De verhaalbaarheid van de kosten van verdediging: en wat met de toegang tot de rechter?* Bruges: Die Keure, 2005, p. 28 with reference to the jurisprudence of the Belgian Supreme Court (Hof van Cassatie), ISBN 9059589572, German Federal Court of Justice (Bundesgerichtshof) 06.02.2014 – IX ZB 57/12, no. 14, available at juris.bundesgerichtshof.de, Supreme Court of Greece (Areios Pagos) 819/2011, Greek legal database NOMOS, Supreme Court of Greece (Areios Pagos), 467/2017, Greek legal database NOMOS.
[34] REIMANN, Mathias: Cost and Fee Allocation in Civil Procedure: A Synthesis. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 18. ISBN 978-94-007-2262-0.
[35] DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 392-393. ISBN 978-960-648-407-0.
[36] Arkin v. Borchard Lines Ltd [2005] EWCA Civ 655 [23]: "*The main principle that underlies the rule is that if one party causes another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has caused the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the*

compensation.[37] This shift was strongly questioned in England. It was rightly argued that this justification for the loser-pays-principle distorts the litigation process by making the cost of access to justice unpredictable and unaffordable.[38] The earlier rule of English procedural law allowed the full shifting of success fees, arranged in terms of conditional fees, to the losing party. This strengthened the position of litigants, who could dramatically increase their opponent's liability.[39] This uncontrolled shifting of legal costs between the parties inevitably resulted in an excessively expensive civil justice system.[40]

The concept of restorative justice serves as the institutional basis for the uniform application of the loser-pays principle to all types of litigation [CPR 44.2(2)], with a few exceptions [CPR 44.2(3)]. The universal application of the loser-pays principle changed with the radical amendment of English costs law in 2013. Lord Jackson introduced qualified one-way cost shifting in personal injury compensation disputes, exempting only the losing claimant (not the losing defendant) from paying the opponent's costs.[41] This reform sparked a vigorous debate on the introduction of other exceptions, such as the application of the American rule in individual cases or qualified one-way cost shifting in specific types of litigation, leading to the emergence of a tendency to break the universal application of the loser-pays principle to all types of litigation.[42]

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defendant in respect of the costs he has caused the defendant to incur. Causation is usually a vital factor when considering whether to make an award of costs against a party. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has caused the defendant to incur".

[37] Nevertheless, according to another opinion, both jurisprudential approaches are based on the corrective justice rationale and are logically equivalent (see FOLKARD, Joshua. Extending Jackson's Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule. *Civil Justice Quarterly*, April 2015, vol. 34, nº 2, p. 176. ISSN 0261-9261 with further references).

[38] HIGGINS, Andrew. The Costs of Civil Justice and Who Pays? *Oxford Journal of Legal Studies*, July 2017, vol. 37, nº 3, p. 703. ISSN 01436503.

[39] HIGGINS, Andrew. The Costs of Civil Justice and Who Pays? *Oxford Journal of Legal Studies*, July 2017, vol. 37, nº 3, p. 703. ISSN 01436503.

[40] JACKSON, Rupert. *Fixed Costs – The Time Has Come* [online]. IPA Annual Lecture, 28 January 2016, § 2.2 [17.09.2025]. Available from: https://www.judiciary.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf

[41] ANDREWS, Neil. *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England*. 2nd ed. Cham: Springer, 2018, no. 5.07. ISBN 9783319748320. However, after recent consideration by Parliament, it was determined that for any cases issued on or after 6 April 2023, defendants will be entitled to recover litigation costs from the claimants if the total amount of the costs orders does not exceed the total amount of damages, costs, and interest awarded to the claimant [see Civil Procedure Rules (CPR) 44.14 (1)].

[42] See, for instance FOLKARD, Joshua. Extending Jackson's Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule. *Civil Justice Quarterly*, April 2015, vol. 34, nº 2, p. 172. ISSN 0261-9261. This trend has been criticized. See extensively ZUCKERMAN, Adrian. The Jackson Final Report on Costs —

The introduction of qualified one-way shifting as an exception to the universal application of the loser-pays principle in English procedural law, as well as the subsequent theoretical trend, highlight the inappropriateness of using corrective justice as the basis for the loser-pays principle. Structuring the loser-pays principle on the compensation theory carries the risk of introducing multiple exceptions to the rule that the losing party pays, leading to legal uncertainty.

