CHINA

CIVIL PRE-TRAIL PROCEDURE IN CHINA

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There is no independent pre-trial procedure in Chinese laws, but there are pre-trial preparation rules. The pre-trial preparation rules as provided for in the *Civil Procedure Law* are simple, with a number of ambiguities, and many specific rules are determined by the internal court administrative rules[1]. Moreover, the compass of competency (Zuständigkeit) of Judges is not generally or abstractly provided for in any statute or regulation. Thus, there is much free room left for the judicial trial reform in China. China has been carrying on the judicial trial reform in more than a decade, the pre-trial procedure is an integral part of it, and multimode pre-trial procedures are practiced within the framework of the *Civil Procedure Law*[2]. So to speak, the trial practice is promoting the specification and regularization of the pre-trial procedure.

Due to the special development mode in China, this report firstly gives a brief introduction to the source of law of the civil pre-trial procedure, followed by a specific account of the pre-trial preparation rules; the third part of this report expounds on the judicial interpretations of the *Civil Procedure Law*, especially the rules on the pre-trial evidence discovery; the fourth part of this report introduces the specific reform measures for the pre-trial procedure taken by the Chinese courts; and lastly, this report also briefly introduces a plan on the civil procedure reform in China.

I. SOURCE OF LAW

China promulgated the *Civil Procedure Law (trial)* in 1982, which was replaced by the *Civil Procedure Law* in 1991. In 2007, the National People's Congress modified the provisions on retrial and execution in the Civil Procedure Law, and deleted the procedures for bankruptcy of a legal person enterprise for debt repayment, because an independent *Enterprise Bankruptcy Law* was promulgated in 2007.

In China, the legislative power and judicial power are not completely separated, and the Supreme People's Court may interpret, modify, and even directly make law by the so-called "judicial interpretation". As for the civil procedure law, the Supreme People's Court made judicial interpretation of the *Civil Procedure Law (trial)* and the *Civil Procedure Law* in 1984 and 1992, respectively; the Supreme People's Court promulgated the *Some Provisions on the Court Hearing in Formal Procedures Applicable to Economic Dispute Cases in the First Instance* in 1993 and *Some Provisions on Issues concerning the Reform*

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[1] CAI, HONG, "Function, target and their realization for pre-trial preparation procedure", *Studies in Law and Business*, volume III, 2003, p. 103.

[2] WU, ZEYONG, "Justification of civil pre-trial preparation procedure", *Law Science*, volume I, 2005, P. 70-75.

of Civil and Economic Trial Mode in 1998. All these judicial interpretations involve the rules on pre-trial preparations. The policies issued by the Supreme People's Court are also legally binding, for example, the *Guideline on Five-Year Reform of the People's Courts* issued in 1999.

Finally, it is worth mentioning that the Supreme People's Court issued the *Some Provisions on Evidence in Civil Procedure* in 2001, which, for the first time, provide for the evidence exchange system before trial, limiting the scope of evidence collection by the court in its own capacity.

II. RULES ON PRE-TRIAL PREPARATION IN LAWS

1 Filing a lawsuit and accepting a case

A) Normally the complaint must be in writing. In accordance with Article 109 in the Civil Procedure Law in relation to ordinary procedure of first instance, when a lawsuit is filed, a motion of complaint shall be submitted to the people's court, and copies of the motion of complaint shall be provided according to the number of defendants. If the plaintiff has genuine difficulty in presenting the statement of complaint in writing, he may state his complaint orally; the people's court shall transcribe the complaint and inform the other party of it accordingly. Besides, Article 143 in the *Civil Procedure Law* provides the ways to file a lawsuit in Summary Procedure, "For simple civil cases, their plaintiffs may file their complaints orally."

In practice, the oft-seen oral complaints play a very important role, and it is emphasized that the judges must go among the people. That is, the judges should hold hearings outside the court among the people, especially in rural areas, because most peasants have difficulty in writing and are reluctant to litigate in court.

When filing an action, the plaintiff may decide whether to engage a lawyer to represent him. In the *Civil Procedure Law*, there is no provision that mandates the engagement of a lawyer (Rechtanwaltzwang).

There is no provision that a plaintiff may file a lawsuit or carry through litigation by electronic means, and there is no precedent in judicial practice.

