



## The Improvement of Civil Pretrial Procedures in China: The Comparison of Pretrial Procedures in China, Japan and South Korea

### SUR L'AMÉLIORATION DE LA PROCÉDURE CIVILE PRÉALABLE CHINOISE: COMPARAISON DES PROCÉDURES CIVILES ENTRE LA CHINE, LE JAPON ET LA CORÉE

WANG Han<sup>1,\*</sup>

<sup>1</sup>School of Law, Changchun University of Science and Technology, China  
LL.M., Lecturer. Research direction: Civil and Commercial Law.  
\*Corresponding author.  
Address: School of Law, Changchun University of Science and Technology, Changhun, Jilin, China.

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#### Abstract

Although the Civil Procedure Law of the People's Republic of China has provided procedures for pre-trial preparation, such procedures have serious defects based on current legislative and judicial situations. Therefore, they are unable to perform appropriate functions. We therefore analyzed the defects pretrial procedures and discussed a possible reformation of pre-trial procedures based on the successful experiences in other countries and actual conditions in China.

**Key words:** Pre-trial procedure; Time limit for the burden of proof; The exchange of evidence

#### Résumé

Le code de la procédure civile chinoise a défini les préparations de la procédure civile avant l'audience au tribunal. Cependant, vu les conditions actuelles en matière de la législation et de la juridiction, cette procédure demeure gravement défailante sans pouvoir fonctionner correctement. Le présent document analyse les défauts existants dans les préparations de la procédure civile préalable chinoise. Compte tenu des conditions actuelles de la Chine et avec les expériences utiles étrangères, le présent document met en avant la discussion sur les préparations préalable de la procédure civile de la Chine.

**Mots-clés:** Procédure civile préable; Délai pour l'échange de preuves provisoire des procédures d'une preuve; Echange d'épreuves

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The centre of civil litigation of the People's Republic of China is the trial. All pre-trial litigation activities are carried out for the conduction of the trial. Theoretically, the pre-trial preparation has been considered as a part of general procedures of the preliminary trial in the Civil Procedure Law of the People's Republic of China. In practice, the court pays most attention to the trial and totally ignores the pre-trial preparation, without doing any work before the trial. The modification of the Civil Procedure Law has been initiated again. One of the issues is the modification and improvement of pre-trial procedures.

#### 1. THE CONTENT OF CIVIL PRE-TRIAL PROCEDURES

Pre-trial procedures are defined as a series of litigation activities carried out for the trial during the period from the filing in the people's court up to the trial. The importance of pre-trial procedures has been emphasized in either civil or common law countries. Two American scholars made an incisive summary about the function of pretrial procedures: "The purpose of pretrial procedures is simply to exclude irrelevant matters, allow the parties to obtain information and determine whether the dispute is appropriate." All contents are directed towards an efficient trial or an informed settlement (Subrin, Wu, 2002).

##### 1.1 Provision of Current Civil Procedure Law of the People's Republic of China

According to Civil Procedure Law of the People's Republic of China, pretrial procedures include:

(1) To promptly deliver litigation documents within the statutory period. After a complaint is filed with the People's Court, the court should send summons to the defendant and filing notice to the respondent. A copy of the complaint should be also sent to the defendant within 5 days from the date of filing.

(2) To inform the parties of the rights, obligations and the composition of collegial panel. The people's court shall inform the parties of their rights and obligations either in filing notice and summons or verbally to ensure that the parties can properly imply their proceeding rights and obligations.

(3) To examine litigation documents and collect necessary evidences. During the pre-trial procedures, judges should carefully examine all documents related to the complaint and understand the dispute and the main problems that need to be investigated and debated in the trial.

(4) To add additional parties. Civil Procedure Law Section 119 indicates that if the parties involving in the action have yet joined the proceedings, the people's court shall notify them to take prompt action.

## 1.2 Relevant Judicial Interpretations

The relevant judicial interpretations about pre-trial procedures mainly come from the Provisions Related to the Reformation of the Way of Civil Trials promulgated by the Supreme People's Court on 19th June 1998 and the Provisions about the Evidences of Civil Trials promulgated on 6th December 2001.

(1) To submit evidences within the time for the burden of proof. Accordance to the Rules of Evidence Articles 33, 34 and 36, the parties shall submit relevant evidences to the people's court within the time for the burden of proof. If the parties fail to submit the evidence within the time specified, it will be considered that they waive the rights of the burden of proof.