The loser-pays principle must be separated from the concept of corrective justice. Identifying the defeated party with the wrongdoer is flawed because the defeated party, unlike the wrongdoer, has not committed an unlawful act. They have merely chosen the judicial route to assert their rights.[43] Both the plaintiff and the defendant exercise their right to access justice, as enshrined in Article 6 § 1 of the European Convention on Human Rights (ECHR).The financial burden of exercising that right is a separate issue from the violation of one party's rights by the other because unfair conduct in proceedings is addressed by a different set of rules.[44] There is nothing inherently unlawful about seeking court adjudication that would justify drawing an analogy between an unsuccessful litigant and a wrongdoer.[45]

In this context, distributive justice is the most suitable basis for the loser-pays principle because it eliminates the need to design a legal costs system based on who won or who must pay the winning party's costs in full.[46]

3. The theory of procedural risk (*procesrisico*) and policy (*procesbeleid*)

In the Netherlands, the basis for the English Rule is found in the principles of equity (*billijkheid*) and justice (*rechtvaardigheid*), which stipulate that winners should

Plastering the Cracks to Shore Up a Dysfunctional System. *Civil Justice Quarterly*, 2010, vol. 29, nº 3, p. 276. ISSN 0261-9261.

[43] ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013, no. 27.52. ISBN 9781847039606.

[44] HIGGINS, Andrew. The Costs of Civil Justice and Who Pays? *Oxford Journal of Legal Studies*, July 2017, vol. 37, nº 3, p. 702-703. ISSN 01436503. For example, in English civil procedural law, the set of provisions [CPR Pt 24 and CPR r.3.4(2)] that attempts to prevent bad faith litigation is constituted by case management powers of the court which are designed to ensure that the losing party has not brought a vexatious claim that had no real prospect of success (see FOLKARD, Joshua. Extending Jackson's Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule. *Civil Justice Quarterly*, April 2015, vol. 34, nº 2, p. 177. ISSN 0261-9261)

[45] ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013, no. 27.52. ISBN 9781847039606.

[46] HIGGINS, Andrew. The Costs of Civil Justice and Who Pays? *Oxford Journal of Legal Studies*, July 2017, vol. 37, nº 3, p. 706. ISSN 01436503.

not be required to pay litigation costs.[47] Shifting the costs to the losing party is premised on the idea that society would be dissatisfied if the burden of litigation costs continued to fall on the party that incurred them and not on the losing party. Not shifting the costs to the losing party could not benefit society: potential litigants would continue to suffer injustice instead of seeking it, and the winning party would feel that they had not received sufficient satisfaction.[48]

The principles of equity and justice are further specialized into the concepts of procedural risk and policy. It is argued that the allocation of litigation costs between the parties should consider procedural risk and policy.[49] This is essential to prevent the freedom to involve another party in legal proceedings or to defend oneself in court against another party's claims from being jeopardized by the fear of being ordered to pay substantial litigation costs.[50]

Procedural risk refers to the potential financial burden every party initiating legal proceedings may bear if their claim or defense is rejected. Therefore, the party that ultimately bears that risk, i.e., the party that loses the case, even if this is solely due to the judge's error, bears the costs of the proceedings. However, considerations of procedural policy are also important because an assessment of the parties' conduct may influence the decision on costs.[51]

According to the theory supported in the Netherlands, the allocation of litigation costs should consider procedural risk and policy aspects guided by the principles of equity and justice. However, equity and justice, in the form of procedural risk and policy, constitute an abstract basis for the loser-pays principle because they do not specify the fundamental function of litigation costs. Litigation costs in the form of procedural risk impose a fundamental restriction on the right to access a court [Article

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[47] HARTOGH, A.F.K. In: *Handeling der Nederlandsche Juristen-Vereeniging*. 's-Gravenhage, 1875, p. 75: *"[z]elfs al laat men de quaestiën van onrechtmatige daad of van rechtzekerheid er buiten, zoo vorderen in ieder geval billijkheid en rechtvaardigheid, dat degeen, die wint, niet nog te betalen hebbe."* HAARDT, W.L. *De veroordeling in de kosten van het burgerlijk geding*. 's-Gravenhage: Martinus Nijhoff, 1945, p. 17.

[48] VAN ROSSEM, Willem, CLEVERINGA, *Rudolph Pabus. Mr. W. van Rossem's verklaring van het Nederlands Wetboek van Burgerlijke Rechtsvordering*, Volume I. 4th ed. Zwolle: Tjeenk Willink, 1972, art. 56, no. 2.

[49] VAN ROSSEM, Willem, CLEVERINGA, *Rudolph Pabus. Mr. W. van Rossem's verklaring van het Nederlands Wetboek van Burgerlijke Rechtsvordering*, Volume I. 4th ed. Zwolle: Tjeenk Willink, 1972, art. 56, no. 2.