B) In accordance with Article 110 in the Civil Procedure Law, a motion of complaint shall clearly set forth the following: (1) The name, sex, age, ethnicity, occupation, working unit, and address of parties or, if the parties are legal persons or organizations, their names and addresses and the names and positions of their legal representatives or principal leading personnel; (2)The claims of the lawsuit and the facts and grounds on which the lawsuit is based; and (3)Evidence and its source, as well as the names and addresses of witnesses.

C) China adopts the system of accepting a case by examination rather than by registration, unlike to Germany. After receiving the motion of complaint, the court shall make examination on it. The review is including two points: firstly, whether to comply with the important conditions of bringing a lawsuit, in accordance with Article 108 in the *Civil Procedure Law*: the plaintiff must be a person that has a direct interest in the case; there must be a definite defendant; there must be specific claim or claims, facts, and cause or causes for the suit; and the suit must be within the scope of acceptance for civil actions by the people's court and under the jurisdiction of the people's court where the suit is accepted;

secondly, whether there is lack in contents of motion of complaint. If filing a lawsuit is lack of important conditions or there is lack in contents of statement of complaint, supplement or modification shall be permitted (Article 111 in the *Civil Procedure Law*).

It is questionable that there is no specific provision in law on what degree is in examination when the court examines claims, which is under the specific mastering by each court and judge on a specific case, however, a formal examination is done under most circumstances. In fact, some courts carry out substantial examination; as a result, many cases are not accepted, leading to "difficulty in accepting a case". Especially for the house removal cases involved in local stability and economic development, courts refuse them in the phase of accepting cases. Herein, the right to be heard of parties are restricted and harmed seriously.

At present, the scholarship circle holds criticism attitude to the practice of strict examination of reasons and basis. According to general theory in scholarship circle, a formal examination shall be made in the phase of accepting a case, and such substantial issues as whether the claims of case are supported shall be solved in the phase of trial.

When a people's court receives a motion of complaint or an oral complaint and finds the complaint meets the requirements of a civil lawsuit after reviewing the complaint, the court shall accept the case within seven days and notify the parties involved; if the complaint does not meet the requirements of a civil lawsuit, the court shall, within seven days, make a ruling to reject the complaint. If the plaintiff does not agree with the ruling, he may appeal on the ruling(Article 112 in the *Civil Procedure Law*). In general, the case-filing tribunal is responsible for examination and acceptance of cases.

For the service of statement of complaint is completed by the people's court, The people's court shall deliver a copy of a motion of complaint to the defendant within five days from its acceptance of a case, and the defendant shall file a motion of defense within 15 days after receiving the copy of the motion of complaint. (Article 113 in the *Civil Procedure Law*).

2 Defense of defendant

A) The main way of the defendant state his first opinions is defense. When the defendant files a defense, the people's court shall send a copy of it to the plaintiff within five days from its receipt. Failure by the defendant to file a defense shall not prevent the case from being tried by the people's court. There are more circumstances without defense in practice.

B) There are no uniform provisions on the format and contents of defense. The common formats in practice mainly include two parts: basic circumstances and defense opinions of the party (his attorney), which are connected by using the similar expressions of "it is hereby the defense lodged by the defense party for the plaintiff brings a lawsuit of …… ".

3 Pre-trial preparation

At present, the civil procedure scholarship circle consistently thinks there is no an independent pre-trial preparation procedure in China, but there is

preparation for trial, whose specific provisions are in Article 113, 119 in the *Civil Procedure Law*.

In sum, the court has the following preparation actions for the starting lawsuit: (1) servicing copy of motion of complaint and filing defense; (2) notifying the parties their relevant litigation rights and obligations and collegial panel members; (3) examining litigation materials; (4) investigating and collecting necessary evidences; (5) adding parties concerned.

A) After acceptance a case before trial in court, in order to ensure smooth development of trail in court, a series of litigation actions which must be carried out by the trial collegial panel are called to be "pre-trial preparations", and it is a legal procedure[3].

Firstly, the court must examine the formalities of bringing a lawsuit, for instance, whether the plaintiff delivered the copy of the motion of complaint according to the number of the defendant, whether the case acceptance fee is prepaid, whether the evidence documents listed in the motion of complaint are complete. In the case of incomplete formalities, the plaintiff may be required to supplement and correct them within a limited period.

Secondly, whether there are expressions doing harm to the personal rights and interests of the other party in the motion of complaint must be examined. If there is lack or error in content, the court may require and order the plaintiff to correct it in a limited period.

