

Study on Compulsory Counterclaim from the Perspective of China

Guo Jiazhen

Law school of Beijing Normal University, Beijing 100875

Correspondence: GUO Jiazhen, Law School of Beijing Normal University, No. 19, XinJieKouWai St., HaiDian District, Beijing 100875, P. R. China. Tel: 86-187-3788-3815. E-mail: 605638892@qq.com

Abstract

Although there is no explicit provision for compulsory counterclaim in Chinese law at present, the clause of "Claims in the Latter Action essentially Deny the Judgement in the Former Action" in Article 247 of the Interpretation of Civil Procedure Law has caused the de facto compulsory counterclaim. The reason why this clause can cause compulsory counterclaim is mainly due to the expansion of the res judicata to the reasons for judgment. In order to prevent the infringement of the parties' rights caused by the excessive application scope of compulsory counterclaim, it is particularly important to identify the specific types of compulsory counterclaim that the defendant should bring. At present, compulsory counterclaim may face the problems of jurisdiction, trial grade and procedural protection of the parties, so it is necessary to point out the corresponding solutions for these problems to protect the legitimate rights and interests of the parties.

Keywords

Compulsory counterclaim; Contradictory judgement; Reasons for judgement; Procedural safeguards.

1. Introduction

Although there is no explicit provision for compulsory counterclaim in Chinese law, the clause of article 247 of the Interpretation of Civil Procedure Law that "Claims in the Latter Action essentially Deny the Judgement in the Former Action" (hereinafter referred to as the elements of Referee Results) seems to imply that some actions must be made in the form of a counterclaim in the former action, otherwise the defendant may face the consequence that not being able to put forward an action anymore after the judgment of the former action took effect. Thus, the de facto compulsory counterclaim was established within a certain range. We can see from the following cases:

Example 1: In the former action, the plaintiff A claimed that the parties had agreed to take the second share transfer payment payable by Company B as the subject matter under the Loan Agreement, because Company B failed to pay the sum as stipulated in the Loan Agreement, A requested that Company B should be ordered to pay the sum to him, finally the court decided to support the plaintiff's claim. After the judgment took effect, Company B put forward an action to request that A should return the excessive part of the share transfer to him. B believed that there was a major misunderstanding when signing the transfer contract to determine the transfer price. The Supreme Court held that Company B could have raised its objection to the payment of the sum in the form of defense or a counterclaim in the former action, but after the conclusion of the first instance of former action, Company B didn't raise an objection through appeal, but chose to put forward a separate action, resulting in the judgement of the former action has took effect when the defendant sued. Now, the action brought by Company B is based on the same fact with the former action, and the claim is also

for offsetting the request of A in the former action, so the claim of company B is a repetitive suit which should be rejected.¹

Example 2: In a contract dispute, A requested B to fulfill the joint and several compensation loan liability in accordance with the Letter of Entrustment signed by both parties. After the judgment took effect, B put forward an action for the revocation of the Letter of Entrustment. The latter court held that B could have challenged the joint and several liability of A in the form of defense or a counterclaim in the former action, but in the whole process of action, B didn't sign the instrument of action without justified reasons and didn't attend the proceeding in court. Now, the action brought by B is based on the same facts with the former action, and the claim is also for offsetting the request of A in the former action, so B's action meets the elements of repetitive suits and should be rejected.²

In the two cases mentioned above, the subject matter of claims in the latter action was different from the former action, and the latter action only denied the judgment reasons in the former action. However, the latter court rejected the defendant's claim on the basis of 'Claims in the Latter Action essentially Deny the judgement in the Former Action'. At the same time, the court clearly pointed out that if the defendant wants to make the request, he should take the form of a counterclaim in the former action. This means that if the defendant insists on the request, he must make it in the form of a counterclaim in the former action. As a result, article 247 of the Interpretation of Civil Procedure Law implies the provisions of compulsory counterclaim.