(2) To organize the exchange of evidence. According to The Rules of Evidence Articles 37 promulgated by the Supreme People's Court, the people's court may organize the exchange of evidence before the trial if the parties apply for it. If the evidence is abundant or the case is complex and difficult, the people's court should organize the exchange of evidence in the period from the close of response to the initiation of the trial.

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## 2. THE CIVIL PRETRIAL PROCEDURES IN JAPAN AND SOUTH KOREA

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The civil procedure in every country includes pre-trial procedures though they are named in different way. For example, it is called pretrial discovery in US and argument preparation procedures in South Korea, while in Japan different pretrial procedures are provided for different cases.

### 2.1 The Civil Pretrial Procedures in Japan

The civil procedure law in Japan has provided three kinds of pretrial procedures, namely written preparation, preparatory oral argument, and argument preparation. The written preparation is a procedure that the parties apply to propose the dispute and evidences with pleadings rather than a court hearing. This procedure is commanded by the presiding judge or appointed judges in the High Court. The preparatory oral argument is a procedure that the parties propose the dispute and evidences with oral argument. In a maturity specified by the court, the parties prepare the dispute and evidence with oral argument. At the end of the argument, the court reserves the right to determine the facts that should be proven by further investigations between the parties. This procedure is very suitable for the cases that cause widely public concern. Compared with the previous two procedures, the argument preparation has its own informal characteristics. In this procedure, the judge calls the parties to sit down together and discuss the dispute and documentary evidence in a rather relaxed atmosphere. This situation is called "preparation maturity".

### 2.2 The Civil Pretrial Procedures in South Korea

According to the Code of Civil Procedure in South Korea, pretrial procedures are defined as the argument preparation procedures, which include the written argument preparation and the argument preparation maturity. Within them, the written argument preparation is a necessary procedure. The case should be prepared with the written procedure first before entering the argument preparation procedure. The argument preparation maturity can be considered as a supplementary procedure of the written argument preparation. It is designated by the judge only for the cases in which the dispute cannot be clarified or the evidence is still confused following the written argument preparation; or the written argument preparation period lasts for more than four months. If the dispute and evidence can be clarified in the written argument preparation, the judge will terminate this procedure directly and specify the argument maturity; otherwise the judge will specify the maturity following the end of the written argument preparation. The argument preparation procedure can be terminated in the cases when the claim and evidences are complete and the dispute is clarified. In addition, it can also be terminated in the cases when the argument preparation lasts for more than 6 months and if the written evidences have not been submitted within the time specified by the judge or the witness did not attend the trial.

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## 3. THE EXISTING PROBLEMS AND ACCOMPLISHMENT STRATEGIES OF CIVIL PRETRIAL PROCEDURES IN

## CHINA

The provisions about pre-trial procedures specified in the current Civil Law in China mainly focus on the trial preparation conducted by the court, ignoring the role of the parties as a main subject of litigation.

### 3.1 The Existing Problems in the Pretrial Procedures

#### 3.1.1 The Trial Court Judge is Responsible for Pretrial Preparation, Thereby Ignoring the Role of the Parties

In current civil law in China, the content of pretrial preparation is mainly provided for the judges who will complete all the jobs for preparation. The pretrial judges are responsible for the trial. As a result, the judges are not only responsible for the pretrial preparation but also responsible for making judicial decision. Under such circumstances, the role of the parties is completely ignored and the rights and pretrial obligations are seriously deviated from the parties. The parties and their representatives are basically excluded from the procedures so that their rights and obligations are very limited. There are two drawbacks existing in these provisions. First, the rights and pretrial obligations are seriously tilted to the judges. Secondly, it is not conducive to mobilize the parties' enthusiasm and initiative motivation.

