Front. Law China 2011, 6(1): 44–97
DOI 10.1007/s11463-011-0118-4

RESEARCH ARTICLE

Yanrong Zhao

Evidence Collection in the German, American and Chinese Legal Systems: A Comparative Analysis

©Higher Education Press and Springer-Verlag 2011

Abstract After comparing different procedures of evidence collection in the German, American and Chinese legal systems, the author analyzes the reasons behind the differences: Each system is determined by its specific social culture and is compatible with the construction of the civil procedures of its own. Based on China's specific social culture and its system of civil procedure law, the German style of evidence collection is in a better position to provide guidance for China in pursuit of justice.

Keywords evidence collection, legal system, civil procedure

1 Introduction

Civil procedure law provides the court with the procedure to apply the substantive law to disputes in reality. In order to resolve dispute, facts concerning the dispute should first be ascertained, evidence regulation thus plays an important role in civil litigation. Evidence collection is essential to evidence regulation because, if the parties do not have sufficient means to collect evidence, the court could not ascertain the facts concerning the dispute and therefore, could not guarantee the realisation of parties' substantive rights. Thus, for any judiciary system, it is important to establish rules of litigation to provide effective mechanisms for evidence collection.

In this paper, a comparison is made between different procedures of evidence collection in the German, American and Chinese legal systems. In recent years, emulating the American model, the Chinese judiciary reform in Civil Procedure

Received November 27, 2009

Yanrong Zhao (✉)
School of Civil, Commercial and Economic Law, China University of Political Science and Law, Beijing 100088, China
E-mail: smm001@sina.com

Law is toward establishing an adversary system. But such practice has brought about some side-effects because some new procedures could not operate concordantly with the existing procedures and to some extent this system cannot adapt to Chinese cultural habits. But what are the different procedure designs in the US and German? Why are they so different from each other? Which is better for China's judiciary reform on evidence collection procedures as part of China's judiciary reform? In order to answer these questions, the author makes a comprehensive analysis about the two different procedures of evidence collection.

In Chapter 2, according to the introduction of the existing evidence collection procedure in the United States, the author analyzes the characteristics of the discovery proceeding and the existing problems herein.

In Chapter 3, by reference to the evidence collection in Germany, the characteristics of the evidence collection in Germany are analyzed, and the advantages and disadvantages are also described.

In Chapter 4, through a comparative analysis, the author presents the reasons for differences between the two systems. Each system is determined by their specific social culture and compatible with the construction of their own civil procedure and each is trying to avoid their shortcomings according to judiciary reform.

In Chapter 5, it analyzes the evidence collection in China. Patterned on the American Civil Procedure, the Chinese Civil Procedure has changed from the inquisitional system to the adversary system. But there are still many problems in the existing civil procedure. Having to afford the burden of persuasion, the parties lack the mechanism to collect evidence. At the same time, the court does not want to help the parties to collect evidence. What is the prospect for China's judiciary reform?

In Chapter 6, based on the analysis mentioned above, the author draws the conclusion about the improvement of evidence collection procedures in Chinese legal system and the judiciary reform in China.

2 Evidence Collection in the United States

2.1 Procedure Allocation for Evidence Collection

It must be remembered that the Anglo-American judicial system is based on adversary system.[1] Its litigation process consists of two separate but interdependent procedures, i.e., pre-trial stage and trial stage. The jury trial is a

[1] Jack H. Friedenthal, Mary K. Kane & Arthur R. Miller, *Civil Procedure* (2nd edition), West Publishing Co. (St. Paul), at 2 (1993).

major form in the United States, which requires each party to prepare his case before the trial, otherwise, there will be little opportunity to discover new facts during the course of the procedure.

As the main part of pre-trial process, the discovery procedure was designed in the Federal Rules of Civil Procedure 26–37 in 1938.[2] The term "discovery" encompasses the methods by which a party or a potential party to a lawsuit obtains and preserves the information regarding the action.[3]

2.2 The Purposes of Discovery

The discovery process serves three major purposes as below:

The first is the preservation of relevant information that might not be available on trial.[4] For a witness, if he/she is ill, or will be out of the country at the time of trial, the Discovery may be used to elicit testimony of that witness which will ultimately be used on trial. The earliest discovery procedure in the federal court was primarily designed for this purpose.[5]

The second is to ascertain the issues that are actually in controversy between the parties.[6] In a discovery process, first, issues which are not likely to be seriously contested may be removed before trial. Once the area of substantive dispute is defined, the discovery devices will then serve to define the crucial issues within that area so that the parties can concentrate on obtaining evidence on those matters.

The third and the most important for a party is to obtain the information that can be regarded as admissible evidence on the issues in dispute. In a seminal opinion about the scope of discovery, the US Supreme Court declared that "mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation."[7] Discovery is designed to serve as the principal mechanism by which such "mutual knowledge of all the relevant facts" will be achieved.[8] For example, if an eye-witness to the event is not willing to talk to a party, what should the party do? The Discovery then furnishes the means to solve this problem. That party can require the witness to submit to a deposition, during which the witness, under oath, must express his knowledge about the facts. The

---

[2] Id. at 379.
[3] See Note, *Developments in the Law-Discovery,* 74 Harv. L. Rev. 940, 942 (1961).
[4] Fed. Civ. Proc. Rule 27.
[5] See fn. 3 at 940, 949.
[6] Fed. Civ. Proc. Rule 32.
[7] *Hickman v. Taylor*, 329 US 495, 507 (1947) , in Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1298 (1978).
[8] Id. at 501.

Discovery also provides tools for one party to obtain from the opposing party's facts, documents, and other items relevant to the case. Permitting the parties to use discovery devices is expected to ensure that all evidence will be unearthed and that the concealment of relevant information and materials is minimized. All devices are designed by Discovery to assure the just adjudication of a controversy.

In addition to the three purposes mentioned above, discovery in practice often tends to encourage settlement before trial. According to Discovery, the relative strength of the opposing claims may be revealed and the factual basis be found. Moreover, the pre-trial conference, which brings the parties together under conditions, is often conducive to the resolution of disputes through negotiation. This can contribute to the settlement before trial.

2.3 The Mechanism of Modern Discovery

Under the Federal Rules of Civil Procedure a plaintiff takes action to file a complaint setting forth a "short and plain statement of the claim" upon which he seeks relief.[9] In his answer brief, the defendant may move to dismiss all or part of the complaint, may deny the allegations or set up affirmative defences, or may combine any of these pleas in the alternative.[10] Any party may request a more definite statement when his opponent's pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."[11]

After the pleading process begins, a broad range of discovery devices become available. With few exceptions these devices operate on the initiative of the parties without court intervention. They may be used to secure any information or material which is relevant to the subject matter of the pending action and is not privileged; the information sought need not to be admissible in evidence on trial so long as it "appears reasonably calculated to lead to the discovery of admissible evidence."[12] All the responses to discovery requests must be under oath.

2.3.1 Oral Depositions

An oral deposition allows the attorneys for the various parties in the case to confront and question any person, including a party, regarding the subject matter of the case.[13] It is often used as a tactical device to enable the examining party to

[9] Fed. Civ. Proc. Rule 8(a).
[10] Fed. Civ. Proc. Rule 8(b).
[11] Fed. Civ. Proc. Rule 12(e).
[12] Fed. Civ. Proc. Rule 26(b).
[13] Fed. Civ. Proc. Rule 30(c).

learn the facts upon which his opponent relies and thus to appraise the case he will have to handle. More often than not, an attorney may schedule a deposition merely by notifying the opposing attorney of the time and the place where the deposition is to be taken,[14] no court order is required. The deponent is placed under oath by any officer who is in charge of the deposition; that officer can be anyone who is authorized to administer oaths or anyone upon whom the parties agree.[15] The officer will make the report which involves questions, answers, and any objections made by the parties or by the witness.[16]

Using this tool, the names of the witnesses and the information leading to further evidence are obtained and the testimony of an opposing party or hostile witness are frozen so that it can be changed at trial only at the risk of impeachment. In addition, depositions may be used to preserve the testimony of the examining counsel's own client or witness in case he would be unavailable to testify at trial.[17] Deposition also contributes to the pre-trial settlement, not only by each party's full awareness of relevant facts but also by the personal contact between the parties and attorneys at the deposition-taking.[18]

On the other hand, the main disadvantage of taking a deposition lies in the possibility that the witness may be given a lesson as to how to conduct himself under cross-examination. The expense of taking the deposition is another significant disadvantage, especially in small cases.

2.3.2 Written Depositions

If a witness lives in a distant place and could not be present at the oral deposition, Federal Rule 31 provides for depositions "upon written interrogatories,"[19] i.e., the parties can prepare direct and cross interrogatories and submit written questions to an examining officer, who reads them to the witness and records his oral answers. The procedure saves time and money. Nevertheless, because the opposing party of a hostile witness usually does not want to give clear answers to the additional questions, the benefits of saving time and money are often outweighed. As a result, written depositions are used primarily to obtain routine information that is not substantial in the dispute. They may also be used in which the amounts involved are small and the investment in terms of investigation and

---

[14] Fed. Civ. Proc. Rule 30(b).
[15] Fed. Civ. Proc. Rule 28.
[16] Fed. Civ. Proc. Rule 30(c).
[17] See James W. Moore, Federal Practice ¶ 26.02, at 1015 (2nd ed., 1950), cited from Note, fn. 3, 74 Harv. L. Rev. 940, 945 (1961).
[18] Archie O. Dawson, *Examinations before Trial in State Courts*, cited from fn. 3 at 945 (1961).
[19] Fed. Civ. Proc. Rule 31.

discovery must be kept at minimum.[20]

2.3.3 Written Interrogatories

Written interrogatories may only be used between parties. It allows one party to send another a series of questions, to be answered under oath within a specific time.[21] No court order is required and no officers need to be appointed; the entire exchange is accomplished by mail. Unlike a deposition, a set of interrogatories may not be sent to any person who possesses information regarding the subject matter of the case, but only to parties.[22]

A party has the duty to respond to interrogatories with regard to the knowledge of himself as well as other persons that can reasonably be obtained through investigation.[23] Thus a party must consult with his attorney, employees, and other agents who have or might have relevant information. The responding party is also required to state his opinions or contentions as the facts relevant to the subject matter of the action.

Interrogatories have proven effective in enabling the defendant to obtain a bill of particulars by serving the defendant together with the answer or shortly thereafter. They are also particularly helpful in acquiring detailed facts, such as bookkeeping entries, disclosure of which by means of oral examination would be cumbersome and expensive.[24]

On the other hand, because interrogatories require no court approval in the first instance, they are relatively inexpensive to propound, and may impose a considerable burden of research and expense on the answering party, interrogatories may also be used as a means of harassment. So the 1991 Amendment to Federal Rule 33 has limited the number of interrogatories to fifteen.

2.3.4 Discovery and Protection of Property

Documents and other personal or real property in possession or control by parties and non-parties may be inspected according to Rule 34 of Federal Civil Procedure.

Whenever disclosure could lead to admissible evidence, a party is entitled to inspect and copy any document or inspect any real or personal property under the

---

[20] See Friedenthal, Kane & Miller, fn. 1 at 400.
[21] Fed. Civ. Proc. Rule 33.
[22] Fed. Civ. Proc. Rule 33(a).
[23] Fed. Civ. Proc. Rule 33(b).
[24] See James, A. Fowler, *Discovery under the Federal Rules of Civil Procedure*, 26 Tenn. L. Rev. 475, 481 (1959).

custody or control of another party.[25] Under this rule, inspection of property in the control of a party is permitted on notice without a court order. If the responding party believes that the evidence is not relevant, or that the time and place set forth in the notice are inconvenient, or inappropriate, he must make the objection in court.

Since the 1991 Amendments of Federal Rule 34(c) and 45, non-parties may be subpoenaed to produce documents and things and to submit to inspections of premises. Now attorneys, as officers of the court, may themselves issue subpoenas in limited circumstances. However, the attorney has a duty to avoid imposing any undue burden or expense on a person subject to the subpoena and may be sanctioned for a breach of that duty.[26] The protection of persons subject to subpoenas is expressly defined.[27] When the non-parties withhold information on a claim of privilege, they must submit a specific written objection to the party or attorney designated in the subpoena.[28]

2.3.5 Request for Admission

Assume that a litigant already knows certain facts, if he can obtain admissions from his adversary, then it would be unnecessary to prove such facts at the trial.