Thirdly , the courts service the notification of acceptance and the notification calling for responses to the action. The people's court shall, with respect to cases whose acceptance has been decided, inform the parties in the notification of acceptance and in the notification calling for responses to the action of their relevant litigation rights and obligations of which the parties may likewise be informed orally (Article 114 in the *Civil Procedure Law*). The courts shall service the copies of the motion of complaint and defense.

Fourthly, the judicial officers must carefully examine and verify the case materials and carry out investigations and collection of necessary evidence (Article 116 in the *Civil Procedure Law*). The judges shall know about the claims of the plaintiff and claims of the defendant rebuttal in accordance with the motion of complaint and defense provided by the parties, whether their fact and reason are proved by evidences or whether the parties need supplement. Herein, it has some characteristics of the written proceedings.

Finally, the necessary joint action parties are notified to participate in the litigation.

Some scholars hold criticism attitude on the rules of examining litigation materials before trial, thinking that the court carries out substantial examination of litigation materials before trial, and takes the examination result as the basis of

[3] YE, ZIQIANG, *China Civil Procedure Law*, Beijing, 2004, p. 255.

substantial ruling, which is actually a process of written procedure in advance, resulting to first determination and later trial.[4]

B) Preparation for trial in court

Firstly, the parties and other participants in the proceedings shall be notified within three days after the members of the collegial panel are determined (Article 115 in the *Civil Procedure Law*). The parties are notified to appear in court in the form of notification or summons. Other participants in the proceedings are notified to appear in court in the form of notification.

Secondly, the bulletin is issued for the case of open trial.

C) Investigation and collection of evidence before trial

In accordance with the Civil Procedure law, the liability of investigation shall be borne by judges. The personnel sent by a people's court to conduct investigations shall produce their credentials before the person to be investigated. The written record of an investigation shall be checked by the person investigated and then signed or sealed by both the investigator and the investigated (Article 117 in the *Civil Procedure Law*). A people's court may, when necessary, entrust a people's court in another locality with the investigations. The entrusting people's court shall clearly set out the matters for and requirements of the entrusted investigations. The entrusted people's court may on its own initiative conduct supplementary investigations. The entrusted people's court shall complete the investigations within 30 days after receiving the commission in writing. If for some reason it cannot complete the investigations, the said people's court shall notify the entrusting people's court in writing within the above-mentioned time limit (Article 118 in the *Civil Procedure Law*).

The judges may determine whether to carry out appraisal or inspection, whether to connect with relevant unit, whether to need notify the third party to participate the litigation; If a party who must participate in a joint action fails to participate in the proceedings, the people's court shall notify him to participate (Article 119 in the *Civil Procedure Law*).

4 The principle of orality (Mündlichkeitsprinzip)

A) China has not the institution of the preliminary hearings (frühe erste Termine) like Germany and Japan, all cases in first instance, whether are in mediation, ordinary procedure or Summary Procedure, in principle, shall be tried in court, in order to guarantee the performance of substantial defense right. Only in the second instance procedure, may special cases be without trial in court. In accordance with Article 188 in judicial interpretation of the *Civil Procedure Law* of the Supreme People's Court, the people's court in the second instance may make a judgment or a written order directly in accordance with Article 152 in the civil procedure law in the following appeal cases, which are not necessary to conduct a trial in court: (1) the cases in the first instance are ruled to be refusal to accept a case, rejection of a complaint and objection to the jurisdiction of a court;(2) the appeal claims filed by parties fail to be supported evidently; (3) if the facts were clearly ascertained but the application of the law was incorrect in the

[4] FAN, YUERU, *Establishment of civil pre-trial preparation procedure from the aspect of comparative law*; www.chinacourt.org/public/detail.phd?id=18534, 15-04-2008.

original judgment;(4) if there was violation of legal procedure in making the original judgment, which may have affected correct adjudication, and the case remanded to the original people's court for retrial. However, for this system, general theories in China think it different with trial in writing, because the civil procedure law of PRC stipulates the inquiry to the parties and necessary investigation etc.

The cases which may be terminated without holding a court are as follows: the cases which is withdrawn by the plaintiff or may be considered as withdrawn by him, one of the parties died before trial in court, non-litigation procedures, examination procedure of objection to execution etc.

The time of the first trial in court is generally arranged by the case-filing tribunal of court, and some cases are arranged by electronic means, which is unnecessarily agreed by the parties as usual. When determining time, the court will consider actual circumstances of the court and judge in charge and the opinions of the parties. If the parties think the date arranged by the court is not proper, he may communicate and harmonize with the court and the other party.