[50] Kamerstukken II 1980/81, 16593, nr. 3, p. 8.

[51] DE TEMMERMAN, Bart. Rechtsvergelijkende variaties op een heikel thema: de verhaalbaarheid van kosten van verdediging. In: EVERS, Freddy, LEFRANC, Pierre. *De verhaalbaarheid van de kosten van verdediging: en wat met de toegang tot de rechter?* Bruges: Die Keure, 2005, p. 29, ISBN 9059589572.

6(1) of the European Convention on Human Rights].[52] The purpose of this restriction, which reflects the fundamental function of the litigation costs, lies in the avoidance of unnecessary litigation.[53] Unnecessary lawsuits are caused by frivolous and abusive claims asserting non-existent rights, as well as lawsuits filed without first attempting to resolve the dispute with the opposing party outside of court.[54] This function is connected to the economy of expenditure, a component of the basic procedural principle of economy of proceedings. The economy of proceedings is expressed in two ways: as a saving of time and expense, and as a means of achieving the civil justice goals by selecting the most efficient and cost-effective procedural route.[55]

In light of the above remarks, the loser-pays principle, which allocates procedural risks between the parties, should be based on a solid foundation that extends throughout costs law. Specifically, the dogmatic foundation of the loser-pays principle should focus on the purpose of restricting access to the courts through litigation costs, rather than on access to the courts itself. Similarly, the term "procedural policy" refers to the parties' conduct and introduces exceptions to the loser-pays principle[56] rather than supporting it. The principle of equity establishes a basis for exceptions to the loser-pays principle.[57] Most procedural laws exempt cases with a strong social element, such as family law and labor disputes, from

[52] The court starts from the premise that access to the courts is not an absolute right, but rather one that may be subject to limitations implied by law (see ECtHR 19.6.2001, Kreuz/Poland, para. 53, available at HUDOC database, ECtHR 28.10.1998, Aït-Mouhoub/France, para. 52, available at HUDOC database, ECtHR 19.12.1997, Brualla Gómez de la Torre/Spain, para. 33, available at HUDOC database). It can particularly be subject to financial limitations (see ECtHR 10.1.2006, Teltronic-CATV/Poland, para. 47, available at HUDOC database). See extensively DJAJIĆ, Sanja. Unlocking Justice: Access to Court and Litigation Costs Under the European Convention on Human Rights. *The Age of Human Rights Journal* [online]. June 2025, n. 24 [18.9.2025]. ISSN 2340-9592. Available from https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/9282/9691

[53] ECtHR 30.1.2017, Cindrić and Bešlić/Croatia, para. 96, ECtHR 18.7.2013, Klauz/Croatia, para. 84: "*[T]he rationale behind the "loser pays" rule is to avoid unwarranted litigation and unreasonably high litigation costs by dissuading potential plaintiffs from bringing unfounded actions or submitting exaggerated claims without bearing the consequences*", available at HUDOC database.

[54] SCHULTZKY, Hendrik. *Die Kosten der Berufung und Revision im Zivilprozess: de lege lata und de lege ferenda*. Köln [u.a.]: Heymann, 2003, § 3, p. 42, ISBN 3452255468.

[55] DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 35 with further references. ISBN 978-960-648-407-0.

[56] REIMANN, Mathias: Cost and Fee Allocation in Civil Procedure: A Synthesis. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 18. ISBN 978-94-007-2262-0.

[57] DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 277 et seq. ISBN 978-960-648-407-0.

cost shifting.[58] Similarly, article 14 of the European Directive 2004/48/EC on the enforcement of intellectual property rights allows for exceptions to the loser-pays principle based on equity.[59]

The principle of equity reflects the social character of civil proceedings. The primary objective of civil proceedings is to enable individuals to establish and exercise their substantive rights in a fair, effective, and efficient manner.[60] However, as rightly noted, this objective would be futile without provisions in the procedural framework ensuring access to justice for the financially weaker party.[61] A procedural model that meets the requirements of a social rule of law considers civil proceedings important to society. It also takes social inequality into account and ensures that no party is disadvantaged in the proceedings because of their social status.[62] In this regard, civil proceedings aptly fall under the category of social assistance (*Glied sozialer Hilfe*)[63].

4. The theory of initiation of unnecessary costs (*Veranlasserprinzip*)

Under German law the loser-pays principle is based on the theory of initiation of unnecessary costs,[64] according to which the defeated (=unsuccessful) party has

[58] REIMANN, Mathias: Cost and Fee Allocation in Civil Procedure: A Synthesis. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, p. 17. ISBN 978-94-007-2262-0.