The Rule 36 for "admission of facts and of genuineness of documents" exactly serves this purpose. One party may serve upon any other party a written request to admit the truth of certain matters of fact that are in dispute or to admit the genuineness of any relevant documents at any time without the necessity of a court order.[29] When objecting on other grounds, a timely motion must be made to the court by which the subpoena is issued.[30]

The party who receives a request to admit must respond under oath, either denying the matter sought to be admitted or setting forth in detail the reasons why the party cannot truthfully admit or deny the matter. The responding party also may object to a request as improper or claim for a privilege that excuses a response.[31] If the responding party fails to respond within the prescribed time, he/she may be held to have admitted the matters set out in the request for admission.[32] However, if a party refuses to disclose facts in compliance with the

---

[25] Fed. Civ. Proc. Rule 349(a).
[26] Fed. Civ. Proc. Rule 45(c).
[27] Fed. Civ. Proc. Rule 45(c).
[28] Fed. Civ. Proc. Rule 45(c)(2)(b), (d)(2).
[29] Fed. Civ. Proc. Rule 36(a).
[30] Fed. Civ. Proc. Rule 45(c)(3)(A).
[31] Fed. Civ. Proc. Rule 36(a).
[32] Fed. Civ. Proc. Rule 36(a).

other "discovery" rules which can result in adverse judgement or a contempt citation,[33] the only penalty for unreasonable denial of a matter whose admission is requested under Rule 36 is an order to pay the costs incurred in making the proof.[34] In effect this constrains the use of the rule. Moreover, as to those obviously undisputed matters which counsels are willing to admit, the rule 36 procedure may be too cumbersome to be useful in general. In practice, the counsels often reach agreements on such issues by the parties' agreement or as part of the pre-trial conference procedure. So request for admission is used primarily for the elimination of undisputed matters, rather than the ascertainment of facts or the preservation of testimony for trial. Although there are some confusion and abuse in applying Rule 36(a),[35] the request for admission is an inexpensive way to use, and is quite direct. Requests to admit the genuineness of documents have proven quite useful.[36]

Because of confusions as to how specific a denial must be or how detailed the reasons why a party "cannot truthfully admit or deny," Rule 36(a) was amended in 1946 to enable a party to file objections to the requests while not having to reply at his/her peril to improper submissions.

2.3.6 Physical and Mental Examinations

In many cases the physical or mental state of a person will be at issue. The person, and those on friendly terms with, is likely to access current/past medical records due to the privileged status, but an opposing party will not be accessed. Therefore, the latter, by which his own medical professional has an opportunity to observe the person whose mental or physical state is in controversy, needs to prepare for trial and if necessary, to testify.

Traditionally, only the parties concerned are subject to physical or mental examinations requested by opposing parties.[37] Because a party can be required only to make a good-faith effort to present for examination, if the proposed examinee under any circumstances refuses to cooperate, the request for an examination will be thwarted and no sanctions can be imposed.[38]

No party has the right to an examination without obtaining a court order on the basis of showing of good cause.[39] A physical or mental examination involves an

---

[33] Fed. R. Civ. 37(B).
[34] Fed. R. Civ. 37(C).
[35] See Friedenthal, Kane & Miller, fn. 1 at 404.
[36] Id. at 406.
[37] Advisory Committee Note to the 1970 Amendment of Rule 35(a), reprinted in 48 F. R. D. 487, 529. See *Clark v. Geiger*, 31 F.R.D. 268 (E. D. Pa.1962).
[38] Fed. Civ. Proc. Rule 37(b)(2)(E).
[39] Fed. Civ. Proc. Rule 35(a).

invasion of a person's privacy that ought not to be required without serious consideration of the circumstances. The court has broad control over the time and place of the examination, the examiner or examiners who will conduct it, the scope that the examination will take, and other details such as who will be present when the examination takes place.[40]

Because of the importance and characteristics of the information in a report of a physical or mental examination, the existing special rules require exchange of examiners' reports. A party, who is examined pursuant to the discovery rules, even when the examination is endorsed by stipulation without court order, is entitled, upon request, to receive a copy of the examiner's report, which includes all findings, results of tests, diagnoses, and other conclusions.[41] The normal limits imposed on discovery of another party's expert do not apply to physical or mental examinations.[42]

To secure compliance with the above orders the court may impose various sanctions enumerated in Rule 37. If any person refuses to answer a question without substantial justification, the court may order him to answer and may order him to cover a reasonable part of the expenses incurred in obtaining the order. Disobedience of such an order may cause a party or witness to be condemned for contempt of court. In addition, when a party refuses to obey an order to answer, produce documents, permit entry upon land, or submit to a physical or mental examination, the court has discretion to make any order which is "just" in that circumstance. Among other sanctions, the court is specifically empowered in these situations to consider certain facts as established against the recalcitrant party, disallow designated claims or defences, refuse to admit certain evidence, strike any part of the disobedient party's pleading, stay or dismiss an action, render a judgment by default, and, except in the case of refusal to submit to a physical or mental examination, order the arrest of the party. Finally, the court may enter a default judgment or judgment of dismissal against a party who wilfully fails to appear for the taking of a deposition after timely notice or who fails to answer the interrogatories.

2.4 Scope of Discovery

The various discovery devices discussed above are components of a mechanism designed to promote the end of truth and to reduce the "sporting" element out of litigation. The scope of discovery is extremely broad under the Federal Rules before the 2000 Amendment. Information can be obtained regarding any matter,

---

[40] Fed. Civ. Proc. Rule 35(a).
[41] Fed. Civ. Proc. Rule 35(b).
[42] Fed. Civ. Proc. Rule 35(b)(2).

not privileged, that is relevant to the subject matter involved in the action and whether or not the information sought will be admissible on trial, just so long as it is reasonably calculated to lead to the discovery of admissible evidence.[43] This language defines the scope of discovery as broadly as one can imagine in a legal system relying upon the concept of evidentiary relevance.[44] Any doubts about the breadth of the scope of discovery enacted by these rules is to be cleared by another passage in the same rule: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[45] Attorneys could not only use all known discovery devices to inquire about any issues relevant to the "subject matter" of the lawsuit, but could even require information not admissible on trial as well.[46]

However, in order to protect social interests such as the privacy and secrecy of individuals, this mechanism must operate within certain limits, which should involve the persons who may be examined and the subject matter encompassed. Generally speaking, there are three limitations on the scope of Discovery.

2.4.1 Privileged Matters

Privileged matters refer to the information that falls under the formal privileges as recognized under the rules of evidence.[47] The person who intends to claim a privilege is obliged to establish its existence. This matter is excluded from discovery in order to protect the privacy and secrecy of individuals in certain relationships. These relationships include the lawyer-client,[48] doctor-patient,[49] priest-penitent,[50] husband-wife,[51] and other similar privileges that exist in particular jurisdictions. Maintain secrecy in these relationships is deemed more important than allowing full access to this information for litigation purposes.

In addition, there are certain testimonial limitations such as the privilege against self-incrimination, the privilege of one spouse not to testify against

---

[43] Fed. Civ. Proc. Rule 26(b).

[44] Of course the scope of discovery was not unlimited. In addition to privileged materials, the rules place severe limits on the discovery of an adversary's trial preparation materials and expert witnesses.

[45] Fed. R. Civ. P. 26(b)(1) (1991) (amended in 2000).

[46] Consider, for example, the expansive power that Rule 34 granted to parties to force their adversaries and even non-party witnesses to turn over private records at any time after the early stage of a lawsuit.

[47] Fed. Evid. Rule 501.

[48] West's Ann. Cal. Code §§ 950–62, see Friedenthal, Kane & Miller, fn. 1 at 404.

[49] West's Ann. Cal. Code §§990–1007, see Friedenthal, Kane & Miller, fn. 1 at 404.

[50] West's Ann. Cal. Code §§1030–34, see Friedenthal, Kane & Miller, fn. 1 at 404.

[51] Id., West's Ann. Cal. Code §§970–73, 980–87.

another and the privilege not to reveal the identity of confidential police informants, which are also applicable. As a matter of policy, we deem the protection of the individuals involved to outweigh any harm that might come about because the information is not disclosed. The law simply deems it too coercive to compel a person to testify against himself, and this notion is extended to spouses as well. A privilege, on the other hand, is designed to further the social interests extrinsic to litigation that is deemed sufficiently important to require that certain matters remain confidential, no matter how probative they may be.[52] As a general rule, disclosure of a privileged matter during discovery will lead to a denial of any later claim for privilege.

Finally, there has been increasing attention to the need of protecting the privacy of a third person. In this field a "semi-privilege" appears to emerge to prevent the disclosure of certain information that would invade the privacy of non-parties.

2.4.2 Work-Product Doctrine

In the initial federal discovery rules there was no provision limiting the discovery of information prepared for litigation. Not long after the rules went into operation, however, it became evident that a problem existed with respect to that type of information. In *Hickman v. Taylor*,[53] the Supreme Court engrafted a judicial exception on the broad federal discovery rules, holding that, in the absence of a showing of need, an opposing party could not discover information obtained by an attorney while preparing for litigation. This so-called "work-product" rule is based on the idea that every attorney should be free to investigate all aspects of a case, whether favourable or unfavourable to his client, without fearing that the opposing party simply could obtain unfavourable information and put them to use. Conversely, every attorney should be encouraged to investigate his own case, and not to remain passive, waiting for the opposing counsel to do all the investigative work.[54] It is assumed that a rule compelling revelation of the materials gathered by the lawyer in exercising his legal skills in anticipation of litigation will lead to "inefficiency, unfairness and sharp practices."[55]

2.4.3 Expert Information

In many cases the parties will employ experts to assist the preparing of a case for

---

[52] McCormick, Evidence 152 (1954).

[53] 329 US 495 (1947), cited from Wayne D. Brazil, *The Adversary Character of Civil Discovery*: *A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1298 (1978).

[54] See Friedenthal, Kane & Miller, fn. 1 at 407.

[55] See 329 US 495, fn. 53 at 1295, 1298.

trial. The expert's theories and opinions may be based on the nature of his training and certain assumptions that are part of his expertise.[56] In the United States the witness usually belongs to one party or another, so do the expert witnesses. Thus, for the party who hires experts, he/she would not like the experts' opinion to be discovered. For the opposing party, however, he/she must be able to ascertain what assumptions are from the hired experts in order to counter them on trial. The Federal Rule 26(b)(4) provides a model for discovery of expert information. Any party may depose an expert whose opinions may be expressed on trial after receiving a detailed report from the expert. Except in exceptional circumstances, if an expert will not be called as a witness, a party should not be permitted to discover the information.

2.5 Temporary Conclusion

According to the above analysis, we find that the Discovery procedure itself has these defining characteristics.

First, the pre-trial stage and the trial stage are two separate but interdependent components of the litigation process in the United States.

Second, the Discovery in the United States is a lawyer-dominated system which leaves to partisans the work of gathering and producing the factual material upon which adjudication depends. Attorneys have sole responsibility for fact investigation. They are authorized to depose witnesses, examine documents and elicit answers to written interrogatories. The officer only minimally supervises the exercise of attorney's legal authority and enforces compliance with their demands for information. Only in special circumstances does the officer charge the discovery. So the American judge's role in the trial is passive and primarily referees between opposing attorneys.

Third, the Discovery provides sufficient means for the parties to collect evidence for trial. There are six specific devices available for the parties to collect all kinds of evidence possessed in the parties and non-parties. Different sanctions under different conditions are also provided to guarantee the compliance with the mechanisms by the relevant individuals.

Discovery plays a central role in civil litigation in the United States. Via different mechanisms laid down in the discovery procedure, the maximum amount of information can be collected before trial and the purpose of reducing, if not eliminating, trial victories based on surprise tactics can be accomplished.

However, after many years' practices, increasingly shortcomings about this discovery process have become pronounced. More often than not, the liberal discovery rules are seriously abused. On account of the division into pre-trial and

---

[56] See Friedenthal, Kane & Miller, fn. 1 at 392.

trial, the parties have to discover for the entire case and investigate everything that could possibly come up on trial, because once entering the trial phase the parties can seldom go back and search for further evidence. As a consequence, demands for massive numbers of documents and service of huge numbers of unnecessary and burdensome interrogatories raise litigation costs substantially. Both large corporations and individual litigants suffer from the overuse of discovery. Whatever the cause, whenever discovery is invoked not to elicit the truth but to force a settlement, justice is subverted.

With the mutual control of fact-gathering by attorneys on behalf of adversary parties in the United State's procedure, there is an intense conflict between partisan interests and orderly disclosure of relevant information. Partisan preparation may result in witness coaching, intentional or otherwise. And because expert witnesses are usually called by one of the parties, they are generally vulnerable to impeachment on the grounds of bias.

In the final analysis, the expense and complexity of discovery and trial, as well as the opportunities and incentives for lawyers to influence witnesses' testimony are inevitable in a system of adversarial facts production.

Unduly burdensome discovery demands and excessive delay are caused by clearly frivolous objections and just plain stalling. Such problems are serious but can be solved by proper judicial management within the present structure.

3 Evidence Collection in Germany

3.1 History of German Civil Procedure

Contrary to the United States, the main characteristic of German Civil Procedure is judge-dominated in the civil proceeding. However, in the German Code of Civil Procedure (ZPO) which was enacted shortly after the foundation of the German Reich to establish a uniform law of procedure in Germany, judge was not in a dominant position. At that time, just similar to the procedure in the United States, "according to the basic idea of the Code, the parties had complete power to manage their case, and to determine and specify the contents, course and duration of the proceedings."[57] But based on the liberty of the parties, this procedure was a nearly ideal instrument for delaying the proceedings by dilatory tactics.[58] Then at the request of lawyers who complained of the length of civil proceedings, on the Austrian for example, the first amendment was enacted in

[57] Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 Am. J. Comp. L. 687, 687 (1983).

[58] Baumbach, Lauterbach& Hartmann, Zivilprozessordnung, Einl, I (40th ed,1982), in Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 Am. J. Comp. L. 687, 688 (1983).