#### 3.1.2 The Time Limit for the Burden of Proof and the System for the Exchange of Evidence are Not Complete

The current time limit for the burden of proof and the evidence exchanging system cannot effectively prevent the delay of trial and the sudden attack in the trial, thus affecting the justice and efficiency of litigation. The establishment of pretrial procedures is to ensure a sufficient preparation by the parties from procedure to details and prevent a sudden attack from one of the parties so that the court proceedings can be carried on efficiently without any interruption. The original purpose to set the systems for the burden of proof and the exchange of evidence in each country is to prevent the sudden attack in proceedings. The evidence should be treated as an important content of pretrial procedures to guarantee the disclosure of truth and the justice of litigation. The Rules of Evidence promulgated by the Supreme Court has accomplished the evidence system in pretrial procedures with a complete system structure. However, such provisions still cannot completely avoid the evidence attacking during the trial. On one hand, the parties are allowed to provide new evidences before or during the preliminary trial and the trial, which enables them to have an opportunity to attack the trial with some "surprising evidences". On the other hand, the provisions about the evidence exchanging system are too general. The Rules of Evidence has two provisions: First, the court may organize the exchange of evidence if the parties apply for it. Secondly, the people's court should organize

the exchange of evidence for the cases if the evidences are abundant or the case is very complex and difficult. However, the provisions fail to provide the detailed method of application.

#### 3.1.3 The System About the Loss of the Right of Defense has not Been Established Yet

Loss of the right of defense means the defendant in the preliminary trial and the appellee in the trial lose the right of defense in the future appeal if they fail to respond within a specified time period. This is not a simple provision or system, but a concept and spirit of the civil proceedings implemented in trial systems, which has a very important significance to guarantee the justice and efficiency of the trial. The current civil law in China has not defined the legal consequences due to the failure of defense within the specified time period. Therefore, it does not establish a system for the loss of the right of defense but simply emphasizes that the respondent has obligations to respond. Failing to provide a pleading does not harm the defendant's actual rights at all. During the trial, the defendant's rights for proceedings have not been restricted as a consequence, thus the debate in front of people still lies on the side of the right.

### 3.2 Accomplishment Strategies

#### 3.2.1 To Establish Pretrial Judge System and Rationally Allocate the Pretrial Rights and Obligations to the Parties

Civil procedures should be clearly divided into two different and independent procedures, i.e., pretrial procedures and the trial. Each of them should be held by different subjects. The pretrial judge is responsible for the pretrial procedures and the court judge is responsible for the trial. The pretrial judge's main responsibilities include organizing the exchange of evidence between the parties, specifying the time limit for the burden of proof, investigating and collecting necessary evidences, and finishing the dispute, etc. In the meantime when the pretrial judge system is established, it should clarify the rational allocation of rights and litigations to the parties and specify the dominant position of the parties in pretrial procedures. During the accomplishment of the pretrial procedures, the concept of ignoring the parties should be changed and the leading position of the parties should be clearly defined. Therefore, the parties are able to play an important role in the pretrial procedures and the judges can equitably allocate the legal resources based on a neutral position.

#### 3.2.2 To Improve the Time Limit for the Burden of Proof and Evidence Exchanging System

The Rules of Evidence has provided two methods to determine the time limit for the burden of proof but it does not indicate which way should be applied in which circumstance. If the time limit has been designated by the court and stated in the informed notice of the

burden of proof, where is the parties' "consensus" from? Therefore, the informed notice of the burden of proof shall define that: the time limit for the burden of proof can be determined freely by the parties and approved by the court; or the court specifies the time limit for the burden of proof according to the circumstances of cases, which seems more appropriate. Although the provisions about the exchange of evidence system have been specified in the Rules of evidence, they are not complete. As mentioned previously, there are two ways to exchange evidences: one is applied by the parties and another one is determined by the People's court for the cases with abundant evidence or the complex and difficult cases. The exchange of evidence is a necessary step in the pretrial procedures and its scope should be defined clearly as well. All evidences should be explicitly included in the scope of exchanging, including those submitted by the parties initially, collected after applying to the People's court, and examined and collected by the People's court under its right. The exchange of evidence is a system involving three parties, which can not only prevent the evidence attacking by the parties but also collect evidences as much as possible to guarantee a justice and a smooth trial.

### **3.2.3 To Establish a System for the Loss of the Right of Defense**

The Civil Law and the Rules of Evidence in China have not yet established a system for the loss of the right of defense. It is necessary to establish this system in the

pretrial procedures, clearly define that the defendant must submit pleadings, and set the time limit. If the defendant fails to submit pleadings within the time limit, it will result in a legal consequence of admitting the plaintiff's claim. It should clearly define that the contents of the pleadings have a legal binding force for the future litigation. The content of the pleadings should not conflict with legal proceedings; otherwise it will become invalid. In addition, such kind of behavior should be considered as a form of loss of the right.

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