But what needs to be explained is the reasons why this clause can produce compulsory counterclaim? What are the specific situations of compulsory counterclaim? Under the current legal provisions, will compulsory counterclaim encounter the problems of jurisdiction and trial grade if the defendant is required to put forward a compulsory counterclaim? Finally, how can we achieve a one-time dispute resolution while safeguarding the legitimate rights and interests of the parties? This paper intends to discuss these issues in order to clarify the compulsory counterclaim contained in article 247 of the Interpretation of Civil Procedure Law and further explore the problems it may still encounter, and provide preliminary solutions. After the introduction, the paper will first explore the reasons why the reverse path of article 247 of the Interpretation of Civil Procedure Law can produce compulsory counterclaim from the point of law. On this basis, type the specific situations of compulsory counterclaim. Finally, the paper will summarize the problems that compulsory counterclaim may face in our country and put forward corresponding solutions based on the relevant comparative law information to protect the legitimate rights and interests of the parties.

2. The reasons for compulsory counterclaim caused by the element of "referee's result"

The inescapable question is, why does article 247 of the Interpretation of Civil Procedure Law can produce compulsory counterclaim? Only by responding to this question accordingly can we lay a theoretical foundation for the discussion below. This paper holds that it is closely related to the provision of "Claims in the Latter Action essentially Deny the Judgement in the Former Action".

Analysis of the element of "referee's result"

The Interpretation of Civil Procedure Law published in 2015 expressly provides for the identification Standards of repetitive suits for the first time. In addition to the positive way of comparing whether the relevant elements of the two claims are the same, the standards also put forward the reverse path of "Claims in the Latter Action essentially Deny the Judgement in the Former Action". It is precisely because of the provision of the element that article 247 of the Interpretation of Civil Procedure Law implies compulsory counterclaim, and the main reasons for determining this phenomenon are the connotation and applicable path of the element.

¹ See Supreme People's Court (2015) Minshen No. 1551.

² See Hunan Provincial High People's Court (2016) Xiangminzhong No.162.

The connotation of "Claims in the Latter Action essentially Deny the Judgement in the Former Action" means that when the parties in two cases are the same as the subject matter of claims³, the claim of latter action can't negate the judgment in the former action, otherwise it is a repetitive suit. The applicable path of this clause is in addition to the type that the claims in the latter action directly deny the judgement in the former action, the claims in the latter action deny the judgement in the former action through denying the core judgement reasons in the former action is also regulated by this element. The reason is that the core judgment reasons are often the direct basis of the main text of the judgment, so the action which conflicts with it is generally regarded as contradictory Judgments .⁴ It means that the clause extends the objective scope of the *res judicata* from the main text of the judgment to the core judgment reasons. Thus, after the judgement in the former action took effect, the defendant's claim will be blocked by this effect if he wants to bring the claim that may negate the core judgment reasons. So If the defendant insists on this request, he must be converted it into a counterclaim in advance in the former action, otherwise the defendant may face the consequence that not being able to put forward a separate action after the plaintiff got victory in the former action.

(2) Why can the defendant's claim only be a compulsory counterclaim rather than a separate action? Why does the defendant want to put forward a claim that may negate the core judgement reasons in the former action must be made in the form of a counterclaim not a separate action during the former action is in progress? This is mainly due to the fact that the former action and the defendant's action share the same facts or arguments. If the two actions are allowed to be heard in parallel, different judges may make different judgments about the facts or arguments resulting in contradictory judgments. Therefore, in order to reduce the repetitive trial of the court to maintain the litigation economy and avoid the occurrence of contradictory judgments, the right of the defendant to put forward a separate action should be limited to some extent, this leads to the *de facto* compulsory counterclaim.