1909. Judge began to take a more positive role in the case by fixing a very early date for the first hearing proceeding. Since the possibility of fixing deadlines for pleading were left to the absolute discretion of the court, this amendment was proved to be a failure.[59]

The second reform, the so-called *Emminger Act of 1924*, broke with the liberal conception of procedure. Again, informed by Austrian law, the principle of party-prosecution was restricted and the power of judge strengthened. The court was permitted to use its influence to encourage proper motions, conclusive allegations, and sufficient offers of proof. At the same time, all trial courts were bound by law to prepare the case so that the proceedings could come to an end at one oral hearing.[60]

Because concrete measures of preparation were at the discretion of the court and most judges took advantage of their duty to ascertain matters only in a reserved, cautious way, always anxious to conceal their own legal view before the pronouncement of the adjudication,[61] in 1933 the next amendment was enacted. It no longer upheld the so-called "sporting theory of justice" but conceived of judicial procedure as a public welfare institution.[62] The duty of the parties to tell the truth was introduced by the amendment and the party prosecution was abolished. In sum, "all kinds of pleadings, summons and official notices of the court were now served by order of the court, regularly by mail, and all dates for conferences were fixed by the court."[63]

Thus, since the various legislative amendments of the ZPO, the dominant position of the parties was weakened step by step and eventually replaced by the court.

3.2 Procedure Allocation for Evidence Collection in Germany

Contrary to the litigation process in the United States which is divided into trial and pre-trial phases, there is one unified litigation process in Germany. There is no separate discovery process in German Civil Procedure Law, the court proceedings also do not provide any effective substitute for American discovery methods. German law no longer follows the second principal of the American adversary system, the principal of party-prosecution.[64] And because there is no

---

[59] See Stein, *Der erste Verhandlungstermin nach der neuen Civilprozessordnung*, (1900) DJZ 33, 34, in Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 Am. J. Comp. L. 687–88 (1983).

[60] Id.

[61] Id.

[62] Id.

[63] Id. at 689.

[64] See Gottwald, fn. 57 at 690.

jury, the litigation process can proceed in relatively informal ways which include "hearings."

For a long time before Stuttgart model was introduced, the complaint and the subsequent pleadings were at the discretion of the court and often cause the adjournment of the litigation. Even after the so-called Emminger Act of 1924 was enacted when the court has a general duty to use its influence to encourage proper motions, conclusive allegations, and sufficient offers of proof, [65]concrete measures of preparation remained at the discretion of the court and most judges took advantage of their duty to ascertain matters only in a reserved, cautious way. After the Second World War the long duration of civil proceedings was again viewed as an obstacle to justice in the Federal Republic. In order to avoid unnecessary delays in the proceeding of a court case, Stuttgart Model was introduced and later was successfully adopted by other panels.[66]

The basic idea of the model is the turning away from a succession of formal hearings to prepared pleadings and the restoration of a genuine oral main hearing (trial). The presentation of evidence takes place in one uninterrupted court hearing. The parties have to prepare the case for this hearing in such a way that they can expect to settle the case definitively and to come to the adjudication at the end of this hearing or on a special date for the pronouncement shortly thereafter. Both parties have to cooperate with the court in the preparatory phase because otherwise the court will reject any subsequent arguments. In view that the experience with the model panels had led to good results, German civil procedure was amended by the so-called Simplification Amendment of December 3, 1976, which took effect on July 1, 1977.

While there is no pre-trial stage in German Civil Procedure, now the German code of civil procedure provides for two ways in which the judge may manage a case after the claim has been lodged. After the initiation of a case by the plaintiff filing a complaint to the court, the judge may choose either the written pre-trial procedure or he/she may fix an early first trial hearing at which the issues will be discussed orally with the parties. The choice usually depends on personal practice and experience. The unanimous purpose behind both forms of procedure is that of preparing the trial as efficiently and quickly as possible, thus allowing the court to deliver the adjudication immediately after the first trial hearing. The main obligation that the German legislator imposes on the judge with respect to both pre-trial procedures is to "accelerate" litigation as possible.

Although the legislators in Germany try to introduce the preparatory stage to

---

[65] Id. at 688.

[66] See Herbst, *Die Verbreitung der Hauptverhandlung in Zivilsachen in Bayern*, in Bender, *Tatsachenforschung in der Justiz* 167 (1972), in Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 Am. J. Comp. L. 687, 693 (1983).

the litigation process to some extent like the pre-trial stage in the US, if the dispute could not be resolved during the written pre-trial procedure or the early first trial hearing, under the control of the court, the proceedings move on to the main hearing, then after a mixture of oral discussion and proof-taking, the judge gives the final judgment. Thus in Germany, the evidence collection mechanism is available throughout the whole litigation till the end of the main hearing.

3.3 Mechanism of Evidence Collection in Germany

3.3.1 Claim and Evidence Exchange in Preparatory Pleadings

The German lawsuit is initiated by the plaintiff. Except in certain special matters, the parties must be represented by lawyers.[67] Based the belief that a system of procedure tied to written pleadings would ruin substantial justice, the German Civil Proceeding is oral which means that the court is to look to the oral statements of counsel at an oral argument, especially at the first session. It does not, however, reject written statements by the parties.

The lawyer commences the action by filing a complaint with the court. The complaint, signed by counsel, besides naming the parties and the court, sets forth the plaintiff's demands, the redress to be sought, and a distinct statement of the grounds and object of the claim.[68] In addition, it contains a statement of plaintiff's means of proof including names of witnesses and references to documents or the physical copies thereof.[69] The answer contains, besides formal elements, the defendant's demands and the grounds thereof, his response to the plaintiff's allegations, and his means of proof.[70] Evidence to be relied upon is normally set out at the end of each paragraph of text.

It may look like this: The claimant parked the car on May 15, 1996 in front of his house, Tierstrabe 14. Proof: Peter Schmidt, Robertsrabe 11, 13457 Berlin, as witness.[71]

Other writings filed during the course of the action will follow more or less these patterns.

The purpose of the complaint and the answer was to serve the purpose of informing the opponent sufficiently to enable him to get ready for the session of oral argument which lay ahead, and to persuade and satisfy the court on the merit of the case. Thus, complaints, answers and further pleadings prepare the hearings

---

[67] ZPO 78.
[68] ZPO 130.
[69] ZPO 253.
[70] ZPO 130.
[71] Jurgen Beier, *The Woolf Report and German Civil Procedure*, XIX (1) Liverpool L. Rev. 67, 75 (1997).

of the case in a way which makes oral explanations of the facts and the issues of fact and superfluous legal provisions.[72]

Before the main hearing, with the complaints and answers, the parties should also provide the court with all the documents that support each one's case and that are referred to in his claim. The opponent should be informed of these documents. The opponent may read these documents in three days which can be shortened or prolonged.[73] There are no restrictions as to the number of documents which may be produced.

The immediate notification of evidence enables the court to summon the witness concerned at every stage of the litigation. Clarifying the evidence parties, provided by the parties, may make it easier for the court at later stage in the proceedings to propose a settlement.

The sanctions for the parties that delay to submit the channels for charge and to defend or excess the evidence adducing time limit are within the discretion of the court. New arguments or new evidence not produced or submitted in time may be struck by the court if their consideration would delay the settlement of the case and such a delay is due to gross negligence.[74] If a party fails to comply with an order of the court to answer the claim or reply or react to references by the court within a fixed time, they will be lost unless the excuse for delaying them is shown.[75]

This kind of claim and evidence exchange seems to some extent similar to the automatic evidence disclosure in the United States. But its scope is narrower than that in the United States, only the evidence that benefit any party are disclosed and the purpose of the disclosure is different either. In the United States, the automatic evidence disclosure aims at further evidence collection. But in Germany, this exchange is designed to prepare for the main hearing and protect party's debate right.

3.3.2 Court's Authority to Initiate Evidence Collection

During the whole proceeding, the courts are authorized by Sections 141–44 or the legislation to make various orders for evidence collection on their own.

After the receipt of the complaint, and generally after receiving the answer, the court may summon the parties to be present in court if it is necessary for them to clarify the case. If the parties summoned are not present in court on time, the

---

[72] See Gottwald, fn. 57 at 689.
[73] ZPO 134.
[74] ZPO 296(2).
[75] ZPO 296(1).

court can file the fine to him.[76] The court may request the parties to submit relevant documents in their possession which they have referred in the complaint and the answer.[77] The court also has the power to request the parties to submit the specific documents which are relevant to the oral argument and the judgment in their possession.[78] The judge may take a view of the locus in quo or the like, and summon the expert.[79]

To get prepared for the main hearing, the legislature internalizes the essence of these powers authorized by 141–44, adds to them somewhat, thereby making the bundle available to the courts for use prior to oral argument according to ZPO 273. Then several measures are to be taken. The judge may order parties to clarify or amplify allegations of his writings or to produce documents in his possession.[80] The judge may request public authorities to transmit documents or furnish official information. When it is apparent that the defendant will oppose the claim, the judge may take a view of the locus in quo or the like, or summon the oral argument witnesses nominated by the parties in their writings, or experts.[81] The court's power to authorize the issuance of preparatory orders between orders is expected to be lasting throughout the case. Thus it complements Sections 141–44 which appear to contemplate orders made at the sessions proper on the basis of what is revealed or discussed.

It is important to note that party-hearing under ZPO 141 should be distinguished from party-testimony under ZPO 288-90. Party-hearing does not constitute evidence and can only serve to clarify the matters at issue. But while party-hearing is not regarded as evidence, the case's procession may be facilitated by it.

3.3.3 Lawyer's Role in Preparation of Facts

The German lawyer can obtain access to a variety of official documents including police files and records of criminal proceedings which may involve the statements of persons who are likely to be regarded as witnesses in the civil litigation.

The lawyer may examine his client's files and consult fully with his client or, when the client is a corporation or similar entity, with the board of directors or employees who in charge of the matter.

Lawyer's access to witnesses outside court is quite limited. For the prospective

---

[76] ZPO 141.
[77] ZPO 142.
[78] ZPO 143.
[79] ZPO 144.
[80] ZPO 273(2) no.1.
[81] ZPO 273(2) no. 2, 3, 4.

witnesses, they are likely to be asked to talk with the client under the instruction of the lawyer to go about assembling the facts. Then the client may give the lawyer reports about the witnesses. In most cases, only by consulting with his client can the lawyer prepare himself for the facts. Further, for contacting with the client or the client's immediate entourage, he/she may be wary of talking with those who may ultimately testify in court, but only in singular cases he/she may and will talk with prospective witnesses.

It is the judges, who conduct the proof-taking in court primarily, thereby weakening the lawyer's expected involvement in the factual side of the case.

3.3.4 Order of Proof-Taking in Oral Argument

3.3.4.1 General Introduction

When it appears to the court at an oral argument with contested issues of fact, it will order proof-taking. Proof-taking is conducted under the court's instruction,[82] and the parties may attend in the proof investigation.[83] The order may be issued at the close of the discussion and be followed immediately by taking evidence, for example, by reading a document, or hearing a witness or expert who is present (perhaps being summoned by an order under Section 141 or 272b) or who can be called without delay. More often than not, however, the court will close the discussion by issuing a proof-order[84] under which evidence has to be collected before a date. In theory the proof-order describes with precision the theme on which the particular person is to testify.[85]

In the writings adopted with possible changes at an oral argument, counsel may have proposed various forms of proof on several issues. For efficiency, the court is entitled to call for nominated evidence which seems satisfactory, thus avoiding cumulative proof-taking. Convenience and availability of witnesses must also be considered. These matters may well have been discussed at an oral argument. Counsel may at the same time have objected to the opponent's proof offers on the grounds of inadmissibility under particular evidence rules or on the grounds of privilege. But first, such objections may be reserved to the proof-taking, for they are best understood when the proof-seeking is under way; and in the case of a privilege waiver by the witness, he/she will have to be heard from in any case.

There is no compulsion for the court to attempt to take proof on all the

---

[82] ZPO 355.
[83] ZPO 357(1).
[84] ZPO 358, 359.
[85] ZPO 359.

apparently contested issues on one occasion. On the contrary, if the court perceives that there is a single matter likely to be determinative—for example, a defence—it may focus its proof-order on that matter and await the results of the proof-taking, as appraised at subsequent oral arguments, before issuing any further proof-order.

One cannot be the plaintiff's or defendant's exclusive witness or evidence in German judicial practices. Burdens of persuasion of course fall to one or the other party. A witness, as distinguished from an expert, will not be heard in ordinary litigation unless nominated by a party.[86] But only the court is entitled to call for nominated witnesses and it exercises discretion as to the order and number of the nominated witnesses.