[59] "*Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this*".

[60] Kamerstukken II 2006/07, 30 951, nr. 1, p. 8.

[61] WASSERMANN, Rudolf. *Der soziale Zivilprozess: zur Theorie und Praxis des Zivilprozesses im sozialen Rechtsstaat*. Orig.-Ausg. Neuwied, Darmstadt: Luchterhand, 1978, p. 85, ISBN 3472160020.

[62] WASSERMANN, Rudolf. *Der soziale Zivilprozess: zur Theorie und Praxis des Zivilprozesses im sozialen Rechtsstaat*. Orig.-Ausg. Neuwied, Darmstadt: Luchterhand, 1978, p. 85, ISBN 3472160020.

[63] KLEIN, Franz. *Zeit-und Geistesströmungen im Prozesse*.1948, p. 25.

[64] BECKER-EBERHARD, Ekkehard. *Grundlagen der Kostenerstattung bei der Verfolgung zivilrechtlicher Ansprüche: zugleich ein Beitrag zum Verhältnis zwischen materiell-rechtlichem und prozessualem Kostenerstattungsanspruch*. Bielefeld: Gieseking, 1985, § 3, pp. 35-37, ISBN 3769402057, ROSENBERG, Leo, SCHWAB, Karl Heinz, GOTTWALD, Peter. *Zivilprozessrecht*. 18th ed. München: C.H. Beck, 2018, § 84 no. 63, ISBN 3406710859, SCHULZ, Andreas. In: LÜKE, Gerhard. *Münchener Kommentar zur Zivilprozeßordnung: mit Gerichtsverfassungsgesetz und Nebengesetzen §§ 1-354*. 6th ed. München: Beck, 2020, vor § 91 no. 26, ISBN 9783406745218, MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2, BAUMBACH, Adolf, et. al. *Zivilprozessordnung: mit Fam FG, GVG und anderen Nebengesetzen*. 74th ed. München: Beck. Beck'sche Kurz-Kommentare, 2016, Übers. § 91 no. 27, ISBN 3406676006. See the opposing opinion in SMID, Stefan, HARTMANN, Sabine. In: WIECZOREK, Bernhard, SCHÜTZE, Rolf. *Zivilprozessordnung und Nebengesetze: Großkommentar*. 4th ed. Berlin: de Gruyter, 2015, vor § 91 no. 1, ISBN 9783110410860, which advocates in favor of theory of strict liability (Erfolgsprinzip).

caused unnecessary costs and therefore bears the burden of paying them.[65] This is a presumption that the losing party has unnecessarily initiated the litigation proceeding.[66] Similarly, the successful party has incurred unavoidable costs that must be reimbursed.[67] These costs are unavoidable because, given the prohibition of self-redress, the successful party was forced to go to court and apply for judicial protection.[68] Therefore, the cost burden imposed on the defeated party is not a penalty for unreasonable or improper conduct during the proceedings because it does not imply fault.[69]

The theory of initiation of unnecessary costs as an independent justification for the loser-pays principle usually implies a causal connection between the parties' conduct and litigation cost incurrence. This is because, if the defendant loses, the plaintiff's decision to bring the case to court and the defendant's refusal to acknowledge the plaintiff's rights at the pre-trial stage are the reasons for incurrence of legal expenses.[70] However, this broad causality regarding the incurrence of costs is limited by the liability of the party that caused unnecessary litigation costs (*Veranlasserhaftung*).[71]

The theory of initiation of unnecessary costs forms the basis for the prevailing theory of causation in Italy,[72] according to which the costs are imposed on the party

