

## Inspiration from Common Law System for Perfecting China's Pre-Trial Procedure in Civil Actions

### PROCÉDURES PRÉALABLES DE LA LOI COMMUNAUTAIRE AU PROCÈS SUR L'AMÉLIORATION CIVILE DE LA CHINE AVANT LE PROCÈS D'INSPIRATION DES PROCÉDURES DES ANGLAIS, AMÉRICAIN ET FRANÇAIS

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#### Abstract

Pre-trial procedure plays an important part in civil procedures. When building up the civil procedure system in China, the importance of it has been ignored and the pre-trial procedure stays as an attachment to the court proceeding. This paper analyses defects existed in pre-trial procedure in civil actions in China and tries to discuss the perfecting it while studying from the common law system.

**Key words:** Civil procedure; Pre-trial procedure; Diverse settlement mechanism

#### Résumé

La procédure préalable au procès dans une action civile a un rôle important, et notre système de droit civil dans le bâtiment sur la procédure préalable au procès, mais ignoré l'importance de placer un satellite dans la position de la procédure judiciaire. Dans ce papier, la Chine civile avant le procès processus de préparation des défauts d'analyse, en s'appuyant sur la common law dans l'absorption de la phase préalable au procès en même temps, d'améliorer la Chine civile procédures de préparation avant le procès sont discutées.

**Mots clés:** Affaire Civil; Procédures préalables au procès; Mécanisme de règlement diversifiées

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The court hearing serves as the center of China's civil procedure system. All litigation activities before the court hearing have been done for how to carry out it. In theory, Chapter 12 of the Civil Procedure Law of the People's Republic of China only has 7 articles which stipulate the pre-trial procedure. In practice, courts put the hearing to the center and nearly do anything before it which means they totally ignore the part for pre-trial preparation. Pre-trial procedure in civil actions is an essential part for making the whole case fair and seasonable. It is a significant task in the revolution of China's civil procedure system that how to perfecting the pre-trial procedure in civil actions and let it plays its own role.

#### 1. OBJECTIVES OF THE PRE-TRIAL PROCEDURE IN CIVIL ACTIONS

Both the continental law system and the common law system have attached much attention to the pre-trial procedure in civil actions. The pre-trial procedure has its key function and status in the civil proceedings. Two American scholars have concluded the pre-trial procedure in civil actions: "the objectives of pre-trial proceedings are very simple: Clean up unrelated matters, allow litigants get information and make sure whether there is contention in the trail and all contents are lead to an effective judgement or mediation after knowing the truth."<sup>3</sup>

<sup>3</sup>Stephen N. Subrin & Margaret Y. K. Woo (2002). Litigating in America: Civil Procedure in Context. In CAI Yanmin & XU Hui (p.123), Beijing, China: Law Press China.

The objectives of the pre-trial procedure in civil actions are as following:

### **(1) Collect and Arrange Evidences**

In civil proceedings, the court has to define the disputed fact. To make the right judgement, the court have to depend on various kinds of evidences. Therefore, whether the content of the trail is adequate and the case could end after one hearing mainly base on the preparation for evidences before the trail. In the pre-trial procedure, the time for giving proof is limited which can make litigants take out evidences timely and also can exchange evidences at certain date. This will help litigants get to know each others' evidence well which could avoid sudden attack in the court hearing and collecting more evidences according to the opposite party to guarantee the case settled on time as well.

### **(2) Crystallize Contention and Eliminate All Matters Not Actually in Controversy**

"No trial without complaint" is a basic principle of civil proceeding. Litigants should give their claims, facts and also evidences. In order to protect their legal rights, litigants usually give as many claims and facts as they can. It is very likely that among those materials some are irrelevant to the case or some are facts without dispute. Thus, before the end of the court hearing, the judge should generalize the contention among numerous and complicated materials in order to make sure the object to judge. Through the claims, response and counter claims in the pre-trial procedure this objective can be achieved and at the same time avoid litigants changing their minds arbitrarily or proposing a new contention and undertake a successful proceeding.

### **(3) Inducing the Case Conciliated Before the Trail**

With the development and perfection of law system, awareness of rights of Chinese civilians have improved and the amount of civil cases are increasing. However, the judicial resources in China now cannot meet the need of the increasing workload in trail. It is a very effective way to solve the case before the hearing and using the pre-trial procedure to settle dispute. Through the pre-trial procedure both parties can have a full understanding about the case and evidences held by the opposite party. On this basis, some cases which is clear and do not have too much dispute can be settled by mediation or other means, therefore, to avoid the court hearing. Nowadays, about 95% civil cases in American are solved in the pre-trial procedure by mediation or other dispute settlement

methods. Only 5% cases go into the court hearing step. Also in the U.K., there are 98% cases that did not go into the hearing step.<sup>4</sup>

## **2. PRE-TRIAL PROCEDURE IN CIVIL ACTIONS IN COMMON LAW SYSTEM**

There is pre-trial procedure in every country's civil action. From the situation of the development of pre-trial procedure, nearly all countries have increased their attention to it. They have made constant perfection work in pre-trial procedure which make it no longer belong to the court hearing and become an independent procedure system.