3.3.4.2 Witness

In Germany, the rules applicable to parties are different from those applicable to witnesses. The parties may apply for summons on the witness. The witness should go to the assigned place to do the deposition. Still, the court may order the witness to submit the answer in the written form as the court sees fit in view of the content of the question and the witness' personality.[87] If from the beginning of the proof-taking, the court thinks that they could not get a direct impression to make an appropriate judgment based on the written response by the witness(es), then they may designate the judge of their court or another court to investigate the proof, as such: (1) If it is appropriate to hear the witness in the site to find the truth or according to the law, it should not hear the witness in court. (2) For some good reasons the witness could not go to the court. (3) The witness lives far away from the court and according to the importance of its statement, the witness is not anticipated to go to the court.[88] In this respect, for instance, the president of Germany should be heard as the witness in his residence.[89] For the witness summoned who does not go to the court, the court may order him to afford the fee and at the same time file a fine to him.[90] The sanction is the same if the witness refuse to testimony without good reasons.[91]

3.3.4.3 Documents

The scope of document production of parties is strictly defined. On motion of a

---

[86] ZPO 379.
[87] ZPO 377(3).
[88] ZPO 375(1).
[89] ZPO 375(2).
[90] ZPO 380.
[91] ZPO 390.

party the court may order the opponent to produce documents to which the latter has referred as a means of proof in his writings or at an oral argument and which are in his possession.[92] For other documents beyond the scope mentioned above, only when the party has a right to demand or inspect under rules of private substantive law, for example, those set out in the Civil Code, is the court able to order the opponent to produce documents on similar party motion.[93] On one party's motion the court can also request the appropriate public authority to supply documents to which the party does not have free access.[94] If one party needs to rely on a document in the possession of a third party, he/she can ask the court to set a time frame within which he/she will seek its production.[95] This should not involve any order or sanction against the third party. In no cases can the court directly compel the production of document from the third party by imposing fine, imprisonment, or the like. Instead, the production of document can be compelled only by the party's commencing a separate proceeding in which his success will be measured by his private substantive law right or his right under public law and administrative regulations.[96]

The failure of one party to produce a document under a proper order made in the principal litigation, unless excused, will justify the court in drawing inferences as to its contents and the court may accept assertions of the moving party as to the existence and substance of the document.[97]

3.3.4.4 Party Testimony

In sharp contrast to the US judicial system which obliges the party to provide information,[98] the German system does not necessarily compel a party to testify. A party can offer to testify, and if the opponent consents, the court may but does not necessarily hear him. Even if the court does so, this should not involve whom the burden of the issue lies on.[99] A party having the burden of persuasion on an issue may propose that the opponent be called to testify on it, and the court may request the opponent to do so if, after hearing all other evidence on the issue, it still remains in doubt where the truth lies.[100] When in a like condition of doubt

---

[92] ZPO 423.
[93] ZPO 422.
[94] ZPO 432.
[95] ZPO 428
[96] ZPO 429.
[97] ZPO 444.
[98] As mentioned above, the obligation of a party to provide information pursuant to the discovery process is extremely broad which is only subject to the application of concepts of relevancy and confidentiality.
[99] ZPO 447.
[100] ZPO 445.

on an issue after hearing all other evidence, the court on its own motion may require either parties or one of them without regard to where the burden lies.[101] But a party when required may turn down any proposals for testimony or refuse to answer any particular question. In this situation, the court may draw inferences after considering all details of the case, especially the party's reason for refusal to testify either in general or with respect to specific questions.[102]

Party-testimony is considered a kind of last resort on the notion that what a party says is inherently unreliable because it is inevitably coloured by certain self-interests.

3.3.4.5 Expert Witness

Experts stand as they are in a midway between witnesses and members of the court, helping the court to find the facts or to draw conclusions from the given facts.[103] A party may challenge an expert for prejudice in the same way he/she can challenge a judge.[104] Fundamentally, it is the court's responsibility to determine whether an expert opinion is needed and then to designate expert.[105] The court may require the parties to designate expert.[106] When both parties agree upon the expert(s), the court cannot refuse to hear him, but the court can prescribe the number of the experts.[107] A party is not barred from filing the report of an expert that he/she has employed, but such a report would be treated circumspectly by the court, like a party's preparatory writing.[108] More often than not, an expert will submit a written statement in advance and then appear before the court for questions on it. A written opinion alone might be acceptable, but it remains possible that a party requires that expert to be present and defend it.[109]

3.3.4.6 Inquisition

On motion of the parties the court may designate one or more experts for inquisition, or designate one judge or another court for inquisition.[110] Based on the 1600(3) and (4), if it is necessary to certify the blood relationship, everybody

---

[101] ZPO 448.
[102] ZPO 446.
[103] ZPO 414.
[104] ZPO 406.
[105] ZPO 404(1).
[106] ZPO 404(3).
[107] ZPO 404(4).
[108] Benjamin Kaplan, Arthru T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure*, 71 Harv.L. Rev. 1193, 1243 (1958).
[109] ZPO 411.
[110] ZPO 372.

is obliged to accept physical investigation. But this kind of investigation should be harmless, conform to scientific principles and is sufficient to reveal the truth.[111] This investigation is compulsory and if the parties refuse it twice, the court may make him accept it by force and even sentence him to detention.[112]

3.3.4.7 Evidence Preservation

According to ZPO 485, when there is likelihood that evidence may be destroyed, lost, difficult to obtain, or with the consent of opposing party, the participants in proceeding or before proceedings apply to the court for the evidence's preservation. The court may begin inquisition\ witness-hearing or refer to expert evaluation. In effect, evidence preservation guarantees a means for the parties to collect relevant evidence. The evidence preservation before the commencement of the case may in some extent contribute to a dispute settlement out of the court.

But the scope of evidence preservation before the commencement of the case must be clearly defined so as not to injure the interests of other people. Thus ZPO 485(2) stipulates that when a party apply for a pre-trial expert evaluation, he/she must certify that the fact is in his legal interest and the subject matter must be restricted into these three institutions as follows: (1) to ascertain physical status of the relevant person or the value of the relevant object; (2) to ascertain whether or not the body is injured, the object is harmed or the lost of the object; (3) to ascertain the cost incurred in covering the hurt to the body or the harm to the object and the lost of the object.

In order to guarantee the protection of opposing party, the procedure was also carefully designed to ensure that the opposing party will get involved in the procedure. If the opposing party was not present on the day of evidence preservation, only when the opposing party are summoned in time can the preserved evidence be used.[113] When applying for the evidence preservation, one party should ascertain his opposing party unless he/she can clarify that it is not because of his fault that he/she is unable to ascertain the opposing party.[114] Having approved one party's application, the court can designate an agent for the unclear party to protect his rights.[115]

In sum, the basic obligation of providing information for court is more limited in Germany than it is in the United States.

---

[111] ZPO 372(1).
[112] ZPO 372(2).
[113] ZPO 493(2).
[114] ZPO 494(1).
[115] ZPO 494(2).

3.4 Scope of Evidence Collection

Contrary to the even boundless evidence collection in the Discovery, the standard of relevancy is significantly higher in Germany. If a party wants to apply for the court for evidence collection, a standard of materiality and procedural prerequisite of substantiation must be fulfilled.[116]

The materiality standard requires (1) that a material fact should be at issue and (2) that the nominated evidence should be material as the proof of such fact.[117] If it is uncertain that the evidence will lead in the direction of relevant information, the court will not help to collect it. Only those that are expected to influence the court's determination regarding the fact are qualified for evidence collection and presentation. The requirement of substantiation requires that a court may order testimony only when a party can generally describe the facts that the evidence is intended to prove.[118]

The German system thus places a substantial limit on any party seeking to utilize the state's power of coercion to secure information. The main purpose for this is to prevent the wasting of judicial resources and protect the efficiency and integrity of the system. Another purpose is to protect individuals and businesses from excessive coercion by the state and from the concomitant compliance costs and impingement on privacy rights that such coercion entails.[119]

In order to protect the privacy for persons and organizations, there are several strict confidentiality limits about privilege.

In Germany two sets of privileges are fundamental. The first set includes privileges based on the nature of the relationship between the witness and the facts sought. A spouse or near relative by blood, marriage, or adoption of a party to the litigation is allowed to refuse to attend testimony even without any reason; he/she may refuse even if the party is willing to have him testify; the court must instruct him on his privilege.[120] Public officials including judges are neither entitled nor be required to testify about matters learned officially unless they are authorized to do so by a superior authority. Ministers and doctors, lawyers and others who by virtue of their office, profession, or occupation are in charge of confidential issues, can turn down any request for disclosure; the court must refrain from asking questions which would impinge on the privilege of turning down any request for disclosure; but (passing the case of the minister) if the

---

[116] Ex 762.
[117] David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems*: *Germany and the United States*, 34 Am. J. Comp. L. 745, 763 (1986).
[118] Id.
[119] Id.
[120] ZPO 383.

person who has the privilege chooses to consent, the witness must testify.[121] These are similar to that in the US.

The second set includes the protection of many types of personal information,[122] including non-public business and artistic information and information which might bring dishonour or economic loss to the witness(es).[123]

In sum, there are several privileges applied to civil cases under certain circumstances. This is comparable to but broader than the American privileges discussed above. It reflects more concerns to the civil rights of individuals in Germany.

3.5 Temporary Conclusion

It is true that German civil procedure is to some extent analogous to the American Discovery. Through the claim and evidence exchange, which to some extent are similar to automatic disclosure in the Discovery in the United States, German procedure protects the litigants from lawsuit surprises. Yet the court proceedings do not in practice serve as an engine of discovery comparable to the modern American methods, and they are not conceived as serving these ends.

In Germany, however, there is another procedure design for evidence collection. Different mechanisms are offered to collect information to reveal the truth and provide justice. In one way or another, the court proceedings also provide opportunities for a party to get evidence from the opposing and third parties.

Contrary to Discovery in the US, the evidence collection is controlled by the court. The court has large authority for initiative evidence collection by itself. With the application of a party, the court may file proof-taking order to help the party to collect all kinds of evidence which are possessed by the other party. To collect the evidence possessed by the third party, the special litigation for evidence submission is available. The procedure of evidence preservation can also be used by one party for evidence collection. In addition, during the process of litigation, the parties are helped by the court's clarification obligation. So for the litigation in Germany, the fact-finding also can be realized.

While there is no official deadline for evidence adducing, the scope of evidence collection is strictly defined. Such kind of procedure design is compatible with the structure of the whole civil procedure in Germany. Because there is no jury trial, the litigation process is not continuous and often develops by several informal stages. Thus, proof-taking may proceed by instalments which

---

[121] ZPO 383, 384.
[122] See Gerber, fn. 117 at 764.
[123] ZPO 384(5).

means that there is additional time to reflect on such leads, pursue them, and formulate further proof offers. The judges control the evidence collection and law application by themselves because they think there is no other means of supervising the gathering of facts while assuring that only those gathered facts are directly relevant to the case. So the scope of evidence collection is strictly defined. The lawyer is not encouraged to fish for extra-court information or to meet the witness before main oral hearing lest the impartiality of the witness be injured.

4 Comparative Analysis of Two Different Procedures of Evidence Collection

Given the expense and complexity of the US judiciary system's devices of discovery and the inherent incentives in itself to distort evidence, some American scholars try to learn from the German Civil Procedure to reform the system of their civil procedure. The most famous one is John H. Langbein who claimed that "by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice," accordingly, the United State's system of procedure should be modified to incorporate the German advantage.[124]

Langbein's critique of the US Civil Procedure inspires a great debate about whether or not the German advantage should be accepted in the United States.[125] In support of Langbein's proposal, some scholars point out that "Indeed, what is fascinating about Langbein's proposal of adopting German-style judicial control of witness examination is that it forces us to appreciate fundamental differences between the legal cultures of Germany and the United States and to anticipate how altering one significant aspect of our legal culture may affect other important aspects."[126]

The difference between the German Civil Procedure and the US Civil Procedure is rooted in cultural differences over the respective roles of lawyers and judges. Although in some way the German Civil Procedure has some advantages, "it would be difficult to convert to the German system because it would involve changing, not positive law, but deeply rooted cultural definitions."[127] Judicial leading fact production is incompatible with a number of

---

[124] See Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 824 (1985).
[125] See Allen, *Idealization and Caricature in Comparative Scholarship*, 82 Northwestern Univ. L. Rev. 785 (1988).
[126] John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 Iowa L. Rev. 987, 988 (1990).
[127] Id.

defining features of American contemporary legal system.

First, the American judges' passive role and the attorney's positive role are a matter of legal culture. For the Americans, competition between attorneys is expected to produce fairness and justice.[128] After a long period of such legal practice, the judges view themselves as umpires between the contending parties and the attorneys regard themselves as playing the primary role in fact-gathering. This view is reinforced by other trial systems such as bar system, in which the attorney is reinforced by some fee structures that pay the attorney on hours. So unless there is a change in American fundamental cultural definitions, evidence collection controlled by the court would not be accepted by the Americans.

Second, the judge's passive role is also compatible with the American judges system. It contributes to a comparatively small number of judges. As a result, the American simply does not have enough judges to staff a German-style court.

Although there is still much criticism of discovery within the American legal culture, most scholars are proud of their discovery procedure. For them, maximum access to facts is necessary for the provision of justice. They think that the American institution of discovery goes far beyond the prevention of lawsuit surprise by allowing a party to search for evidence possessed by the opponents and non-parties to support its own claims and defences or to challenge opponents' claims and defences. However, the strict standard of relevance in Germany could not guarantee the truth-finding. Accordingly the expansive testimonial privileges overcome these limits on the general discovery of evidence in German civil cases.

In fact, these differences reflect a fundamental divergence in value choices between the German and American systems. Both systems recognize the significance of truth to the fact-finding process and both recognize the importance of protecting areas of personal or business privacy from unreasonable invasion, but the two systems strike a balance between these two goals in different ways. Apparently, the US system of discovery values the truth more than privacy in civil litigation. Culturally, they do not trust the bureau's power. They fear the judge-dominated evidence collection may result in unhealthy state intrusion into the private sphere. They also fear that the judge-controlled discovery may not be thoroughly conducted by the lawyers because there is no interest for the court to conduct well.

The German system of specific disclosure duties and expansive privileges shows greater concern for protecting privacy interests and less concern for finding the truth. In Germany, there is no assumption that justice is directly proportional to the access of the parties to facts. Indeed, it is the ability of the system to identify what is relevant to the legal issues that is considered critically

---

[128] See Gerber, fn. 117 at 767.

important. The idea underlying the court-controlled procedure design is that "it is the judge's skill and experience in evaluating evidentiary materials which is considered likely to lead to the truth, not the gathering of immense quantities of factual information by attorneys who are then free to present or not to present such information and to manipulate its presentation to serve their own ends."[129] In addition, because it is the judge who is responsible for both facts and legal issues, the keystone of the legal process is the proper application by a professional judge applying a body of concepts to a given fact pattern. The judge's ability to apply such principles correctly is the central value in the judiciary process.