[65]MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2.
[66] SCHULZ, Andreas. In: LÜKE, Gerhard. *Münchener Kommentar zur Zivilprozeßordnung: mit Gerichtsverfassungsgesetz und Nebengesetzen §§ 1-354*. 6th ed. München: Beck, 2020, vor § 91 no. 26, ISBN 9783406745218.
[67] MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2.
[68] MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2.
[69] GOLDSCHMIDT, James. *Der Prozess als Rechtslage: eine Kritik des prozessualen Denkens*. Berlin: Springer, 1925, p. 117, German Federal Court of Justice (Bundesgerichtshof) 06.02.2014 – IX ZB 57/12, no. 14, available at juris.bundesgerichtshof.de.
MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2.
[70] SCHULTZKY, Hendrik. *Die Kosten der Berufung und Revision im Zivilprozess: de lege lata und de lege ferenda*. Köln [u.a.]: Heymann, 2003, § 15, p. 295, ISBN 3452255468.
[71] BECKER-EBERHARD, Ekkehard. *Grundlagen der Kostenerstattung bei der Verfolgung zivilrechtlicher Ansprüche: zugleich ein Beitrag zum Verhältnis zwischen materiell-rechtlichem und prozessualem Kostenerstattungsanspruch*. Bielefeld: Gieseking, 1985, § 3, pp. 25-27, ISBN 3769402057, SCHULTZKY, Hendrik. *Die Kosten der Berufung und Revision im Zivilprozess: de lege lata und de lege ferenda*. Köln [u.a.]: Heymann, 2003, § 15, pp. 295-296, ISBN 3452255468.
[72]ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 167. ISBN 3896497391.

whose wrongful conduct, caused the proceedings.[73] In other words, equity requires that the successful party be placed in the position they would have been in if the other party had not brought or defended a claim.[74]

One aspect of the theory of initiation of unnecessary costs is also the basis of the theory of judicial protection advocated in Sweden, according to which, costs should not be awarded to a party who was obliged to seek judicial protection to defend their rights.[75] A similar position seems to be adopted in Scotland.[76] These approaches are intertwined with the theory of initiation of unnecessary costs because the successful party was forced to take legal action and incur unavoidable legal costs due to the prohibition of self-redress.

The theory of initiation of unnecessary costs is the most appropriate justification for the loser-pays principle, as it refers to the necessity of the litigation costs incurred. In this sense, it is connected to the principle of necessity**.** The principle of necessity determines the type and amount of litigation costs awarded, referring to those deemed necessary for conducting the proceedings.[77] At the European level, this principle is found in recital 29 of the European Regulation 861/2007, which establishes a European Small Claims Procedure,[78] and in recital 38 of Directive 2020/1828 on representative actions for the protection of the collective interests of consumers.[79]

The principle of necessity is linked to the principle of the economy of proceedings

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[73] ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, p. 154, fn. 97 with further references to the Italian bibliography. ISBN 3896497391.

[74] DE LUCA, Alessandra. Italy: A Tale of Successful Resistance? In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 186-187. ISBN 978-94-007-2262-0.

[75] ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001, pp. 159-160
with further references to the Swedish bibliography. ISBN 3896497391.

[76] Howie v. Alexander & Sons (1948) SC 154 (157): "*If any party is put to expense in vindicating his rights he is entitled to recover it from the person by whom it was created, unless there is something in his own conduct that gives him the character of an improper litigant in insisting on things which his title does not warrant*".

[77] DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 209. ISBN 978-960-648-407-0.

[78] "*[….] Having regard to the objectives of simplicity and cost-effectiveness, the court or tribunal should order that an unsuccessful party be obliged to pay only the costs of the proceedings, including for example any costs resulting from the fact that the other party was represented by a lawyer or another legal professional, or any costs arising from the service or translation of documents, which are proportionate to the value of the claim or which were necessarily incurred.*"

[79] "*[….] However, the court or administrative authority should not order the unsuccessful party to pay the costs to the extent that those costs were incurred unnecessarily. Individual consumers concerned by a representative action should not pay the costs of the proceedings […].*"

which is a key feature of the entire litigation costs law. In the same vein, the theory of initiation of unnecessary costs promotes the economy of proceedings by identifying the defeated party with the party that caused unnecessary costs. Furthermore, it takes into account the regulatory function of litigation costs: to prevent unnecessary litigation.[80] In light of this teleological approach, ordering the losing party to pay the costs does not appear to be a random choice but expresses the legislator's choice to draw the conclusion from the objective fact of the defeat that the losing party has caused unnecessary litigation, and, therefore, unnecessary costs. Justifying the loser-pays principle on the theory of initiation of unnecessary costs highlights the advantages of the English rule, which discourages parties from bringing or defending unmeritorious actions.[81]

This choice is also supported by the need to simplify the rules for imposing and allocating litigation costs, in order to make the process of determining litigation costs easier.[82] The system of rules governing the award of litigation costs is directly linked to legal certainty. Parties must be able to predict the financial cost of bringing a case to court in advance, (a) who will be liable for litigation costs in the event of a victory or defeat and b) the amount thereof. Simply drawing up provisions for the imposition and allocation of litigation costs can help predict financial risk.[83] Simplification requires clear definitions of rules and exceptions. Exceptions must be interpreted narrowly (*exceptio est strictissimae interpretationis*). However, choosing either the compensation theory or the procedural risk and policy theory as the doctrinal basis for the loser-pays principle, which mainly support the exceptions to the loser-pays principle, leads to