B) There are two kinds of trial components of ordinary procedure (trial by collegial panel) and Summary Procedure (trial by sole judge) in the first instance procedure. Besides this, there are some special procedures in non-litigation cases, for example, the special procedure of Chapter 15, procedure for hastening debt recovery of Chapter 17, and procedure for publicizing public notice for assertion of claims enterprises of Chapter 18 etc in the *Civil Procedure Law*.

China has not established an independent litigation of small amount system, but such compensation cases and liabilities cases with clear fact, specific liabilities, not large compensation amount may apply to Summary Procedure, to some degree, which is playing the function of litigation of small amount.[5]

In accordance with Article 142 in the *Civil Procedure Law*, when the facts are evident, the rights and obligations clear and the disputes trivial in character, trying simple civil cases is applied. Herein, the Supreme People's Court took special promulgation of *Some Provisions on Trial of Civil Cases Applying to Simple Procedure*.

At present, there are about 6 million civil and commercial cases entertained every year in China, 80% of them applied to Summary Procedure[6].

C) China has no system similar with the case management system, and the process and development of procedure may not be agreed by the parties and the court.

5 Brief review

A) The Civil Procedure Law distinguishes the phase of pre-trial preparation and trial in court, and there are only the difference of holding a court and failing to hold a court, but there are no difference of trial in written and oral

[5] YE, ZIQIANG, *China Civil Procedure Law*, Beijing, 2004, p. 255. BI, YUQIAN, *Research and Legislation Proof of Civil Procedure*, Beijing, 2006, p. 923.

[6] BI, YUQIAN, *Research and Legislation Proof of Civil Procedure*, Beijing, 2006, p. 556.

procedure, furthermore, all cases in the first instance are tried in court in general, however, a lot of cases are conclude by mediation, thus, there is no evident written procedure.

B) Article 12 in the *Civil Procedure Law* stipulates the principle of orality; parties to civil actions are entitled in the trials by the people's courts to argue for themselves. However, for the court may collect evidences in accordance with its will, failing to get information from the arguments of the parties and take it as basis of judgment, finally, the principle of orality is not realized[7]. Its fundamental reasons are: based on socialism national theory, under the influence of civil procedure law theories of the Soviet Union, the civil procedure law pursued the doctrine of function and power and the doctrine of national intervention, therefore, there are specific provisions on the principle of argument and the principle of disposition of the parties, but these principles are formalized ultimately[8].

At present, the main problems with which China is faced are the non-independence and corruption of the judiciary. They are also the important causes for the reform of the pre-trial preparation rules. Procedural efficiency plays only a supporting role. So, it is not the principle of orality (Mündlichkeit), but is the principle of open trial (Öffentlichkeit) and division of work within the court that stand first in the reform.

C) In the phase of pre-trial preparation, under the action mode of super doctrine of function and power of judges, the parties fail to actively participate[9], as well as, the court's strong function of examination makes the pre-trial preparation more similar with the written procedure. In China, the court especially is concerned about conclusion of a case by mediation. If the conclusion of a case by mediation is not successful, he will report to the superior and finally make a ruling by collective decisions. It is to say that the basis of final ruling doesn't come from the evidences and argument in court, besides, if the court actively collects evidences before trial (it is so especially before the issuance of *Evidence Rules*), he will make a conclusion before trial, which will lead to the trial in court is nominal and formalized[10]. Therefore, some scholars further think that since the trial in court loses its original meaning, its preparation phase is meaningless[11].

D) Furthermore, the phase of pre-trial preparation has the function of collecting evidence rather than the function of forming dispute points, and the parties are unfamiliar with the case, evidence, the opinions of the other party,

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[7] ZHANG, WEIPING, "Restatement of the principle of argument in civil procedure in China", *Chinese Journal of Law*, volume IV, 1996, p. 47.

[8] ZHANG WEIPING, "Transformation of system and development of the civil procedure law in China", *Tsinghua Law Science*, volume IV, 2001, p. 2-5.

[9] LI, SHUJIE, *Research of Civil Judicial Reform*, Xiamen, 2000, p. 124.

[10] WANG, YAXIN, *Civil Procedure in Social Reform*, Beijing, 2001, p. 114.