### **(1) Pre-Trial Procedure in America**

Pre-trial procedure in the U.S.A includes the pleading, disclosure of evidence and pre-trial meeting.

#### **1) The Pleading**

Pleading is a process that plaintiff brings a claim and defendant respond to it. Pleading concludes two types: code pleading and notice pleading.<sup>5</sup> The code pleading mainly aims at the fact that claims depend on rather than the legal result. The language used should be simple, clear and easy to understand. The types of code pleading contains indictment, bill of defence, rebuttal statement and demurrer. Notice pleading emphasizes noticing the nature of the case instead of discovering the fact. It contains indictment, bill of defence and rebuttal statement. In a notice pleading, the plaintiff needs to declare briefly and clearly that he or she has certain rights to gain certain relief. However, the statement of the fact is not required so much.

#### **2) Disclosure of Evidence**

Disclosure of evidence is a formal process that litigants or their agents get related information from the opposite party and other witnesses of the case.<sup>6</sup> Disclosure of evidence is a feature in the American civil actions. The current procedure of disclosure of evidence is a reform of the 1938 Federal Rules of Civil Procedure. It not only applied in the federal court but also accepted by most states in America. There are five ways to practice disclosure of evidence: recording testimony, interrogation record, providing writ or material evidence, requirement of confession, examining body and mental conditions.<sup>7</sup> The scope of disclosure of evidence is very wide in America. All issues about the case can be the object of disclosure. The court usually accept flexible mode when stipulating disclosure of evidence. Litigants on one

<sup>4</sup>As cited in LI Hao (2004). Pre-trial Preparation Procedure in Civil actions: Objective, Function and Patten. *Politics and Law Forum*, 4.

<sup>5</sup>LIAO Zhonghong (2008). *Comparative Study on Civil Action System* (p.289). Beijing, China: China Procuratorial Press.

<sup>6</sup>TANG Weijian (2003). *Rules of American Civil Procedure* (p.179). Beijing, China: China Procuratorial Press.

<sup>7</sup>LIAO Zhonghong (2008). *Comparative Study on Civil Action System* (p.289). Beijing, China: China Procuratorial Press.

hand collect evidences and on the other hand crystallize contention without being intervened by the court. However, issues about privacy and privilege are excluded. In addition, there are no mandatory rules for disclosure of evidence and comprehensive remedy system for disclosure of evidence. It requires that at the beginning of the disclosure procedure, without being asked by the opposite party, litigants have the obligation to disclose or ask for related information. Setting up mandatory disclosure of evidence aims at promoting exchange of information in litigants and improve effective of disclosure so as to save human and material resources.

### 3) Pre-trail Conference

Pre-trail conference is a consultative conference before the court hearing which is attended by lawyers of litigants. The main objective of the meeting is to crystallize contention, speed up the process of the case, promote mediation and guarantee the pre-trail procedure complete to improve the quality of court hearing. Although according to law it is not inevitable to hold a pre-trail conference before the court hearing, most cases have hold the pre-trail conference in practice. Through discussion between judge and litigants, the judge directed and set up schedule for preparation activities. The time and application scope of it are crossing and cooperating with disclosure procedure in order to make sure the disclosure procedure go smoothly. Thus, among many issues in pre-trail conference controlling the disclosure of evidence and arrange schedule is the basic one.

## (2) Pre-trail Procedure in U.K.

Pre-trail procedure in the U.K. Includes pre-action protocols, case declaration, allocation process and disclosure of evidences.

### 1) Pre-action Protocols

The United Kingdom has set up the pre-action protocols in Civil Procedure Rules 1999 by which to stipulate conducts of litigants before the trail. The pre-trail procedure in fact has been divided into two parts: before and after the accusation and the court hearing. The function of pre-action protocols is to boost information exchange between litigants before the trail and directs both parties resolve dispute before the court hearing. According to the law, plaintiff has to give a written notice to the defendant before bringing a lawsuit and he or she can only sue the defendant after 3 days of the notice served. Plaintiff provides details about the case, copy of important written evidences, hoping to resolve dispute through mediation or other non-litigation methods, requirement of a written

despondence from the respondent in reasonable time. After the noticed being served, the defendant has to inform the plaintiff in written form within 21 days and give the date for a comprehensive response. The defendant can accept the requirement from the plaintiff for mediation and also can deny it. If the despondence goes beyond time limit, the defendant have to give reasons. Pre-action protocols is a practical exchange of the fact of case. It has boost communication between litigants before the trail and has functioned in evidence exchange and mediation.

### 2) Case Declaration

The case declaration is assertion about the fact and legislation. Litigants provide various kinds of litigation documents to express their claims of the case.<sup>8</sup> It includes claim forms, particulars of claim, declaration of case and acknowledgement of service. Claim forms are issued by the court as the plaintiff applied which provide information about the type of the claim and the amount of the object. Particulars of claim is a notice for respondent to inform he or she details of fact and legal foundation to make related preparation work.<sup>9</sup> Chapter 10 of the Civil Procedure Rules of the United Kingdom has specified the acknowledgement of service. The defendant has to make the acknowledgement of service before he or she respond or propose objection on jurisdiction.