Moreover, this approach does not infringe on the defendant's rights of litigation, since the rights of the defendant can also be realized by counterclaim. While this approach only limits the defendant's procedural options to some extent, but it is justified by the guarantee of the public interest and the equal use of court rights by others.⁵ So how should the court deal with the action which should be made in the form of a compulsory counterclaim? According to the concept of compulsory counterclaim used in the federal Rules of Civil procedure of the United States, the defendant has to claim his rights in the plaintiff's action because of the *de facto* relationship between two requests, otherwise he would lose his rights under the principle of *res judicata*.⁶ Japanese scholars, on the other hand, argue that the latter action court can prohibit the separate prosecution and carry out the compulsory consolidated trial on the basis of the principle of a broad prohibition of repetitive suits.⁷

³ Most scholars suggest that when applying this clause, the subject matter of claims should be understood as the same fact rather than the Substantive Claim. The paper also holds the same opinion. See WANG Yaxin and CHEN Xiaotong, The Impact of Pre-appeal Judgment on Post-appeal: An Analysis of Articles 93 and 247 of Interpretation of Civil Procedure Law, *Journal of East China University of Political Science and Law*, No. 6, 2015, P. 14;

⁴ YAN Renqun, "New Progress in the objective scope of *res judicata*", *Peking University Law Journal*, No. 2, 2017, 553. see CHEN Hangping, A New Paradigm of the Theory of the Subject Matter of Claims, *Chinese journal of law*, No. 4, 2016, P. 188.

⁵ See XU Shihuan, *The Expansion of Counterclaim*, Volume 31, No. 5, 2002, P. 151.

⁶ see SHEN Daming, *A Preliminary Study of Comparative Civil Procedure Law*, Beijing: University of Foreign Economic and Trade Press, 231 (2015).

⁷ See TAKAHASI Hiroshi, *Civil Procedure Law: A Deep Analysis of Institutions and Theories*. Translated by Lin Jianfeng, Law Press, 2003, P. 105.

For our country, neither of these approaches is suitable for direct application. The reason is that the former is difficult to implement in the current legal environment of our country, while the latter is unable to avoid the occurrence of contradictory judgments in the former action proceeding. The author suggests that the former court can first clarify the counterclaim of the defendant, if the court has fulfilled its obligation to clarify, the defendant still choose to put forward a separate action, the latter court can directly reject it. However, if the former court does not fulfil the obligation, the latter court cannot directly reject the defendant's claim, it should make the former action and the latter action achieve consolidated trial by means of transfer or debate merge. When two actions are not suitable for consolidated trial, the latter court should suspend the hearing waiting for the judgement of the former action to be determined, and then open the latter action hearing.

(3) The role of compulsory counterclaim

a. Avoid the occurrence of contradictory judgments. The matters required compulsory counterclaim are usually closely related to the plaintiff's claim, and if the defendant is allowed to open another procedure to the matter, it is extremely easy to lead to the occurrence of contradictory judgements. Forcing the defendant to make a counterclaim can promote the settlement of multiple disputes in the same procedure, and achieve the purpose of avoiding contradictory judgments by means of consolidated trial.

b. To achieve the purpose of settling disputes in one action, and in line with the principle of litigation economy. The compulsory counterclaim and principle claim are based on the same facts or the same arguments, if the defendant is allowed to put forward a separate action that should be forced to make a counterclaim, it will result in the situation in which different judges repeatedly hear the same facts or the same arguments. This situation will increase the trouble of the other party and the burden of court proceeding. And forcing the defendant to make a counterclaim in principle claim can realize the consolidated trial of two actions, which is conducive to achieve the purpose of settling disputes in one action.

3. The typology of compulsory counterclaim

As can be seen from the above, if the defendant wish to put forward a separate action which may negate the Plaintiff's claim, he must make it in the form of a counterclaim. But is there any possibility to help the defendant identify the counterclaim that should be brought? Combining with the analysis of article 247 of the Interpretation of Civil Procedure Law and the definition of compulsory counterclaim, the paper holds that the main types of compulsory counterclaim that this clause can trigger are as follows:

(1) The former is a negative confirmation action, and the latter is an action of performance when the plaintiff put forward a negative confirmation action in the former action, if the defendant wants to put forward an action of performance, he must make it in the form of a counterclaim in this action. For example, the plaintiff's claim is to confirm that the contract is invalid, but the defendant wants to claim payment from the plaintiff on the basis of effective contract legal relations. In this case, the claim and the subject matter of claims of two actions are not the same, so the latter action does not constitute a repetitive suit in the positive path of article 247 of the Interpretation of Civil Procedure Law. However, the claim for payment contains a confirmation action, and the request for payment is premised on the validity of the legal relationship between the parties. So if the former court decides that the legal relationship is invalid, the request for payment may thus constitute a repetitive suit in the reverse path. Therefore, if the defendant insists on the request, the request must be made in advance in the form of a counterclaim. Otherwise, if the defendant brings a claim for payment after the court decides that the legal relationship is invalid, the claim will be rejected by the

court because of constituting a repetitive suit, and the defendant will permanently lose the right to put forward a suit in respect of this claim.⁸

(2) the former is an action for revocation of contract, and the latter is an action of performance

When the plaintiff puts forward an action for revocation of contract in the former action, if the defendant later wants to put forward an action of performance, the request must also be made in the form of a counterclaim. For example, the plaintiff hold that the contract entered into by the parties had grounds for revocation, and request to revoke the contract from the court. However, the defendant wants to request that the plaintiff should perform its contractual obligations in accordance with the contractual relationship. In this situation, the former is an action for revocation of contract, and the latter is an action of performance. Although the two actions have different subject matters of claims and claims, but due to the both claims involve the determination of the legal relationship of the contract, it may result in repetitive suits in the inverse path. Specifically speaking, if the former court decided to revoke the contract entered into by the parties, the contractual legal relationship would be invalidated, the latter claim will constitute a repetitive suit because of negating the result of former judgement. Therefore, if the defendant insists on the request, in order to prevent the consequence of the right loss, the claim must be made in advance in the former action in the form of a counterclaim.

(3) the former is an action of performance , and the latter is an action for revocation of contract

When the plaintiff puts forward an action of performance in the former action, if the defendant wants to bring an action for revocation of contract, in principle the request must also be made in the form of a counterclaim. If the former Court makes a judgment in support of the plaintiff's claim for payment, it must be based on the validity of the contract legal relationship between the parties. At this time, if the defendant later requests to revoke the contract, the suit may result in a repetitive suit because of negating the core judgment reasons of the former action. Therefore, if the defendant does not wish to bear the consequence of his failure to exercise the rights after the former action took effect, he must convert the request into a counterclaim in advance. Some scholar believes that the exercise of the right of formation in the former action does not necessarily need to be in the form of a counterclaim, and the defense can achieve the desired effect. Therefore, there is no question of compulsory counterclaim. ⁹The author thinks that it was not the case, the contract revocation right belongs to the special right of formation that the right holders need to exercise the right of formation through the court or the arbitration institution¹⁰, the defense can not achieve the purpose of revocation of contract. So if the defendant wants to revoke the contract, he must make it in the form of a counterclaim and form a consolidated trial with the former action. However, if the defendant realizes the cause of revocation after the judgement of former action took effect, he should be allowed to exercise the right of formation.¹¹

(4) The defendant wishes to put forward a separate action in respect of his rights under the defence in the former action.

When the principal claim is in proceeding, the defendant can hold defense in order to defend against the request of the other party. But beyond that, if the defendant also wants to obtain legal confirmation of the right, the request must be made in a counterclaim. For example, the plaintiff sues the defendant

⁸ see XIA Xuan, A Study of Counterclaim in Negative Confirmation Procedure: A Re-examination from the Perspective of Judicial Interpretation and Related Cases, Academics, No. 3, 2016, P. 90.

⁹ see YAN Renqun ,“New Progress in the objective scope of res judicata”, Peking University Law Journal, No 2,2017.554

¹⁰ see LI Hui, Analysis Concerning the Relationship between Action Based on Right of Formation and Action for Change, Legal Forum, Jan.2016.No. 1(Vol. 31, Ser. No. 163), 72

¹¹ see ZHANG Lian and HU Zhenling: On the Exercise of the Right to Revoke a Contract, Law Review , No. 2, 2007, P. 120.

for the return of the house on the basis of ownership, and the defendant argues that he is entitled to the house because of the tenancy right. At this time, if the defendant wants to sue for confirmation that he has tenancy right in respect of the property, the request must be made in the form of a counterclaim in the former action. The reason is that the defendant's right defense is directly related to whether the plaintiff's claim can be established, so the court's determination of the tenancy right will become the core judgment reason of this lawsuit. Because of the regulation of the reverse path of article 247 of the Interpretation of Civil Procedure Law, the objective scope of res judicata is extended from the main text of the judgment to the core judgment reasons. So if the defendant sues for the right after the plaintiff has won the former action, the defendant's claim may be rejected because of denying the core judgment reason of the former action. Therefore, if the defendant insists on his request, the request must be converted into a counterclaim in advance.