[11] WANG, YAXIN, "*Report of investigating operation of civil procedure in the first instance for middle people's courts",* paper in Seminar on comparison of civil procedure law countries in August 2002 in Beijing; WU, ZEYONG, "pre-trial preparation procedure", cit. p. 70.

what's more, its aim to make preparation for trial in court, without the conciliation before court and alternative dispute resolution (ADR), which is a kind of waste of judicial resource[12].

E) Some scholars think the preparation for trial in court is the arrangement of evidence and dispute points, in order to make the confrontation in trial more efficient and order, thus, the judge cannot make substantial examination of the claims and evidences filed by the parties in the phase of pre-trial preparation, otherwise, it will weaken the confrontation[13].

Moreover, the right to be heard to the parties (due process) is not ensured with regard to function in the phase of pre-trial preparation. It is especially important that the pre-trial preparation fails to play a role of accelerating trial and improving efficiency.

It is to be emphasized that there is no constitutional court in China at present, without any possibility of constitutional litigation. If the procedure of accepting a case infringes the parties' right of litigation in court based on the constitutional law, but the parties have no channel to carry out constitutional litigation.

III. TRANSFORMATION OF PRE-TRIAL PROCEDURE BY JUDICIAL INTERPRETATION OF COURT

For China is always pursuing the doctrine of super function and power, the courts enjoy for extensive rights and liabilities of collecting evidences. Paragraph 1, Article 65 in the *Civil Procedure Law* provides: The people's court shall have the right to make investigation and collect evidence from the relevant units or individuals; such units or individuals may not refuse to provide information and evidence. However, some units and individuals often refuse to cooperate in practice, resulting to the people's court failing to investigate evidences. Hereby, the Supreme People's Court issued Some Provisions of the Supreme People's Court on Evidence in Civil Procedures (hereinafter referred to be *Evidence Rules*) in 2002, which weakens the function of investigating and collecting evidences based on function and power of the court, introduces the systems such as time limit of producing evidences and exchange of evidences, and provides relevant remedy rules for the system on discovery of evidence. The rules imposed a fundamental effect on the rules on pre-trial preparation of the court.

1 Limitation of the court's liability of investigation and producing evidence

In accordance with the *Evidence Rules*, the people's court is still responsible for collecting evidence, but which is restricted strictly. The scope of the people's court collecting evidence is limited as follows: (1)The facts that may injure the interest of the state, the public interest of the society or the lawful interest of other people;(2)The procedural matters that have nothing to do with the substantial dispute, such as adding parties concerned, suspending the litigation, ending the litigation, withdrawing, etc on the basis of authority of the courts. (Article 15 in the *Evidence Rules*).

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[12] JIANG, WEI, *Civil Procedure Law*, Shanghai, 2002, p. 336; LIU MIN, *Civil Judicial Reform of China at Present*, Beijing, 2001, p. 252.

[13] WU, ZEYONG, "pre-trial preparation procedure", cit. p. 70.

Besides, the people's court investigating and collecting evidences shall be based on the application of the parties concerned (Article 16 in the *Evidence Rules*). The scope of filing an application to the people's court for investigating and collecting evidences is: (1) The evidences applied for investigation and collection are the archive files kept by relevant organs of the state and must be accessed by the people's court upon authority; (2) The materials that concern state secrets, commercial secrets or personal privacy; (3) Other materials that cannot be collected by the parties concerned or the agents ad litum thereof due to objective reasons. (Article 17 in the *Evidence Rules*).

When the party or his attorney applies to the people's court for investigating and collecting evidence, he shall file a written application. The application shall clearly specify the basic information of the evidences, such as the name of the person investigated or the title of the entity, the dwelling place, the contents of the evidences to be investigated upon and collected, the reasons of why the evidences need to be investigated upon and collected by the people's court and the facts to be proved(Article 18 in the *Evidence Rules*).

The application of the parties concerned and his attorney thereof to the people's court for investigating upon and collecting evidences shall be filed at no later than seven days prior to the expiration of the term for producing evidences. If the people's court refuses to approve the application of the parties concerned or the agents ad litum thereof, it shall service a notice to them. The parties concerned and the agents ad litum thereof may file a written application to the people's court that accepts the application for reconsideration within three days after receiving the notice. The people's court shall give a reply within five days after receiving the application for reconsideration.(Article 19 in the *Evidence Rules*).

2. Procedure of evidence exchange

The preparation for litigation between the parties before formally holding a court is to exchange evidence under the direction of the court, without formal systematic arrangement similar with the discovery procedure in the United States. The evidence produced by the party is also produced to the court, and if the party desires to obtain the evidence in the other party's hand, he may apply to the court to collect evidence. However, there are similar effects and attempt in practice, for instance, collecting evidence from the other party's witness and making transcript of collecting evidence.