Based on this notion, the German procedural system is dominated by the judge. The judge controls all aspects of the litigation process to limit the scope of the proceedings, so that evidence-taking can be focused on those specific issues which are identified as potentially dispositive. Therefore, allowing attorneys to employ state power to search for information with virtually no supervision by the court conflicts with fundamental principles of the German procedural system.

Methods of evidence collection in the US is bound up with the American cultural definitions of the respective jobs of judge and attorney and is compatible with other aspects of its legal culture, including the use of juries, the way juries choose and judges control, and attorneys' fee structures. Similarly, Germany's judge-led evidence collection is also defined by their whole legal culture and is closely tied to other fundamental aspects of the German system. Both the German and American systems have their advantages and disadvantages but all aiming to guarantee the judiciary justice and efficiency. At the same time efforts to improve their judiciary system according to judiciary reform never relax. And an interesting phenomenon is that several trends overlap with each in recent years.

To improve the judiciary efficiency, Federal Rule 26(c) provides the court with broad discretion to protect a party or other person from "annoyance, embarrassment, oppression, or undue burden or expense."[130]

As a further means of discouraging discovery abuse, the Federal Rule was amended in 1980 and 1983. According to the 1980 amendment, discovery conferences are to be convened when an attorney cannot work out a reasonable program of discovery with opposing counsel. The 1983 Amendment gave the

---

[129] Id. at 768–69.

[130] Federal Rule 26(b)1 was amended in 1983 to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The Federal Rule now specifically provides that the court on its own initiative should limit discovery whenever it appears unreasonably cumulative, or the information is obtainable in some other less burdensome way; the party seeking discovery already has had ample opportunities to obtain the information sought; or discovery is unduly burdensome or expensive.

court specific authority to limit discovery if it appears unreasonably duplicative, oppressive or disproportionate to the matters involved in the case.[131]

The court is also expected to head off potential harassment by limiting discovery to certain types of issues, until those issues are firmly established and it is clear that it will be necessary to go forward on other matters.

The court also has power to set the time, place, and atmosphere of fact discover. It can issue orders to regulate how the discovery is to be recorded, and it can be creative in its attempts to define the extent to which discovery is appropriate in a given situation. In all these ways the court can structure or limit discovery to allow for open exchange of information desired by the rules, while assuring that the discovery process is used only for legitimate and non-abusive purposes.

The liberal discovery rules used in most state and federal courts have made great achievement in reducing, if not eliminating, trial victories based on surprise tactics. At the same time, there is no question but that they have been seriously abused and that, although the rules provide the courts with various means to curb harassing and other abusive discovery practices, abuses continue to occur. Demands for massive numbers of documents and needless and burdensome interrogatories have raised litigations costs substantially. Both large corporations and individual litigants suffer from the overuse of discovery. Whatever the cause, when discovery is not used to search for facts but to enforce settlement, justice is subverted. In August 1991, therefore, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed a major revision of discovery rules and was approved in 1993.

This amendment introduced the automatic disclosure procedure. According to this procedure, the parties have a duty to provide most of the information previously gathered through formal discovery automatically.[132] Unless otherwise ordered, under Rules 30 and 33(a), each party would be limited to 10 depositions and 25 interrogatories. These amendments accelerate the exchange of basic information and reduce costs.

In 2000, the Federal Rules of Civil Procedure governing pre-trial discovery was amended again. This amendment fundamentally changed the legal behaviour of judges and lawyers. For example, the 2000 amendment truncates the scope of discovery that parties are entitled to pursue.[133] Parties now must obtain permission from the court before they can pursue discovery that is as broad as the Rules had permitted for more than a generation.[134] The change in the scope of

---

[131] Fed. Civ. Proc. Rule 26(b)(1).
[132] Fed. Civ. Proc. Rule 26(a)(1).
[133] Morgan Cloud, *2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Prestrial Litigation*, 74 Temp. L. Rev. 27, 27 (2001).
[134] Id.

discovery is intended to produce two related results: (1) to prod judges into more active involvement in and management of the discovery process, and (2) to encourage lawyers to confine discovery to issues at the heart of the litigation.[135]

The new system attempts to bring about these behavioural changes by creating two new categories of discovery, which the Advisory Committee labelled as "attorney managed" and "court managed" discovery.[136] Whether the new classification system will alter the fundamental behaviours of judges and lawyers is debatable. Yet it does provoke discovery disputes, motions to resolve those disputes, and changes in the pleading.[137]

The new Rules also amend the provisions imposing mandatory duties to provide certain information without awaiting a discovery request.[138] Like the original mandatory disclosure provisions added to Rule 26(a) in 1993, these changes are intended to alter the behaviour of judges and lawyers. The mandatory disclosure rules are imposed upon all districts for the first time, and the scope of these disclosures is narrowed by a formula certain to provoke new disputes among some litigants. Those unfamiliar with the disclosure rules may be surprised at the extent of their impact upon the conduct of pre-trial discovery.

The most recent amendments to the discovery rules represent a movement away from some of the fundamental concepts upon which the federal discovery rules have rested for decades.[139] The principles which apparently generated these changes suggest that even more fundamental changes in the rules and practices governing pre-trial litigation in federal courts might be adopted in the future.

These changes may include revisions intended to: (1) to limit the scope of discovery conducted as a matter of right, (2) to limit the scope of the mandatory disclosure obligation, (3) to impose the mandatory disclosure duty in all federal districts, and (4) to impose new quantitative limits on depositions.[140] Comparing these changes with the past, we can draw the conclusion that the recent amendments to the federal rules are intended to move federal practice away from the traditional model of adversarial pre-trial discovery conducted by largely autonomous attorneys, and toward a model in which attorney autonomy is strictly limited by formal rules and more active judicial management of pre-trial litigation.

In Germany, although the court takes charge of nearly all aspects of the litigation, it should be emphasized that the court's power is fully reconciled with the principle of party presentation of facts. In this regard, the court makes

---

[135] Id.
[136] Id.
[137] Id.
[138] Id.
[139] Id.
[140] Id. at 29.

judgment on the basis on the allegations made by the parties, and its duty to ascertain facts cannot engender new allegations. Even if a proof taken ex officio produces real new facts and arguments, the court is not allowed to consider them unless at least one party takes up these facts in his own allegation. The principle of party-presentation is intended to check the court's authority to avoid power abuse.

How to guarantee the judiciary efficiency is another matter for justice to consider, because generally there is no money incentive exclusively to the lawyers in the process of judge-dominated fact-gathering. Based on Langbein's analysis,[141] the answer to that concern in the German tradition is straightforward: The judicial career must be pursued in a fashion that creates incentives for diligence and excellence. The idea is to attract very able people to the bench, and to make their path of career advancement congruent with the legitimate interests of the litigants.

In Germany, the profession of judge is separate from the profession of lawyer. Judges are career civil servants who are trained as judges immediately after their training in jurisprudence and are expected to remain judges throughout their lives. The great honour enjoyed by judge career absorbs the most talented students into the career. The incentives of appraisal and promotion ensure that the judges work hard and efficiently.[142]

From the analyses above we can draw these temporary conclusions. The difference between the German Civil Procedure and the US Civil Procedure is rooted in their respective cultural understandings of the roles of lawyer and judge. Both systems pursue the aim of fact-finding and privacy protection, but the two systems strike a balance between these two goals in different ways. The US system of discovery values truth more than privacy. It is thus concerned that the court-controlled system may not be able to collect evidence so thoroughly as the discovery conducted by the parties' lawyers. This is because, on the one hand, of the continual institutional pressure to curtail discovery in order to clear their dockets and on the other, the judges are under no economic pressure to collect evidence as thoroughly as possible. Second, it is more concerned that discovery by a judicial officer may result in unhealthy state intrusion into the private sphere. It seems undeniable that judge's domination of powerful discovery means would pose a danger of unwarranted state intrusion into personal privacy much more than their present system of party-driven and attorney-led discovery.[143]

---

[141] See Langbein, fn.124 at 823.

[142] Id. Part Ⅺ.

[143] See fn. 15 at 206; Hazard, Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U. Pa. L. Rev. 2237, 2240–41 (1989) (having judicial officer participate in discovery process even as neutral archivist would raise concerns of civil libertarians).

The German's system of specific disclosure duties and expansive privileges shows greater concern for protecting privacy interests and less concern for finding truth. The idea underlying the court-controlled procedure design is that "it is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the truth, not the gathering of immense quantities of factual information by attorneys who are then free to present or not to present such information and to manipulate its presentation to serve their own ends."[144] Methods of evidence collection in the US is bound up with Americans' cultural understandings of respective jobs of judge and attorney and is compatible with other aspects of their legal culture—including the use of juries, the way they choose and interact with judges, and attorneys' fee structures. Germany's judge-led evidence collection is also rooted in their whole legal culture and is closely tied to other fundamental aspects of the German system. Both the German and American systems have advantages and disadvantages and aim to guarantee the judiciary justice and efficiency. At the same time the efforts to improve their judiciary systems never relax, and the interesting phenomena are some blend trends in recent years.

5 Evidence Collection and Reform Recommendation in China

5.1 Evolution of Chinese Civil Procedure Law

Basically, the Chinese law system belongs to the continental law family. Via Japan, the German Code provided the raw materials as the first modern codes to be published by the Republic of China in the early 20th century.[145]

After the People's Republic of China was founded in 1949, all previous existing laws were repealed.[146] China came under the influence of the Soviet Union. Nevertheless, the exemplary force of the Civil Code was reinforced through the German-derived Soviet law.[147]

After 1949, the planned socialist economy system was established in China, and the Chinese government owned all factories and farms while individuals

---

[144] See Gerber, fn. 117 at 768–69.

[145] Richard A. Danner and Marie-Louise Bernal, *Introduction to Foreign Legal Systems*, Oceana Publications Inc. (New York), at 102 (1994).

[146] Weiping Zhang, 大陆地区民事诉讼法的沿革、改革与民事诉讼法的修正 (The Evolution and Reform of Civil Procedure in the Mainland of China and the Revisions of Its Civil Procedure Law), in 2006 两岸四地法律发展,下册 (Cross-Strait, Four-Region Law Development) (vol. 2), Institutum I Urisprudentiae, Academia Sinica (Taipei) at 174 (2007).

[147] See Danner and Bernal, fn. 145 at 102.

usually had few property of their own. There was little need for exchange of goods. Under such circumstances, individuals seldom exercised their civil rights and there were not many disputes in their ordinary life. Even if there were some in the civil realm, they were usually resolved through conciliation. Accordingly, there was no Civil Procedure Law for a long time after 1949. However, after Deng Xiaoping initiated the policy of opening up to the world in 1978, China introduced reforms in rural and urban areas. The planned socialist economy system was gradually replaced by the "socialist market economic system." Individual became the basic unit of the market.

With the change of individuals' social status come changes in social relationships. Increasing civil and commercial disputes invoke an urgent need for the legislation of Civil Procedure Law. In 1982, therefore, the Civil Procedure Law of China (trial implementation)[148] was promulgated.

The Civil Procedure Law of China of 1982 has two main sources. One is the litigation tradition which was popular in the areas under the Communist Party's control since 1930s; the other is the ex Soviet Union law which demonstrates the influence of civil code tradition.[149] The Civil Procedure Law of 1982 is characterized by an inclination toward the inquisitorial system. According to it, the court completely dominates fact finding and law application. The court shall, in accordance with the prescribed procedure, collect and examine evidence comprehensively and objectively.[150] The court may give its judgment totally depending on the evidences collected on its own motion. Although the parties to a civil lawsuit shall have the right to argue about the issues in dispute[151] and shoulder the responsibility to provide evidence in support of their own propositions,[152] the fact alleging and evidence providing just constitute the factors that the court may or may not consider. It suggests such factors do not play a key role in helping the court make judgments. Thus, a common practice in the judiciary process at that time was that, after initiating the litigation by the plaintiff, all the other issues are left to the court. The court has the authority to obtain evidence from the relevant units or individuals.[153] The court shall verify and determine the validity of documentary evidence provided by state organs, public organizations, enterprises, institutions or individuals.[154] When the court

---

[148] The trial implementation was added to the title of Civil Procedure Law. When this law was promulgated, the legislature did not sure if it would meet the requirement of dispute resolution at that time, but the 1982 Civil Procedure Law was implemented on test for about 10 years until 1991.

[149] See Danner and Bernal, fn. 145 at 102.

[150] CPC (1982) 56(2).

[151] CPC (1982) 10.

[152] CPC (1982) 56(1).

[153] CPC (1982) 57(1).

[154] CPC (1982) 57(2).

needs to solve a problem concerning professional knowledge, it is the court that has the authority to notify the department concerned to assign an expert.[155] The court also may inspect material evidence or a site by itself.[156] Thus, at that time, an excellent judge should inspect evidence or a site or to hear the witness in the witness' residence or to collect other evidences by himself actively. Based on the evidence collected the court obtains the conviction of the facts. If the evidence offered by the party conflicts with the evidence the court collects, they will not be evaluated by the court. Even the parties agree with each other over some facts, the court's judgment could not define for it. Philosophically, such a procedure is designed to pursue the objective truth. After the process of evidence collection is completed, most of the disputes would be resolved through conciliation, which is one of the principles of Civil Procedure of China.[157] If the conciliation efforts are ineffective, there will be an oral hearing. But usually the oral hearing is informal because the judges have already had the conviction of the facts before it. Also, because the court controls the evidence collection, there is no need to provide specific means for the individuals to collect evidence.