Through the above combing, the provision of the reverse path of article 247 of the Interpretation of Civil Procedure Law can produce the following compulsory counterclaims: the former is a negative confirmation action, and the latter is an action of performance; the former is an action for revocation of contract, and the latter is an action of performance; except in special situations, the former is an action of performance, and the latter action is an action for revocation of contract; the defendant wishes to put forward a separate action in respect of his rights under the defense in the former action. In these cases, the claim of defendant must be made in the form of a counterclaim in the former action proceeding, otherwise the defendant face the consequence that not being able to put forward a separate action because of negating the judgement of the former action.

4. The possible problems faced by compulsory counterclaim and ways to deal with them

From the above discussion, because of the provision of article 247 of the Interpretation of Civil Procedure Law, some de facto compulsory counterclaims have been established. Although such a fact already exists, at present our country has not yet matched the measures to guarantee. if fail to propose reasonable solutions to the problems, it will seriously infringe upon the rights of the defendant

(1) jurisdiction

Requiring the defendant to put forward a compulsory counterclaim in the former action proceeding may face the jurisdictional problems, namely that the former court may not have geographical or level jurisdiction to the counterclaim. At present, there are no clear legal provisions on the jurisdiction of counterclaim in our country, and there are many different opinions of scholars. The view was expressed that the court accepting the principal claim must have jurisdiction over the counterclaim.¹² On the other hand, the view was also expressed that the defendant was allowed to put forward a counterclaim as long as the defendant's counterclaim did not fall within the exclusive jurisdiction of other courts.¹³ In order to avoid the embarrassing situation in which the receiving court of the principal claim rejects the counterclaim on the grounds that "there is no jurisdiction over the compulsory counterclaim", resulting in the defendant can neither prosecute nor counterclaim, it is necessary to solve this problem by referring to the relevant practices in comparative law.

First of all, about the territorial jurisdiction, we can draw on the provision of article 33rd of the German Code of Civil Procedure on the implicated jurisdiction that the court of principal claim obtains jurisdiction over the counterclaim on the basis of the relationship between the counterclaim and principal claim, except for the level jurisdiction and exclusive jurisdiction.¹⁴ This point has also

¹² see SONG Chaowu, Editor-in-Chief, Civil Procedure Law, Xiamen University Press, 2007, P. 283; Shao Ming, Civil Procedure Law (Second Edition), Renmin University Press, 2007, P. 66.

¹³ see Qi Shujie, Editor-in-Chief, Civil Procedure Law, Higher Education Press, 245 (2007).

¹⁴ see ZHAO Xiuju, Research on the Procedural Value of Declaratory Action, The Jurist, No 6,2017.114

obtained the recognition of the authoritative recognition of the Interpretation of Civil Procedure Law in our country. ¹⁵ Because of the close connection between the compulsory counterclaim and principal claim, compulsory counterclaim rightly obtains the jurisdiction of principle claim. In fact, the United States federal precedent also recognizes that the compulsory counterclaim does not need to have an independent jurisdictional basis and should be considered to fall within the subsidiary jurisdiction of the Court of former action. It is worth noting, when there is a conflict between exclusive jurisdiction and implicated jurisdiction, is it necessary for implicated jurisdiction to give way to exclusive jurisdiction? This issue relates to the value choice of legislation. Compared to other types of jurisdiction, exclusive jurisdiction is more effective rigidity and strong legal exclusion force. So territorial jurisdiction should give way to exclusive jurisdiction in ordinary circumstances. However, in the case of compulsory counterclaim, because of the logical contradiction between the compulsory counterclaim and principal claim, it is easy to produce contradictory judgments if the two claims are heard by different courts. At this time, more procedural safeguards should be given for compulsory counterclaim. In this regard, the author more agrees with the suggestions put forward by Professor Zhang Jinhong that when some action belongs to the exclusive jurisdiction of other courts in the case of compulsory consolidated trial, the consolidated trial can be achieved by adapting the court of jurisdiction, that is, the court with exclusive jurisdiction can implement the merger jurisdiction. The way can achieve the effect of neither violating the exclusive jurisdiction, but also the merger jurisdiction, and then guarantee the effective realization of the merger of the lawsuit.¹⁶