[80] As correctly pointed out (see BREYER, Michael. *Kostenorientierte Steuerung des Zivilprozesses. Das deutsche, englische und amerikanische Prozesskostensystem im Vergleich*. Tübingen: Mohr Siebeck, 2006, p. 106, fn. 379. ISBN 3161489845), the approach of BECKER-EBERHARD, Ekkehard (*Grundlagen der Kostenerstattung bei der Verfolgung zivilrechtlicher Ansprüche: zugleich ein Beitrag zum Verhältnis zwischen materiell-rechtlichem und prozessualem Kostenerstattungsanspruch*. Bielefeld: Gieseking, 1985, § 3, p. 37, ISBN 3769402057), which established the principle of initiation of unnecessary costs in the German legal system, did not take into account this supplementary function of litigation costs. („…*Aufgabe des prozessualen Kostenrechts besteht allein darin, die unvermeidlichen Kosten auf die Beteiligten zu verteilen*...").

[81] DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021, p. 209. ISBN 978-960-648-407-0.

[82] SMID, Stefan, HARTMANN, Sabine. In: WIECZOREK, Bernhard, SCHÜTZE, Rolf. *Zivilprozessordnung und Nebengesetze: Großkommentar*. 4th ed. Berlin: de Gruyter, 2015, vor § 91 no. 1, ISBN 9783110410860, MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung.* 23rd ed. Tübingen: Mohr Siebeck, 2016, vor § 91 no. 6. ISBN 978-3-16-152897-2, BAUMBACH, Adolf, et. al. *Zivilprozessordnung: mit Fam FG, GVG und anderen Nebengesetzen*. 74th ed. München: Beck. Beck'sche Kurz-Kommentare, 2016, § 91 no. 3, ISBN 3406676006.

[83] DOUKA, Anastasia. Offsetting litigation costs based on the proportional application of Article 179 of the Greek Civil Procedure Code (in Greek). *Epitheorisi Politikis Dikonomias*, October 2024, nº 5, p. 566. ISSN 1791-3705.

confusion over the definition and interpretation of the exceptions to this principle, which can result in legal uncertainty.

Conclusion

The justification of the loser-pays principle extends beyond mere academic interest. Adopting an inappropriate doctrinal basis can lead to deviations from the loser-pays principle that are not justified by the law and that are unfavorable for the winner. The above analysis reveals a lack of unanimity among jurists regarding the doctrinal basis of the loser-pays principle. The theory of compensation reflects an earlier legal reality of an earlier era and is universally rejected as the justification for the loser-pays principle. Contemporary theories of strict liability and procedural risk and policy are not clearly linked to the procedural principles that govern litigation costs. On the premise that litigation costs restrict the right to access to justice in order to save time and money, the prevailing theory of initiation of unnecessary costs in German law is proposed as the most appropriate justification for the loser-pays principle. This theory effectively distinguishes the rule (loser-pays principle) from its exceptions, fulfilling the requirement to simplify cost allocation rules and offering legal certainty.

REFERENCES

ADELMANN-PENTEK, Carola. *Das Prozesskostenrecht der ZPO im Vergleich mit den entsprechenden Regelungen in Österreich, in der Schweiz, in Frankreich, Italien, Spanien, England, Schweden und in der ehemaligen DDR*. Konstanz: Hartung-Gorre, 2001. ISBN 3896497391.

ANDREWS, Neil. *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England*. 2nd ed. Cham: Springer, 2018. ISBN 9783319748320.

ANTUNES, Henrique S. Portugal. In: HODGES, Christopher, VOGENAUER, Stefan, TULIBACKA, Magdalena. *The Costs and Funding of Civil Litigation: A Comparative Perspective*. 1st ed. London: Hart Publishing, 2010, p. 467-482. ISBN 9781849461023.

BAUMBACH, Adolf, et. al. *Zivilprozessordnung: mit Fam FG, GVG und anderen Nebengesetzen*. 74th ed. München: Beck. Beck'sche Kurz-Kommentare, 2016. ISBN 3406676006.

BECKER-EBERHARD, Ekkehard. *Grundlagen der Kostenerstattung bei der Verfolgung zivilrechtlicher Ansprüche: zugleich ein Beitrag zum Verhältnis zwischen materiell-rechtlichem und prozessualem Kostenerstattungsanspruch*. Bielefeld: Gieseking, 1985. ISBN 3769402057.