With the extension of economic reform, the 1982 Civil Procedure Law which was enacted at the beginning of the economic reform could not meet the practical needs of litigation. Thus in 1991, Civil Procedure Law of China (trial implementation) was amended. Compared to the 1982 Civil Procedure Law, the 1991 amendment makes several distinct changes:

First, the court's authority of initiative evidence collection was restricted. In the Article 56(2) in 1982 Civil Procedure Law, there is no limit to the court's authority of evidence collection. But Article 64 of Civil Procedure Law of 1991, with respect to the evidence, for only those that the party and its agent ad item are unable to obtain by themselves because of objective reasons or that the court considers necessary for the trial of the case, the court shall investigate and collect them on its own initiative. Theoretically, the court's authority is defined and the party's responsibility for evidence collection is improved. But the term ("the court considers necessary") apparently gives the court great discretion to exercise the initiative authority so that in the legal practice, the court's power with respect to initiative evidence collection remains unlimited.

Second, corresponding to the restriction of court's authority, the party's right of disposition is stressed. Since the 1982 Civil Procedure Law, the party has had the right of disposition, but it is only a right on paper and was not reflected in the following rules. In the Civil Procedure Law, however, some specific provisions are enacted to guarantee this right.

As it is mentioned above, although the 1991 amendment of the Civil

---

[155] CPC (1982) 63.
[156] CPC (1982) 64.
[157] CPC (1982) 10.

Procedure Law tries to restrict the court's authority for initiative evidence collection, it is still within the discretion of the court to evaluate whether it is necessary for the court to collect evidence on its own motion. Also, because of the conventional wisdom about the roles of the party and the court that has been tacitly recognized, in practice most of the parties still rely on the court to collect evidence. With the development of China's economy, however, the Chinese idea also changes. Increasingly, people exercise their individual rights. They are not afraid of going to court to protect their interests now. The court's initiative evidence collection requires judges to do almost all of the works for dispute resolution. The overwhelming amount of litigations renders the court unable to handle cases in old ways. Again, there are great popular demands for the amendment of Civil Procedure Law.

The reconstruction of legal education is another important reason for the advocate for judiciary reform. Before 1978, most of ordinary Chinese people were not familiar with the theory of civil procedure law in Europe and the United States. After the reform and open policy were launched, China began to reconstruct a system which included over 50 law departments and specialized institutes of political science and law in most universities. Nowadays, after 30 years' development, the legal education has become one of the most popular majors in China. There are thousands of students pursuing masterate and doctorate in law. Moreover, an increasing number of students go abroad each year to pursue advanced law education in the United States, Japan and Western Europe. The western legal theory is introduced into China and accepted during these 30 years. However, partly because of the obstacle of language, although the Chinese legal system originates in Europe, now the American civil procedure law theory is more popular in China. Many scholars recommend the American law as the foundation of China's judicial reform. They want to introduce the party-prosecution and party-representation principles into China and hope that according to the conflict of the parties the facts of the case can be revealed.

As a consequence, after numerous courts' tests, a great reform was launched in 2001 not according to the law amendment but to the Supreme Court's judicial interpretation instead.[158]

In 2001, the Supreme Court issued a new regulation entitled Evidence in Civil Proceeding Several Provisions (Several Provisions), which became effective in

[158] The statutes of judicial interpretation enacted by the Supreme Court of China should be mentioned. Based on the Constitutional Law of China, the adjudication committee of the Supreme Court can issue advisory opinions about the interpretations of newly promulgated laws. Although the force is lower than the Civil Procedure Law, all the courts should abide by these interpretations during the trial. Because it is very difficult to amend the Civil Procedure Law, many reform measures are implemented according to judicial interpretations enacted by the Supreme Court of China.

April, 2002. This regulation is the product of 20 years' research on the theory of Civil Procedure Law of China. The author will now analyze the rules about evidence collection.

The most important innovation reflected in the Several Provisions is the introduction of party's burden of persuasion. Similar to Article 64(1) in the Civil Procedure Law of China (1991), Article 2 in the Several Provisions clearly stipulates that the parties have responsibility to provide evidence to certify their propositions and the facts. But contrary to the Civil Procedure Law of 1991, a heavy persuasion responsibility is introduced now, and if the party bearing the persuasion responsibility could not provide evidence or sufficient evidence to justify his claim, he/she will lose the case.

Another important change for the Civil Procedure Law of 1991 is the restriction of the court's initiative evidence collection. In Article 15 of Several Provisions, the "necessary situation" is interpreted as two specific situations. First, the facts related to the harm to the state interests, the common social interests and non-parties' legal interests. Second, the facts related to procedural problems such as adding participants, suspending the litigation, ending the litigation and withdrawal.[159] Except for these two situations, the court may collect evidence only when the parties apply.

In sum, the Several Provisions reflect the result of Chinese scholars' research for the modern theory of civil procedure law. Specifically, "in the name of judiciary reform or trial pattern reform, no matter what the Chinese theory study or judicial practice, they all have the same aim, namely, to build the adversary system."[160]

5.2 Procedure Allocation for Evidence Collection

In 1982 the Civil Procedure Law of China, the oral hearing stage is informal and it is in the stage before the oral hearing that the court ascertains the facts. Because the real interested party could not determine the evidence offer and facts ascertaining, the party could not predict the result of the litigation and often doubts the justice of the judgment. The court's comprehensive involvement in the fact investigation could not guarantee the neutrality of the court. Thus the trial pattern was reformed in the 1980s. As a result, the oral hearing receives unprecedented emphasis and all evidences should be taken after the debate of the parties in the oral hearing. Furthermore, in order to maintain the neutrality of the

---

[159] Several Provisions art. 15.

[160] Jianhua Xiao, 回归真实：民事诉讼法的真谛——对《关于民事诉讼证据的若干规定》的批判 (Back to Reality: the True Meaning on Civil Procedure Law—Criticize on "Several Provisions of the Evidence in Civil Proceeding"), (2) 河南省政法管理干部学院学报 (Journal of Henan Administrative Institute of Politics and Law) 107 (2006).

court, like the United States litigation pattern, the judge is not permitted to get involved into the litigation before oral hearing. Because there is neither jury to determine facts nor experienced lawyer[161] to collect evidence and prepare for the oral trial in China, the court could not schedule the oral hearing to give a just judgment. Also, because the parties have no effective means to collect evidence by themselves, the strategy of "evidence surprise" becomes inevitable in the oral hearing. Thus, the Several Provisions introduces a new mechanism that divides the trial into pre-trial and trial stages. Here the influence of the Civil Procedure Law of the US could be clearly seen.

When the plaintiff will bring a suit, a bill of complaint shall be submitted to the court, and copies of the bill shall be prepared according to the number of defendants. To convince the court and inform the opponent, the plaintiff should give the claim of the lawsuit, the facts and grounds on which the lawsuit is based, and any evidence and its source, as well as the names and addresses of witnesses.[162] In practice, however, most plaintiffs do not follow the requirement for the first evidence disclosure, because there is no sanction for the absence of such information and the court does not care about it either. For this reason, the Several Provisions emphasizes parties' obligations again in Article 1. But still, it stipulates no sanction if the parties do not comply with those obligations.

During the pre-trial phase, mandatory pleading procedure is also introduced. Although mandatory pleading exists both in the United States and Germany, it does not exist in the Civil Procedure Law of China (1982 and 1991). After the plaintiff files a complaint to initiate the litigation, it is the defendant's right to answer the complaint. Thus many defendants are not willing to give the answer before oral hearing because they do not want the plaintiff to make full preparation for the following oral hearing. Without the answer of the defendant, the plaintiff could not make a good preparation for the evidence collection and the court could not know every aspect of the dispute. In order to avoid the litigation surprise, according to Article 32 of Several Provisions, the defendant is required to answer the complaint in 15 days after he/she receives the copy of complaint. But if the defendant does not comply with this rule, no sanctions will occur. In this sense, Article 32 of Several Provisions is only an instructing rule in practice.

5.3 Mechanism of Evidence Collection

It should be mentioned that evidence, in Article 63 of the Civil Procedure Law

---

[161] There is no mandatory lawyer presentation system because for most of the parties in China, they do not have enough money to hire lawyers to help them.

[162] CPC (1991) 109, 110.

of China (1991), refers to documentary evidence, material evidence, audio-visual reference material, testimony of witnesses, statements of the parties, expert conclusion, and records of inquests.

5.3.1 Court's Initiative Evidence Collection

As mentioned above, the most obvious change in the Several Provisions is the introduction of the party's burden of persuasion. According to Several Provisions, the burden of evidence collection was on the parties and those who bear the persuasive burden but fail to provide sufficient evidence have to bear an unfavourable result.[163] The court's initiative authority of evidence collection is confined to only two situations analyzed above.[164] This reflects the Chinese legislature's attempt to transfer the inquisitional system into the adversary system. The scope of the court's initiative evidence collection in China is even narrower than that in Germany. In fact, other than the facts relating to social interests or procedure problems in China, the court has no authority of evidence collection. As the author has introduced, in Germany, based on the ZPO 273 and ZPO 143–44, the court has comprehensive authority to order evidence collection on its own motion. However, in contrast to the Discovery procedure in the United States which the court usually have no power for evidence collection, our court not only has no legal authority but also no effective means to provide for the parties to collect evidence

5.3.2 Time Limit for Evidence Adducing and Evidence Exchange

Another notable change in the Several Provisions is the introduction of time limits of adducing evidence and evidence exchange between the parties.

According to Article 34 of the Several Provisions, parties should provide the evidence to the court to support their claims before the deadline of evidence adducing. If any party that does not provide evidence in time will be regarded as abandoning the right of evidence providing. The evidence that is collected after that deadline will not, except with the opposing party's consent, be allowed to be presented and verified in the oral hearing. It also means that this evidence will not be accepted by the court because according to Article 47, those not verified in court could not be the basis for fact ascertaining.

Because there is no mandatory lawyer representation and the parties usually do not know the Civil Procedure Law well, the court has an obligation of instruction. Together with the service of notification on case acceptance or notification on

---

[163] Several Provisions art. 2.

[164] See 5.2 of this article.

response to prosecution of case acceptance and case defence, the court should send the notification on evidence adducing to notify the parties the principle of allocation on the burden of evidence persuasion or the situations that may apply for the court to collect evidence and the time limit the court appoint for evidence adducing and the sanction for failing to meet the deadline.[165]

The deadline of evidence adducing may be negotiated between the parties and then approved by the court. The court may also set a deadline by itself which should not be less than 30 days after the parties' receipt of the notification on case acceptance or notification on response to prosecution.[166] The deadline can be extended by the court after the application of the party before the deadline of evidence adducing if the party indeed has difficulty submitting it in time. If the party still has difficulty to submit the evidence during the prolonged time he/she may apply for the prolongation again, which depends on the court decision.[167]

The introduction of the time limit of evidence adducing once inspired a great debate among judges and scholars. From Article 34 of the Several Provisions we can see that this rule is so strict in the sense that there is even no discretion for the court to decide the result of absent providing or access the deadline to submit. This is different from the equivalent rules in Germany. The court in Germany may reject the evidence only when it thinks that the submission of evidence which exceeds the deadline of evidence adducing postpones the litigation and the party has great fault for this delay.[168] In Germany, the sanction for exceeding the time limit is not as serious as it is in China. In the United States, the sanction is serious, but there exist sufficient means for evidence collection and excellent lawyers to facilitate evidence collection. It is also the need of continuous trial. In China, the fact that no sufficient means for evidence collection exists under strict rules for evidence decline substantially hinders the fact finding in the litigation. As a consequence, the parties often do not understand Article 34 of the Several Provisions while many judges fail to apply it to the practice of litigation.[169] Based on the investigation of four courts which locate in four areas under different financial conditions and different judicial resources, one scholar finds that some judges refuse to accept the time limit for evidence adducing and usually allow the party to exceed the time limit for evidence adducing while

---

[165] Several Provisions art. 33(1).
[166] Several Provisions art. 33(2).
[167] Several Provisions art. 36.
[168] ZPO 296 (2).
[169] Because the force of the judicial interpretation issued by the Supreme Court is lower than the Civil Procedure Law, and according to the Civil Procedure Law there are no rules about time limit of evidence adducing, many lawyers contest the validity of this rule and many judges refuse to apply this rule on trial to avoid the parties' objections.

some other judges strictly comply with the time limit.[170] Here, this rule becomes a potential instrument for the court to bargain with parties for bribery.

Evidence exchange is not mandatory for all cases. For complicated cases in which many evidences are involved, the court should organize the evidence exchange after the expiration of defendant's defence and before the oral hearing. The court may also organize evidence exchange according to the parties' application.[171] The time for evidence exchange may be negotiated by the parties and approved by the court. Or, the court may schedule a date by itself. In the latter case, the date of evidence exchange automatically becomes the deadline.