Secondly, about the rank jurisdiction, when the amount of a compulsory counterclaim exceeds the scope of the admissibility of the Court, and the court does not have the rank jurisdiction over the counterclaim, it can adopt the principle of “choice the high not the low” that the court accepting compulsory counterclaim shall exercise consolidated jurisdiction. When the amount of a compulsory counterclaim is lower than that of the receiving court, the principle of “absorption rule” can be adopted, and the compulsory counterclaim shall be subject to consolidated jurisdiction by the principle claim court. Finally, the compulsory counterclaim requires not only consolidated jurisdiction with the principle claim, but also be heard in combination. According to article 233 paragraph 2nd of the Interpretation of Civil Procedure Law, the court must conduct a joint hearing if the counterclaim and principle claim are based on the same legal relationships or the same facts, or there is a causal relationship between the two claims. The compulsory counterclaim caused by the reverse path of article 247 of the Interpretation of Civil Procedure Law is closely related to the above three standards, so it must be heard in combination with the principle claim.

(2) Trial grade

when the former action is during the procedure of second instance, asking the defendant to make his claim by the form of a compulsory counterclaim may face the following problems: First, there is a suspicion that this practice undermines the trial-level system interests of the parties. Our country implements two-tiered trial system, the counterclaim as an independent lawsuit should also be subject to this restraint. Therefore, if the first instance defendant is required to put forward a compulsory counterclaim in the procedure of second instance, once the judgment is pronounced, it is a definite judgment. The consequence is tantamount to depriving the trial-level system interests of the parties which is clearly unfair to the parties. Secondly, even if the defendant is allowed to make a compulsory counterclaim in the procedure of second instance, the practice may also be dispelled by the current legal provisions of our country. According to article 328 of the Interpretation of Civil Procedure Law, when the original defendant makes a counterclaim in the procedure of second instance, the Court of second instance may mediate the counterclaim on the basis of the litigants 'voluntary participation. If

¹⁵ see Shen Deyong, Interpretation and Opinions of the Supreme People's Court on the Application of the Civil Procedure Law, People's Court Press, 611 (2015).

¹⁶ see ZHANG Jinhong, Legislative Research on Amalgamated Jurisdiction in Civil Procedure, China Legal Science, No 2, 2017.154.

mediation fails, the court should inform the parties of bringing a separate action. But If the parties agree to hear it together by the court of second instance, the court of second instance can hear it together. Therefore, the conduct of counterclaim in the procedure of second instance must be premised on the successful of mediation or agreement to be trail by the court of second instance together. Usually, in order to avoid the complexity of the procedure, the other party are very likely not to agree to the mediation or trial, so the compulsory counterclaim put forward in the procedure of second instance may still move towards a separate action, the purpose of compulsory counterclaim will naturally not be achieved. So how exactly should we deal with the situation in which the defendant must put forward a compulsory counterclaim in the procedure of second instance?