BOKELMANN, Erika. „Rechtswegsperre" durch Prozeßrecht. *Zeitschrift für Rechtspolitik*, 1973, vol. 7, pp.164-171. ISSN 0514-6496.

BREYER, Michael. *Kostenorientierte Steuerung des Zivilprozesses. Das deutsche, englische und amerikanische Prozesskostensystem im Vergleich*. Tübingen: Mohr Siebeck, 2006. ISBN 3161489845.

BYDLINSKI, Michael. *Kostenersatz im Zivilprozess: Grundfragen des Kostenrechts und praktische Anwendung*. Wien: Manz Verlag, 1992. ISBN 978-3-214-05927-9.

CAMERON, Camille. The Price of Access to the Civil Courts in Australia – Old Problems, New Solutions: A Commercial Litigation Funding Case Study. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 59-68. ISBN 978-94-007-2262-0.

CHVOSTA, PETER. *Prozesskostenrecht.* Wien: Manz Verlag, 2001. ISBN 978-3-214-07967-3.

DAVIS, W. Kent. The International View of Attorney Fees in Civil Suits: Why Is the United States the

Odd Man Out in How It Pays Its Lawyers. *Arizona Journal of International and Comparative Law*, 1999, vol. 16, pp. 361-436. ISSN 0743-6963.
DE BARROS, Alexandre Alcino, DE MIRANDA, Sílvia Julio Bueno. Major Shifting: The Brazilian Way. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 89-98. ISBN 978-94-007-2262-0.
DE LUCA, Alessandra. Italy: A Tale of Successful Resistance? In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 185-194. ISBN 978-94-007-2262-0.
DE TEMMERMAN, Bart. Rechtsvergelijkende variaties op een heikel thema: de verhaalbaarheid van kosten van verdediging. In: EVERS, Freddy, LEFRANC, Pierre. *De verhaalbaarheid van de kosten van verdediging: en wat met de toegang tot de rechter?* Bruges: Die Keure, 2005, pp. 21-52, ISBN 9059589572.
DJAJIĆ, Sanja. Unlocking Justice: Access to Court and Litigation Costs Under the European Convention on Human Rights. *The Age of Human Rights Journal* [online]. June 2025, n. 24 [18.9.2025]. ISSN 2340-9592. Available from https://revistaselectronicas.ujaen.es/index.php/TAHRJ/article/view/9282/9691
DOUKA, Anastasia. *Economic parameters of the civil trial in Greek and international civil procedural order* (in Greek). Athens – Thessaloniki: Sakkoulas, 2021. ISBN 978-960-648-407-0.
DOUKA, Anastasia. Offsetting litigation costs based on the proportional application of Article 179 of the Greek Civil Procedure Code (in Greek). *Epitheorisi Politikis Dikonomias*, October 2024, nº 5, pp. 561-571. ISSN 1791-3705.
EHRIG, Hans-Georg. Kostenerstattung – Erfolgsprämie oder Prozeßtrafe? *Zeitschrift für die Rechtspolitik*, 1971, vol. 11, pp. 252-253. ISSN 0514-6496.
FASCHING, Hans Walter. *Lehrbuch des österreichischen Zivilprozessrechts: Lehr- und Handbuch für Studium und Praxis*. 2nd ed. Wien: Manz Verlag, 1990. ISBN 3214046977.
FOLKARD, Joshua. Extending Jackson's Patchwork Quilt: A Disintegrated Approach to the Costs-Shifting Rule. *Civil Justice Quarterly*, April 2015, vol. 34, nº 2, pp. 172-190. ISSN 0261-9261.
FUCIK, Robert. In: RECHBERGER, Walter. *Kommentar zur ZPO*. 3rd ed. Wien: Springer, 2006, § 41. ISBN 3211838880.
GLENN, Patrick. The Irrelevance of Costs Rules to Litigation Rates: The Experience of Quebec and Common Law Canada. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 99-107. ISBN 978-94-007-2262-0.
GOLDSCHMIDT, James. *Der Prozess als Rechtslage: eine Kritik des prozessualen Denkens*. Berlin: Springer, 1925.
GULDENER, Max. *Schweizerisches Zivilprozessrecht*. 3rd ed. Zürich: Schulthess, 1979. ISBN 3725519641.
HAARDT, W.L. *De veroordeling in de kosten van het burgerlijk geding*. 's-Gravenhage: Martinus Nijhoff, 1945.
HARTOGH, A.F.K. In: *Handeling der Nederlandsche Juristen-Vereeniging*. 's-Gravenhage, 1875.
HIGGINS, Andrew. The Costs of Civil Justice and Who Pays? *Oxford Journal of Legal Studies*, July 2017, vol. 37, nº 3, pp. 687-713. ISSN 01436503.
JACKSON, Rupert. *Fixed Costs – The Time Has Come* [online]. IPA Annual Lecture, 28 January 2016 [17.09.2025]. Available from: https://www.judiciary.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf
KLEIN, Franz. *Zeit-und Geistesströmungen im Prozesse*.1948.
KOHLER, Josef. *Der Prozess als Rechtsverhältnis: Prolegomena zu einem System des Zivilprozesses*. Mannheim: J. Bensheimer, 1888.
MUTHORST, Olaf. In: STEIN, Friedrich, JONAS, Martin. *Kommentar zur Zivilprozessordnung*. 23rd ed. Tübingen: Mohr Siebeck, 2016. ISBN 978-3-16-152897-2.
PAWLOWSKI, Hans-Martin. Zur Funktion der Prozeßkosten. *Juristenzeitung*, April 1975, vol. 30, nº 7, pp. 197-202. ISSN 00226882.
PFENNIGSTORF, Werner. The European Experience with Attorney Fee Shifting. *Law and Contemporary Problems*, Winter 1984, vol. 47, no. 1, pp. 37-124. ISSN 0023-9186.
RECHBERGER, Walter, SIMOTTA, Daphne. *Grundriss des österreichen Zivilprozessrechts: Erkenntnisverfahren*. 8th ed. Wien: Manz Verlag, 2010. ISBN 3214157493.
REIMANN, Mathias: Cost and Fee Allocation in Civil Procedure: A Synthesis. In: REIMANN, Mathias. *Cost and Fee Allocation in Civil Procedure: A Comparative Study*. Dordrecht, New York: Springer, 2012, pp. 3-56. ISBN 978-94-007-2262-0.
ROOT, David A. Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the