The evidence exchange is directed by one judge on the bench. This is similar to the judiciary procedure in Germany. In the process of evidence exchange, the judge records the uncontested evidence and facts and the contested evidence. After the evidence exchange, the issue of real dispute is fixed.[172]

After receiving the opposing party's evidence, if the party argues the truth of the evidence and provides new evidence to support his claim, the court should tell the parties to exchange the new evidence again. More often than not, evidence exchange is expected to be no more than twice for one case except for those difficult and especially important cases.[173]

5.3.3 Evidence Preservation

Similar to the evidence preservation in Germany, the Civil Procedure Law of China (1991) also has provisions of evidence preservation. When it is likely that evidence may be destroyed, lost or difficult to obtain later on, the participants in proceedings may apply to the court for evidence preservation.[174] But different from the German Civil Procedure, the court may also take measures to preserve such evidence. This reflects the traditional inquisitional system in China. Several Provisions limit the time to apply for evidence preservation and define the methods for evidence preservation.[175] Similar to the German Civil Procedure for evidence preservation though, the purpose of the Chinese Civil Procedure is to preserve evidence. In effect it enables parties to collect evidence under special circumstances. But the missing of pre-trial evidence preservation brings some

---

[170] Yaxin Wang, 实践中的民事审判——四个中级法院民事一审程序的运作 (Practice in Civil Trial—the Procedure in Four Intermediate Courts of First Instance, in：法律程序运作的实证分析 (*Positive Analysis of the Operation of Legal Proceedings*), Law Press (Beijing), at 24 (2005)

[171] Several Provisions art. 37.

[172] Several Provisions art. 39.

[173] Several Provisions art. 40.

[174] 1991 CPC art. 74.

[175] Several Provisions art. 23, 24.

problems. Before a potential plaintiff brings a suit, if it is likely that some key evidences are to be destroyed or lost (such that a key witness is about to die), no effective means exist for the parties to protect their rights. This is one of the drawbacks for evidence preservation in China.

5.3.4 Application for Court to Collect Evidence

In China, the most powerful method for evidence collection is to get the help from the court. Article 17 of the Several Provisions is designed to invest the parties with the right of applying for the court to collect evidence under such conditions: (1) the file documents which are preserved in relevant government departments can only be inspected by the court; (2) the document relating to state\commercial secret and private matters; (3) the evidence that the party and its agent ad item are unable to obtain by themselves because of objective reasons.

When the parties and their agents want to plead for the court's involvement in the evidence collection, they should submit an application which informs the court of the basic information of the person they want to investigate, the content of the evidence, the reason and the facts it intends to ascertain.

It seems from Article 17 that the parties may get the help from the court to collect any evidence they want when they could not make it by themselves because of "objective reasons." However, how to define the "objective reasons" in concrete terms is within the discretion of the court. Although the Chinese procedure is similar to the German Civil Procedure, the specific methods are different. If the court accepts the application of the parties, it will not just file an order for relevant individuals or institutions to submit the evidence. The judges will go out to collect evidence by themselves. Comparing to the parties, the court does not have sufficient incentive to collect evidence by itself. There are so many cases waiting for its judgement, the court has not enough time to collect evidence. Thus, in the litigation practice, if the judge wants to help one party, he/she does so. If he/she does not want to, after receiving the application, he/she will argue that there are no "objective" difficulties for the party to collect evidence and therefore, refusing to help. As a consequence, the power in evidence collection is potentially a leverage of the court to bargain with the parties for bribery.

In addition, because there are no rules about parties' participation during the court's evidence collection, the process of evidence collection in which the court plays the key role often results in the parties' doubt about the fairness and justice. Here lawyers play a little role as well. Because China is still a developing country, most parties cannot afford the stipend of a good lawyer for their litigation; such a procedure design, therefore, could not guarantee the justice of the litigation.

In the following sections the author will analyze different ways for kinds of evidence to apply for the court to collect in detail to illuminate the existing major problems in this procedure.

5.3.4.1 Documentary Evidence Collection

Documentary evidence is one the most important kinds of evidence. For documentary evidence, most countries have designed special procedures for evidence collection. In China, means of documentary evidence collection mainly include evidence exchange and the parties' right to apply to the court for the collection and preservation of evidence. The problems which exist in the three procedures[176] mentioned above are the obstacles for documentary evidence collection.

5.3.4.2 Witness Testimony

In China, all institutions and individuals who have information about the case are obliged to give testimony in court.[177] Only when it is extremely difficult for a witness to appear in court, can he/she, with the approval of the court, submit a written testimony.[178] From this provision we can see that at first, all of the persons who have information about the case are obliged to give testimony. There exist no rules of individual privilege. Only those who are unable to express his will properly are exempted from the obligation of testimony.[179] The underlying philosophy is the pursuance of the truth. In order to get the truth, even the wife should give testimony to her husband's case. Second, all witnesses should give testimony in court. However, comparing to the strict rules for the witness to appear in court to give testimony in legal practice, it is extremely difficult for parties to bring the witness(es) to the court. It is not a problem in the 1982 Civil Procedure of China, because at that time it was the court's duty to collect witness' testimony outside the court. With the stress of the trial hearing especially with the burden of persuasion placing on the party, the witness' refusal to appear in court to give testimony and to accept the interrogation of the judges and parties caused serious problem to ascertain facts. The court is hardly able to accept just written testimony as admissible evidence. Thus legislator has to consider how to enable the parties to collect witness' testimony. In the Several Provisions there are some rules enacted trying to solve this problem.

---

[176] See 5.3.2, 5.3.3, 5.3.4 of this article.
[177] 1991 CPC art. 70.
[178] 1991 CPC art. 70.
[179] 1991 CPC art. 70.

Article 55 emphasizes again that the witness should appear in court and answer the interrogations from each party. According to Article 54, if one party wants the witness to appear in court to give testimony, it should submit an application to the court 10 days prior to the deadline of evidence adducing. If the court approves the party's application, it should notify the witness to appear in court to give testimony in time and inform them of the rights and obligations. The witness' rational expense should be covered first by the applying party and finally be afforded by the party who loses the case.[180]

The Civil Procedure Law of China (1991) stipulates that "when it is truly difficult for a witness to appear in court, he may, with the approval of the court, submit a written testimony." Here, by "truly difficult" the Several Provisions refers to five situations as follows: (1) old and weak or difficult to move to the court; (2) the post is too special to leave; (3) extremely remote to the court and have poor transport facilities to arrive to the court; (4) other special situations to unable to appear in court. In the above situations, with the approval of the court, the witness may submit written testimony or give testimony through oral-video documents or transmission.

However, even with the modern technology introduced into the court to ensure that the witness can give testimony in court, the rate of witness' appearance in court is still under 5% of the cases filed in the intermediate court, according to some Chinese legal scholars.[181]

Chinese scholars analyze several reasons for the low rate of witness' appearance in court, which include no compelling rules to enforce the witness to appear in court, no rules to protect the witness from revenge, generally the witness in China is not willing to fulfill the obligation of giving testimony in court, the special relationship between the individuals in China makes the witness unwilling to give witness to offend other people.[182] So how to guarantee the parties to collect valid witness' testimony is another important issue for Chinese legislature.

5.3.4.3 Expert Conclusion

Just like the German Civil Procedure Law, in the Civil Procedure Law of China (1991), the undertakings of initiating the expert evaluation and appointing an authentication department are left to the court.[183] Some legal scholars severely

---

[180] Several Provisions art. 54.

[181] Yaxin Wang, 证人出庭作证的实证研究 (An Empirical Study of the Appearance of Witnesses), in Yaxin Wang, Yulin Fu et al, 法律程序运作的实证分析 (The Positive Analysis of the Operation of Legal Proceedings), Law Press (Beijing), at 267 (2005).

[182] Id. at 281.

[183] 1991CPC art. 72.

criticize that this would compromise the judge's independence and neutrality, and more easily give rise to allegations of, or acts of, corruption,[184] the Several Provisions, therefore, allow the parties to negotiate over how to choose the authentication department and experts. When the parties could not reach agreement over the choice of experts, the court has the power to appoint authentication department.[185] Still, the court retains the power to appoint the authentication department when the parties' application is not approved by the court or when the parties do not apply for the authentication. Under this circumstance, if one party does not agree with the expert evaluation and apply for the evaluation of the evidence, the court should approve the application under the conditions as follows: (1) The authentication department or expert has no certification to supply evaluation; (2) the evaluation procedure is severally illegal; (3) the result of evaluation is apparently scarce of bases; (4) after debating in court, it could not to be used as evidence.[186] When one party applies for authentication and gets the expert evaluation, if another party has sufficient evidence to contest the result of authentication and applies for evaluating again, the court should approve such application.[187]

In legal practice, the main trend is to distance the judge from expert nomination, thereby reducing the possibility of corruption and ensuring judicial fairness. The High Court in Beijing compiled a directory of organizations with various fields of expertise by the end of the first quarter of 2003. When an expert witness is required to define an area of evidence concerned by the parties will be able to choose an appraiser from the register. If the agreement cannot be reached among the parties as to the choice of the expert then one will be selected at random from six candidates proposed by the parties. Both appraisal organizations and individuals can apply to be on the register and the High Court will decide whether they are suitably qualified to be included.

The register in the directory will be applicable to all courts at all levels in Beijing. The High Court will review the listed appraisers annually and those who fail to meet the requirements will be removed from the register.[188]

---

[184] At http://en.chinacourt.org/public/detail.php?id=1379&k_title=evidence&k_content=evidence&k_author=mple (last visited April 3, 2009). Experts Witness Judicial Reform from Judicial News in the Supreme Court Of The People'S Republic Of China.

[185] Several Provisions art. 26.

[186] Several Provisions art. 27.

[187] Several Provisions art. 28.

[188] Experts Witness Judicial Reform from Judicial News in THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, at http://en.chinacourt.org/public/detail.php?id=1379&k_title=evidence&k_content=evidence&k_author=mple (last visited April 5, 2009).

5.3.4.4 Records of Inquisition

The judge can begin inspection of material evidence or a site only after receiving the application from a party.[189] This is also different from the German procedure.

In sum, for about 30 years since 1978, the trend of Chinese judiciary reform is to restrict the court's power in the litigation and to enhance the party's right in control of the proceeding. Some scholars point out that "the basic way for our judiciary reform is to shift the economic cost of judiciary justice (such as improving the litigation cost, totally transferring the burden of certification) and the risk of fact unrevealing and to place such venture on the parties."[190] From the analysis above, we find that with the decline of court's initiative evidence collection and the strict rules for the time limit of evidence adducing, China's court abandons the purpose of seeking the truth of the case. This has adverse complications. When laws and regulations try to restrict the authority of the court on paper, however, the court's power is not restricted in the practice of litigation. The relevant rules in effect provide the court with more discretion for the use of their power.

5.4 Main Factors that Determine the Procedure for Evidence Collection in China

Now eight years have passed after the Several Provisions was promulgated in 2001. Confronted with the dilemma that the court are not willing to help collect evidence and parties have no effective means to collect evidence, scholars begin to reconsider the trend of Chinese judiciary reform. An extreme inquisitional system is not desirable. But this does not mean that we should change it completely into an adversary system.

But how can we design a procedure to guarantee that the parties have appropriate means for evidence collection? As the author has analyzed above, the Discovery in the United States and the evidence investigation in Germany are not determined by their statutes, but by their cultural definitions of the respective roles of lawyer (as well as the parties) and judge and are compatible with their respective legal systems. Let us study what is the situation of Chinese judges and parties.

5.4.1 The Situation of Chinese Judges

How to guarantee that judges are impartial and work efficiently is a major

---

[189] 1991CPC art. 73.

[190] See Jianhua Xiao, fn. 160 at 107.

challenge. In the United States, there is not much concern in this respect, as the author has analyzed above. The German legal system solves this problem through the principles of presentation and incentives in the form of appraisement and promotion. But what is Chinese judges' situation? Does our judiciary system provide sufficient incentives to guarantee the best performance of judges? Is our supervision effective enough to guarantee the impartiality of judges?

For the Chinese judiciary system, the constitution and the organic law of the courts establish a four-level court system: the court of first instance; the intermediate court at county level; the high court at provincial level and the supreme court at national level. One appeal right is permitted, usually to the higher court from the court that a case starts.

For the judge selection, the Judge Law of the People's Republic of China (JLC) promulgated in 1995 set forth the requirements for judges. It is surprising that in China, everyone can become a judge as long as he possesses the professional knowledge of law. However, there is no way to evaluate whether he/she "possesses the professional knowledge of law."

With the development of legal education and the improvement of Chinese legal system, the need for professional judges increases. In 2001, the JLC was amended. The qualifications for them were raised subsequently. In 2002, China began to have the State Judicial Exam (SJE). It aims to raise the qualifications for the court and boost the competence of the judgement.

However, strict requirements for a judge alone cannot guarantee the quality of China's judiciary system. The court's reliance on the local government for personnel and funding emerged as a serious problem. Apparently, it undermines the court's ability to handle the cases fairly and efficiently. It is the local not the central government which finances the court. Above all, the president and vice presidents of the court are nominated by the local government. As a result, although the Chinese Constitution, the Civil Procedure Law and the Judge Law all mention judiciary independence, in practice, the judges could not get the expected independent status. This sets the stage for corruption.

Although Chinese courts are divided into four levels, the higher bench is produced not by promotion but by comprehensive exams. More often than not, after a person is appointed as a judge in a court, he/she will work there for the rest of his life. There are no incentives for a judge in the lower court to work hard to get to the higher court. The only incentive for a judge is to be promoted to be the president or vice presidents, who are nominated by the local government, members of judicial committees, chief judges and associate chief judges of divisions are nominated by the president of the court. In sum, Chinese courts and judges are not independent from the administrative branch of government.