A) Liability of defense

In order to push the parties to produce evidence and carry out evidence exchange, Article 32 in the Evidence Rules providing the defendant's liability of defense. The defendant shall submit a written reply before the expiration of the prescribed time period, specifying his opinions concerning the facts and reasons on which the allegations of the plaintiff are based. However, failing defense won't lead to the result of losing-right in practice.

B) The system of time limit of producing evidence

The people's court shall service a notice for accepting the case and a notice for responding to the suit to the parties concerned, and at the same time service a notice for producing evidences to them. The notice for producing evidences shall specify the principle and requirements of distributing the burden of proof, the circumstances under which the parties concerned may plead the

people's court to investigate upon and collect evidences, the time period prescribed by the people's court for producing evidences and the harmful consequences for failure to produce evidences during the prescribed time period. The time period for producing evidences may be agreed upon by the parties concerned and be affirmed by the people's court. If the time period for producing evidences is designated by the people's court, the designated time period shall be not less 30 days, starting from the next day when the parties concerned receive the notice of accepting the case the notice for responding to the suit (Article 33 in the *Evidence Rules*).

The parties concerned shall submit evidential materials to the people's court within the time period for producing evidences; in case any party fails to submit evidences during this time period shall be deemed as giving up the right to produce evidences. The evidential materials submitted by the parties concerned beyond the time period shall not be cross-examined during the court hearing of the people's court, unless both parties agree to have the evidences cross-examined. In case any party makes additional or changes allegations or lodges a counterclaim, he shall do so prior to the expiration of the time period for producing evidences (Article 34 in the *Evidence Rules*).

If, in the process of litigation, the nature of the legal relations alleged by the parties concerned or the validity of the civil acts are inconsistent with the findings of fact made by the people's court on the basis of the facts of the case, the provisions of Article 34 of the present Provisions shall not be applicable, and the people's court shall inform the parties concerned that the allegations litigation may be changed. Where the parties concerned change their allegations of litigation, the people's court shall prescribe the time period for producing evidences anew (Article 35 in the *Evidence Rules*).

If it is difficult that the party submits the evidence within the time limit of producing evidence, he shall apply to the people's court for postponing the time limit of producing evidence within the time limit of producing evidence, after the permission of the people's court, the time limit of producing evidence may be postponed. If it is still difficult that the party produces the evidence within the postponed time limit, he may apply again to the people's court for postponing, whether it is permitted shall be decided by the people's court (Article 36 in the *Evidence Rules*).

C) Exchange of evidence

The people's court may organize the parties to exchange evidence before trial in court after the application of the party. With regard to the case with many evidences or complicated and difficult case, the people's court shall organize the parties to exchange evidences after the expiry of defense period before the trial in court (Article 37 in the Evidence Rules).

The time of evidence exchange may be agreed by the parties and approved by the people's court, or designated by the people's court. If the people's court organizes the parties to exchange evidences, the date of evidence exchange is the expiry of the time limit of producing evidence. If the party applies for postponing the time limit of producing evidence, which is permitted by the people's court, the date of evidence exchange is postponed correspondingly (Article 38 in the *Evidence Rules*).

The exchange of evidence shall be carried through under the direction of judge. In the course of evidence exchange, the judge shall record the undisputed fact and evidence of the parties into files; the disputed evidences classified in accordance with the fact needing to prove and the reasons of objection are recorded into files. The main issues disputed by both parties are determined by evidence exchange (Article 39 in the *Evidence Rules*).

After receiving the exchanged evidence from the other party, the party files the rebuttal and produces new evidence; the people's court shall notify the parties to exchange within the designated time. In general, the exchange of evidence does not exceed for two times, unless the people's court think it is surely necessary to carry through exchange of evidence again in the important, difficult case with specially complicated details (Article 40 in the *Evidence Rules*).

However, the parties basically submit the evidence to the court in practice rather than active discovery or production to the other party[14].