### 3) Allocation Process

After the despondence of the respondent, the trail goes into the case management and allocation stage. In this step, the court gives every litigant an allocation questionnaire. This questionnaire contains witness and other evidences hold by litigants, the disputed amount of money, duration of the court hearing, date that litigants wish to avoid the hearing, existing and future trail cost, proper hearing procedure accepted by litigants and whether they wish to stop the trial or adopt ADR or other management information. The allocation questionnaire must be handed in specified time or the judge can make appropriate orders according to discretion. If the information provided by the allocation is not sufficient enough, the court will ask litigants provide more information about the case within 14 days or be provided by litigants voluntarily.

## 3. INSPIRATION FROM THE AMERICA AND THE UK IN PERFECTING CHINA'S PRE-TRAIL PROCEDURE

Through the introduction of both the America and the

<sup>8</sup>CHANG Yi (2009). *Recent Advance of Foreign Civil Procedure Law* (p.87). Beijing, China: China University of Political Science and Law Press.

<sup>9</sup>QI Shujie (2003). *Rules of Civil Procedure in the United Kingdom* (p.304). Xiamen, China: Xiamen University Press.

UK's pre-trial procedures, it is clear that the attitudes of them are the same that they both recognize the pre-trial procedure as an independent procedure and it plays its own role in civil actions. In the process of perfecting China's pre-trial procedure, we can study from other countries and improve ours.

### (1) Crystallize the Position of Pre-Trial Procedure

Pre-trial procedure in the common law system is an independent procedure in civil actions and it has its own value and function. For instance, scholar has concludes that: "the objectives of pre-trial proceedings are very simple: Clean up unrelated matters, allow litigants get information and make sure whether there is contention in the trail and all contents are lead to an effective judgement or mediation after knowing the truth."<sup>10</sup> We have been paying too much attention to the court hearing instead of the value and function of pre-trial procedure both in theory and in practice in China. The function of the pre-trial procedure for achieve justice and effective has been ignored. We have to crystallize the position of pre-trial procedure which means the pre-trial procedure is an independent procedure and has its own value and function. A complete and independent pre-trial procedure must have specified content such as pre-trial judge, exchange of evidence, loss of the right to reply system and pre-trial mediation. By building up those system to achieve objectives of the pre-trial, in other words, to collect evidences, crystallize contention and inducing case conciliated before the trail.

### (2) Adversarial System

Civil action in common law system is based on the Adversarial system which contains principles as litigants control the action, judge practicing neutrally and passive which are also reflected in the pre-trial procedure. The main body in pre-trial procedure is litigants. Exchanging and serving documents, discovering of evidence are all conducted by litigants according to law without being intervened by the court. China adopts the inquisitorial system. The scope, content and method of pre-trial activities are directed by the court. Litigants do not have their proper role and the main position of them are ignored. When perfecting the pre-trial procedure, we should give litigants the directing position in pre-trial process and carry out their enthusiasm and initiative in dispute resolving and give them plenary rights. Allow litigants to crystallize contention of the dispute in pre-

trial procedure. Facts without dispute that litigants thought should be used as judgement materials. Evidences collected and provided by litigants for proving their claims are not allowed be collected by judges according to their authority. Litigants have right to choose ways for dispute resolving. No matter mediation or judgement, the judge should not decide compulsorily.

### (3) Building up Diverse Dispute Settlement System

Judicial reforms in common law countries have paid much attention to the alternative dispute resolution (ADR, also Non-litigation dispute resolution). One of the 6 principles of the Civil Justice Reform Act of 1990 is the requirement for extending and increase the application of ADR. America has promulgated the Alternative Dispute Resolution Act in 1998 (The ADR Act). It is the first special act for ADR. The United Kingdom has made the ADR an important task in its judicial reform and specified it in legislation and practiced it in operation. In the judicial practice in China the biggest problem is the contradiction between the increasing amount of civil cases and the limited judicial resources. Under this circumstance, diverse dispute resolution system can solve problems easily and therefore improve effective of the trail. "Since dispute resolve is a process, litigants choose ADR to resolve dispute depends on not only cost, conscience and relation and benefit but also consider the function and effectiveness of the ADR which means whether the ADR's function in resolving dispute is satisfied and it can reach a better result in both social effect and cost."<sup>11</sup> Diverse dispute resolution system has more flexibility. Litigants based on negotiation according to their own will, standard and motive to choose the way they wish their dispute solved.

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<sup>10</sup>Stephen N.Subrin & Margaret Y.K.Woo. Litigating in America: Civil Procedure in Context. In CAI Yanmin & XU Hui (2002, p.123), Beijing, China: Law Press China.

<sup>11</sup>FAN Yu (2000). *Study on Alternative Dispute Resolution* (p.127). Beijing, China: China Renmin University Press.