American Rule and English Rule. *Indiana International and Comparative Law Review*, January 2005, vol.15, no. 3, pp. 583-617. ISSN 1061-4982.
ROSENBERG, Leo, SCHWAB, Karl Heinz, GOTTWALD, Peter. *Zivilprozessrecht*. 18th ed. München: C.H. Beck, 2018. ISBN 3406710859.
ROWE, Thomas D. The Legal Theory of Attorney Fee Shifting: A Critical Overview. *Duke Law Journal*, September 1982, vol. 1982, nº 4, pp. 651-680. ISSN 00127086.
SCHULTZKY, Hendrik. *Die Kosten der Berufung und Revision im Zivilprozess: de lege lata und de lege ferenda*. Köln [u.a.]: Heymann, 2003. ISBN 3452255468.
SCHULZ, Andreas. In: LÜKE, Gerhard. *Münchener Kommentar zur Zivilprozeßordnung: mit Gerichtsverfassungsgesetz und Nebengesetzen §§ 1-354*. 6th ed. München: Beck, 2020. ISBN 9783406745218.
SMID, Stefan, HARTMANN, Sabine. In: WIECZOREK, Bernhard, SCHÜTZE, Rolf. *Zivilprozessordnung und Nebengesetze: Großkommentar*. 4th ed. Berlin: de Gruyter, 2015. ISBN 9783110410860.
VAN ROSSEM, Willem, CLEVERINGA, *Rudolph Pabus. Mr. W. van Rossem's verklaring van het Nederlands Wetboek van Burgerlijke Rechtsvordering*, Volume I. 4th ed. Zwolle: Tjeenk Willink, 1972.
VRENDENBARG, C.J.S. *Proceskostenveroordeling en toegang tot de rechter in IE-zaken: regelingen over proceskosten getoetst aan het EU-recht*. Deventer: Wolters Kluwer, 2018. ISBN 9789013148084.
WASSERMANN, Rudolf. *Der soziale Zivilprozess: zur Theorie und Praxis des Zivilprozesses im sozialen Rechtsstaat*. Orig.-Ausg. Neuwied, Darmstadt: Luchterhand, 1978. ISBN 3472160020.
ZUCKERMAN, Adrian. *Zuckerman on Civil Procedure: Principles of Practice*. 3rd ed. London: Sweet & Maxwell, 2013. ISBN 9781847039606.
ZUCKERMAN, Adrian. The Jackson Final Report on Costs — Plastering the Cracks to Shore Up a Dysfunctional System. *Civil Justice Quarterly*, 2010, vol. 29, nº 3, pp. 263-283. ISSN 0261-9261.

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