D) Submission of new evidence

In accordance with Article 125 in the *Civil Procedure Law*, the parties may present new evidence during a court session. Therefore, the *Evidence Rules* provides the rules for the time limit of producing evidence, but there is an exception, when the party provides new evidence in the first instance, he may present it before holding a court or at the time of trial in court (Article 42 in the *Evidence Rules*). In accordance with Article 41 in the *Evidence Rules*, new evidences in the first instance are including: the evidence which is found newly after the expiry of the time limit of submitting evidence; if the party fails to produce the evidence within the time limit of submitting evidence due to objective reason, after the permission of the people's court, he still fails to submit the evidence within postponed time limit, the judge's discretion may be permitted to judge whether such evidence is new evidence according to Para 2 Article 32 in the *Evidence Rules*. As long as it is possible to lead to obviously unjust ruling if failing to try such evidence, the evidence provided by him may be deemed as new evidence. Therefore, there are no provisions on the system of proof losing-right as a result, and the system of the time limit of producing evidence loses its meaning.

When one party submits new evidence, the people's court shall notify the other party to present his opinions or submit evidence within a reasonable period (Article 45 in the *Evidence Rules*).

This judicial interpretation of the *Evidence Rules* transfer the matters in the trial procedure of evidence exchange to the phase of pre-trial, in order to determine the disputed points of the parties and speed up the trial procedure. However, due to the lack of the system of proof losing-right in juridical practice, the defendant often does not defend or fails to defend in time, and the parties are not willing to exchange evidence, therefore, the system of evidence exchange fails to reach its anticipative aims in practice.[15]

E) Remedy measures

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[14] BI, YUQIAN*, Research and Legislation*, cit. p. 582.

[15] BI, YUQIAN*, Research and Legislation*, cit. p. 559.

It is necessary to pay attention to China has the provisions on "spoliation of evidence" rather than the procedure similar with discovery of evidence, i.e. if one party has evidence to prove the other party holding the evidence and refusing to submit to the court, and the content of the evidence is unfavorable to the party hiding the evidence, the court may make the presumption unfavorable to the hiding party when determining the fact (Article 75 in the *Evidence Rules*). Herein, some scholars think as the provisions are too general, the court shall examine whether the party to file the application has just reason so as to prevent this party from abusing the right[16].

Where the holder of the evidence refuses to disclose or submit the evidence favorable to him, it is not applicable (Article 75 in the *Evidence Rules*).

IV. RULES FOR PRE-TRIAL PREPARATION IN JUDICIAL PRACTICE

After the mid 1990s, the courts in all places successively pushed the reform of trial way, there are many beneficial attempts on the phase of pre-trial preparation under the mode of confrontation[17]. Their focus is how to separate the pre-trial preparation and trial in court, involving in such issues as the subject and scope of pre-trial procedure. Through the system of evidence exchange, the parties also participate the phase of pre-trial. However, it is not involved in such issues of arrangement of disputed points, limitation of pre-trial procedure, and the doctoring of disposition of the parties etc.

The court has the difference between case-filing tribunal and trial tribunal. Both of them are composed of judges. It leads to conflict of functions between them. The judge staff has the difference between judge and assistant judge, in a broadly sense, the engrossment clerk and court policemen etc in court are also included.

They may specifically be divided into the following modes, however, it is necessary to pay attention to not only there are important differences among all modes, but also there is large difference in matters of pre-trial under the same mode.

1 Under the first mode, the case-filing tribunal is only responsible for the registration of accepting a case. When the case is registered, it will be transferred to the trial tribunal, and the service of documents and investigation and collection of evidence and so on are borne by the trial tribunal[18]. It is a traditional mode of internal labor division in the court, and consistent with the provisions in the civil procedure law.

2 Under the second mode, the case-filing tribunal is responsible for the pre-trial preparation, i.e. "large accepting a case mode". The work of case-filing tribunal includes examining and entertaining a case, servicing statement of complaint and defense, notification of submitting evidence, exchange of evidence, investigation and collection of evidence, summons of holding a court, notification of presenting in court, arrangement of period for holding a court, deliberation and

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[16] BI, YUQIAN, *Research and Legislation*, cit. p. 592.

[17] WANG, YAXIN, *Confrontation and Ruling: Basic Structure in Japan Civil Procedure*, Beijing, 2002, Chapter 3.

[18] BI, YUQIAN, *Research and Legislation*, cit. p. 527.

announcement of ruling, conclusion of case and filing, administration of supervision and urge etc. It is to say, except trial, other matters are handled by the case-filing tribunal[19]. In pretrial preparation activity, case-filing staff and parties are responsible for preparation while the trial judge completely does not intervene so that trail staff is avoided meeting the parties and judicial corruption is avoided.