Firstly, for the issue that compulsory counterclaim in the procedure of second instance may harm the trial-level system interests of the parties, it is possible to solve the problems by taking effective measures to urge the defendant to put forward a counterclaim in the procedure of first instance in time and to give the court the corresponding obligation of clarification is an effective way to achieve this goal. At the same time, because the approach gives the parties more procedural safeguards, it can also play a role of legitimizing the consequences of compulsory counterclaim. Specifically, when the principle claim is in proceeding, the judge should clarify to the defendant the circumstances in which he must put forward a compulsory counterclaim and the consequence of not suing it. When the plaintiff puts forward a negative Confirmation suit, an action for revocation of contract or an action of performance, the court should inform the defendant that if he has a corresponding claim for payment or revocation of the contract, must be in the form of a counterclaim in the former action. Otherwise, the defendant may face the consequence of losing his right. If the defendant makes a right defense in the course of the principle claim, and the defense will affect the result of the plaintiff's claim, the court should clarify to the defendant that the right can be made in the form of a counterclaim. If the defendant has not put forward a compulsory counterclaim before the end of the debate in the first instance, it is considered that the defendant has no intention to sue a compulsory counterclaim. If the defendant raises it again in the second instance procedure, it should be rejected by the court. However, if the court of first instance does not to fulfil the obligation of clarification, the defendant can put forward a compulsory counterclaim in the second instance.

Secondly, with regard to the conflict between the compulsory counterclaim in the procedure of second instance and the legal provisions of our country, the compulsory counterclaim can be dealt with as an exception. Specifically, if the parties make a general counterclaim in the procedure of second instance, the procedural operation must comply with the current legal provisions, but the trial of a compulsory counterclaim can be heard directly by the Court of second instance without the consent of the other party or the court's mediation, and a final judgment shall be made. The reason for such a solution is mainly due to the different characteristics of compulsory counterclaim and general counterclaim: When the type of counterclaim is a general counterclaim, there is no logical contradiction between it and Principle claim. Even if the mediation fails or the plaintiff does not agree with the consolidated trial, the defendant will not cause a contradictory judgment, so It can operate in accordance with the current legal provisions. However, when the counterclaim of the original defendant belongs to a compulsory counterclaim, since it usually has a greater relationship with the principle claim. if it is heard by two different courts or trial organizations, it is very likely that two contradictory judgments will be formed, so it is best for the compulsory counterclaim to be resolved in a procedure with principle claim. Therefore, when the parties do not agree to mediate or make a consolidated trial, the court can not ask the defendant to sue separately action, otherwise it will contradict the nature of the compulsory counterclaim.

5. Conclusion

From what has been discussed above, we can draw at least the following conclusions: First, the reverse path of article 247 of the Interpretation of Civil Procedure Law has already contained some de facto compulsory counterclaims. Secondly, the reasons why the clause can produce some compulsory counterclaims are mainly determined by its own meaning and applicable path. Third,

under the above definition, the circumstances in which the defendant needs to make a compulsory counterclaim are : the former is a negative confirmation action ,and the latter is an action of performance; the former is an action for revocation of contract, and the latter is an action of performance; except in special situations, the former is an action of performance , and the latter action is an action for revocation of contract; the defendant wishes to put forward a separate action in respect of his rights under the defense in the former action. Fourthly, compulsory counterclaim may face the problems of jurisdiction and trial grade. When the former Court has no territorial jurisdiction over compulsory counterclaim, it may refer to German law to introduce implicated jurisdiction, that is, the former Court gains jurisdiction over counterclaim on the basis of the relationship between the counterclaim and the principle claim. When the compulsory counterclaim belongs to exclusive jurisdiction, the exclusive jurisdiction court should merge the jurisdiction of principle claim. when the former court does not have the rank jurisdiction over the counterclaim, it can adopt the principle of 'choice the high not the low' or "absorption rule" to achieve consolidated jurisdiction.

Here, it is still necessary to make further elucidation on the topic. Although the compulsory counterclaim is a system of American law, in recent years, in order to improve the efficiency of litigation and prevent the occurrence of contradictory judgments, the academic circles generally believe that this system should be constructed in our country. However, how to realize the topic's localization in our country is still a relatively long exploration process, it requires us to further explore and identify the specific situations of the compulsory counterclaim through practice on the basis of the combination with our country's theory and system. More importantly, in view of its serious consequence of loss of rights, it is more necessary for us to further improve and construct its peripheral systems, such as the evidence proposed system, the pretrial procedure and the lawyer agency system, so this topic still needs to be more in-depth study.