In some courts, case-filing tribunal is in charge of property preservation, advance execution, and with respect to cases under unique circumstances, if both parties come to reconciliation agreement after property is preserved, mediation may be adopted to conclude the case; and if the plaintiff withdraws the case, case-filing tribunal will make procedural determination.[20]。

3 Under the third mode, in addition to case-filing tribunal, a specific preparation tribunal is established to be in charge of preparation activities. The whole process of civil procedure is divided into three steps, accepting a case, preparation and trial. After the case-filing tribunal finishes accepting and service, the litigation material will be sent to the preparation tribunal, which will prepare the trial: check the litigation material, determine, on the right day or next day, the engrossment clerk (the engrossment clerks are under the collective management of this tribunal) for trial after it is decided that the conditions for accepting are satisfied; with respect to the cases the trail date of which are not arranged by the case-filing tribunal (i.e. the plaintiff of case requests for preservation before the institution of action, the service can not be made to more than 3 defendants and the case that the defendant is missing and needs public announcement) determine the time and place for the first opening of trial, in charge of service and accept the defense, notify the concerned parties to present in court, notify both parties to exchange evidences before court, execute preservation before trial, implement the investigation, inspect, authentication, evaluation and audit if so requested by the plaintiff[21].

Also there are some courts that form a pretrial team with members from experienced judge or assistant judge from various trial tribunals, which is in charge of the pretrial preparation for complicated case or case of new type, especially in charge of organizing disputing points, guiding quoting of the parties and collecting necessary evidence based on its authority[22].

4 In the fourth model, the engrossment clerk is in charge of the pretrial activity, which is limited to accepting procedure, arrange the time for opening trial, dealing with litigation instruments. The bailiff, in some court, is in charge of servicing instruments and the tribunal for trial is in charge of collecting evidence and organizing evidence exchange[23].

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[19] WU, ZEYONG, "pre-trial preparation procedure", cit. p. 70; WANG, YAXIN, "*Research of preparation procedure in civil procedure*", *China and Foreign Law Science*, volume II, 2000.

[20] BI, YUQIAN*, Research and Legislation*, cit. p. 526.

[21] WU, ZEYONG, "pre-trial preparation procedure", cit. p. 73.

[22] BI, YUQIAN*, Research and Legislation*, cit. p. 545.

[23] BI, YUQIAN*, Research and Legislation*, cit. p. 545, 527.

5 In the fifth model, the trial tribunal is in charge of the pretrial preparation while it is the assistant of judge rather than the judge himself who does the preparation. The assistant is in charge of the following pretrial activities: first trial and service, guiding quoting of the parties, adopt property preservation and evidence preservation measures, organizing evidence exchange and collect evidence in accordance with the request of the parties before trial or authority, mediate on behalf of the judge, arrange date for opening the trial, etc. Most of those activities are under the guide of the judge. And a summary shall be reported to the judge after the pretrial is completed[24].

In addition to the practice model mentioned above, there are also suggestions to establish pretrial judge system and evidence preparation team[25].

V. CONCLUSION AND MOTION TO THE RENOVATION OF PRETRIAL PROCEDURE

The civil procedure law of China is still in the phase of changes on the basis of Germany law, however, in recent years, more and more affected by American law, in addition to the need of socialism politics and stability, its legal system is showing obvious characteristics of mixed system. There still exist to a large extent unconformity, illogicality and no system in the aim, function, principle and contents. The people can only expect the future renovation on civil procedure can solve these problems and develop a perfect, unique and systemized civil procedure system.

As to the beginning stage of civil procedure, there are extensive motions and discussions in China, mainly discussing the role of the parties before trial (pretrial discovery), and the body presiding the pretrial procedure, the main scope involved in pretrial procedure, whether the judge can make material investigation before trial, evidence investigation and evidence exchange, pretrial meetings. Although the issue of written and oral form of civil procedure is not involved, the issue concerning right of defense and antagonism in trial procedure is involved.

For the amendment to the law in 2007 is only petty amendment and modification, at present, the Standing Committee of the National People's Congress is seeking the opinions on amendment. The whole amendment to the civil procedure law and formulation of civil compulsory enforcement law may exist, but without final conclusion.

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[24] WU, ZEYONG, "pre-trial preparation procedure", cit. p. 74. BI, YUQIAN*, Research and Legislation*, cit. p. 544.

[25] BI, YUQIAN*, Research and Legislation*, cit. p. 542.