In addition to the administrative positions in court, Chinese judges are divided into twelve grades.[191] On paper, the grades of judges shall be determined on the basis of posts, actual working ability and political allegiance, professional competence, achievements in judicial work and their seniority.[192] The result of appraisal is also very important for a judge. It shall be taken as the basis for award, punishment, training, dismissal of a judge, and for readjustment of his grade and salary.[193] The appraisal of judges may include their achievements in judicial work, their ideological doctrines and moral characters, their competence in judicial work, their mastery of law theories, and their attitudes in and work styles.[194]

In the 5000 years' Chinese history, we do not have a powerful notion of "rule of law."[195] The notion of "rule of man" governs the Chinese minds. The Chinese live in a *guanxi* (relationship) society, and *guanxi* is one of the important factors that shape the Chinese people's life. Although the criteria for the judge's grade dividing and appraisal are diverse, it is not a specific criterion. Because the appraisal is conducted by the courts that the judges belong to,[196] the leader and the colleagues' views are important, so the judges usually do not want to offend their superiors and colleagues. This renders the judge unable to play an independent role in court, which also increases of corruption.

Most judges work in their hometowns. This also contributes to the injustice. Some defendants use local connections and bribery to pressure judges directly dealing with their cases. In order to reform China's justice system and promote justice, the Supreme Court launched a nationwide campaign last year to have prospective judicial officials work outside their home areas. This practice is expected to free the justice officials from the social and official networks likely to compromise principles of justice that characterizes their occupations.

The last but not the least, the judges' salary is low, which heightens the incentive for them to take bribery.

The above analyses make it clear that the judiciary system of China, the court and judge are not independent and easy to be corrupted. There are also no enough incentives for the judge to conduct efficiently and effectively. That is the root cause for the fact that throughout the 30 years after 1978, the current of

---

[191] 2001 JLC art. 16
[192] 2001 JLC art. 17
[193] 2001 JLC art. 22
[194] 2001 JLC art. 21
[195] Roberto M. Unger, *Law in Modern Society*: *Toward a Criticism of Social Theory*, The Free Press (New York), at 48–58 (1976), in Shuzo Shiga,中国法文化的考察—以诉讼的形态为素材 (Investigation on Chinese Legal Culture—Litigation Pattern as Material), (3) 比较法研究 (Journal of Comparative Law) 19 (1988).
[196] 2001 JLC art. 19.

Chinese judiciary reform aims to restrict the court's power in the litigation and to enhance the party's right in the proceeding.

5.4.2 The Parties

The success of the adversary system relies on the capacity of the parties. However, the parties in China generally lack the ability requisite for the adversary system. On the one hand, most parties do not have a good mastery of the knowledge of litigation. On the other hand, lawyers' assistance is insufficient. Although the China's economy has made great improvement over these years, the Chinese are poor in terms of per capita. Parties do not usually have sufficient fund to hire lawyer. For this reason, in the Civil Procedure Law of China there are no rules about mandatory lawyer representation.

These are two fundamental variables that condition the procedure design for evidence collection. Some other variables are also at work. For example, in the litigation structure, we have no jury trial and judges dominate both truth finding and law applying processes. Traditionally, Chinese people respect authority and prefer the judges to settle the case just as they did before.

In sum, we lack the social and cultural bases to practise the American trial pattern. It is designed on the assumption that there may be a jury. It relies on experienced lawyers to operate the litigation proceeding. Americans do not trust court's power in the pursuit of justice. These are totally different from the situation in China. Still, we cannot learn totally from the Germany in view that Chinese judges are not independent enough and are easy to be bribed. What will be China's choice?

5.5 Tentative Reform Recommendation for Evidence Collection in China

5.5.1 Judge's Authority Be Constrained and the Criteria Are Justice and Efficiency

As we have discussed above, although the German civil procedure is dominated by the judge, it is still based on an adversarial principle. The judge's role is limited by the party-presentation principle. According to this principle, "the Court may take into consideration only those facts and assertions which the parties have presented to him. The judge may not on his own seek out new evidentiary material."[197] In the scope of facts and assertions the parties have presented, the judge enjoys much privilege of initiative evidence collection. Under the control of judge's power abuse, the judge can bring his power into full

[197] See Gerber, fn. 117 at 754.

play in efforts to find the truth and then make a just judgment.

In China, therefore, completely denying the authority of judge for initiative evidence collection is not appropriate. We also should apply the principle of party-presentation to check the judge's possible abuse of authority. Based on this principle, some authority of initiative evidence collection should be retained just as those in ZPO 141–43 and 273. To be sure, as it is regulated in the Several Provisions, the court should initiate evidence collection without any application from a party in order to protect social interest and to solve procedural problems. In addition to these two aspects, the court should have authority to summon the parties (compelled by fine for not being present) to be present at the court if it is necessary for them to clarify the case. The court may request the parties to submit relevant documents in their possession that they have referred in the complaints and the answer briefs. The court also has the power to request the parties to submit specific documents which are relevant to the oral argument and judgment in their possession. The judge may request public authorities to transmit documents or furnish official information. The judge may summon the witnesses nominated by the parties in their writings. Although it appears that the court has great authority for initiative evidence collection, it will not result in power abuse because all the evidence collected by the court are within the scope that the parties have referred in complaint and answer briefs or in oral argument. But we must bear in mind that the judges in China are not independent, and as a result, in the initiative evidence collection proceeding, all the evidence collected initiatively by the court should be accessible to the parties and subject these evidence to debate in the oral hearing.

5.5.2 Time Limit for Evidence Adducing and Evidence Exchange

In order to make the litigation more efficient and avoid evidence surprise in the oral trial, measures of mandatory pleading and time limit for evidence adducing and evidence exchange can be introduced. As we have mentioned above, the scarceness of sanction for defendant's refusal to answer makes the mandatory pleading just an instruction rule. Both in Discovery in the United States and the evidence collection in Germany, there are certain rules about the sanctions for such refusal. In China, therefore, sanctions must be provided to compel the defendant to submit the answer brief to the complaint in time. In efforts to design specific sanction provisions, we can learn from the German principle that if a party fails to comply with an order of the court to answer the claim within a fixed time, they will lose the case unless the excuse for delaying them is shown.

While there is no sanction in the stage of mandatory pleading, sanction for the exceeding of the time limit in the process of submitting evidence is too strict. Thus we can provide the judge some discretion to define the sanction. Just as the

sanction in German civil procedure, the court can reject the evidence only when the court thinks that the submission exceeding the deadline of evidence adducing is enough to delay the end of the litigation and the party has a big fault for such delay after the evaluation of the court. Again, in order to constrain the impossible abuse of this judge's discretion, in the second trial procedure, this sanction should be evaluated by a higher court.

Evidence exchange is such an important means for the parties to employ for evidence collection. Thus it should be mandatory for all cases that will be handled in normal procedure. Compared to the Discovery, a more positive role of judge in evidence exchange will improve the efficiency of litigation.

5.5.3 Evidence Preservation

The pre-trial evidence preservation should be added to the Civil Procedure Law of China to ensure that the interests of a potential party will be protected. Like the rules in German civil procedure, strict provisions should be set to minimize the chance to impinge on other individuals involved in the case.

5.5.4 Application for Court to Collect Evidence

For the parties, the right of application for court to collect evidence is the most useful method for evidence collection. Thus it should be equipped with a careful designed procedure. Because the court has great discretion in determining what is "objective reason," this discretion should be defined so as to provide remedies such as endowing parties with a right to appeal to the higher court if their application is refused. Changing the method of court's evidence collection would be another effective way to boost the court's morale to help parties in collecting evidence. Instead of collecting evidence by itself, the court only needs to file an evidence collection order and request the relevant persons or institutions to submit the evidence they possess with specific sanctions for refusal. Thereby, any impartiality that results from the court's collecting evidence by itself is rendered impossible, and the court has no reason to refuse the parties' reasonable application because the judges do not need to employ their own judiciary resources for purposes of evidence collection.

For the specific kinds of evidence, now, for documentary evidence, we have three tools for parties to use: evidence exchange, evidence application for court to collect and evidence preservation. As the reform for the three mechanisms, the documentary evidence may be collected successfully.

The author will discuss how to facilitate the collection of the testimony of witness.

As discussed above, all institutions and individuals who have information

of the case bear the obligation of giving testimony in court. At the same time, it is extremely difficult to make the witnesses to appear in court to give testimony. Although in some specific cases, with the approval of the court, the witness may submit a written testimony, the written testimony is not often justified and legitimate because it could not be subject to debate in court.

How to collect the testimony of witness? In accordance with specific reasons for the low rate of witness' appearing in court, merely enforcing the witness to appear in court will not bring about good effect because this needs enormous judiciary resources, which the court could not afford. Thus in such circumstances, special rules are needed to solve this problem. According to ZPO Article 375, in Germany the judge can go to the witness' residence to get the testimony by himself. This is indeed a good way to collect the very kind of evidence and can be introduced to China. Because most of the Chinese seldom go to court in their whole life, they generally fear going to court. Thus if the judge can go to the residence of the witnesses, they might be willing to give their testimony. Of course, in order to guarantee the impartiality of the procedure, the two parties should be present, too.

Alternative ways such as the notarization of the testimony of the witness is also helpful to evidence collection.

To be sure, the most effective way remains the one that compels the witness to appear in court when the testimony of a witness is key to a dispute resolution. For this reason, sanctions should be filed if the witness did not appear in court after the summon of the court such as fine or detention.

There are no privileges a witness can invoke to refuse to give testimony in some special situations. This reflects a philosophy that in pursuit of social interests the individual rights can be encroached upon. With the Chinese right consciousness awakened, this should be changed. Some fundamental individual rights should be protected. We can also learn from the German privileges system because in checking the court's power, it protects more privacy rights than the United States legal system does.

6 Conclusion

The lawyer-dominated discovery in the United States almost provides the most sufficient devices in the world for the parties to collect maximum amount of information before trial to succeed and find the truth in the trial. With the maximum access to the information, the Discovery was abused. The expense and complexity, coupled with the opportunities and incentives for lawyers to influence witnesses' testimony are severely criticized. There has been certain voices advocating the change of the Discovery into the German style of evidence

collection.

The structure of German Civil Procedure Law is fundamentally different from that in the US. There is no Discovery Mechanism in German Civil Procedure. However, according to the multiple mechanisms provided by the German Civil Procedure, the judge-controlled evidence collection may also guarantee the fact-finding in the litigation. Because the scope of evidence collection is strictly defined by the court, some scholars think that the German style for evidence collection may improve the litigation efficiency.[198]

In fact, the difference between the German Civil Procedure and the American Civil Procedure is rooted not in statutes but in cultures defining the respective roles of lawyers and judges.

Methods of evidence collection in the US is bound up with its cultural definitions of the respective jobs of judge and attorney and is compatible with other aspects of their legal culture—including the use of juries, the way they are chosen and influence the judge, and attorneys' fee structure. The American system of discovery values truth more than privacy. Accordingly they fear the court-controlled evidence collection may not be as thorough as discovery conducted by the parties' lawyers. Because on the one hand, the continued institutional pressure will make the court to curtail discovery in order to clear their dockets; on the other hand, the judges are subject to no countervailing economic pressure to be thorough. Another fear is that discovery by a judicial officer may result in undesirable state intrusion into the private sphere. It is undeniable that putting strong discovery means the judge would bring about more unwarranted state intrusion into personal privacy than does China's present system of party-driven and attorney-led discovery.

Germany's judge-led evidence collection is also determined by the German legal culture and is closely linked to other fundamental aspects of the German legal system. Within it the specific disclosure duties and expansive privileges shows greater concern for protecting privacy interests and less concern for finding the truth. Underlying the court-controlled procedure design is the assumption that "it is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the truth, not the gathering of immense quantities of factual information by attorneys who are then free to present or not to present such information and to manipulate its presentation to serve their own ends."

---

[198] For example, see Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986); Ronald J. Allen, Stefan Köck, Kurt Riecherberg & D. Toby Rosen, *The German Advantage In Civil Procedure*: *A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 Nw. U. L. Rev. 705 (1988).

Both systems pursue the aim of fact-finding and privacy protection, but the two systems strike very different balances between the two goals. At the same time efforts to improve their judiciary system according to judiciary reform never relax. And the interesting phenomenon is there is some blend trend in recent years.

The Civil Procedure Law of China was first promulgated in 1982 and has been amended for several times. Although originated in Germany law system, for about 30 years after 1978, the current of Chinese judiciary reform is to check the court's power in the litigation and to improve the party's right of the litigation control mainly following the American style. However, the decline of court's initiative evidence collection and the strict rules for the time limit of evidence adducing have caused many bad effects. When the law and regulation try to restrict the authority of the court on paper, however, the court's power does not been restricted in litigation practice. The relevant rules just provide the court more discretion for the use of their power.

In China the court and judge are not independent and easy to be corrupted. There are also no full incentives for the judge to conduct efficiently and effectively. That is the root cause why the current Chinese judiciary reform is to restrict the court's power in the litigation and to improve the party's right in the proceedings. However, the parties in China generally lack the ability to move on the litigation by themselves because most of the parties do not know the knowledge of litigation well. At the same time most of the parties in China have no money to hire a good lawyer to help them in the litigation.

These two basic factors, combined with other factors such that we have no jury trial and judges impinge on both the truth finding and law applying. Traditionally, Chinese people respect authority and prefer the judges to provide the truth of the case and give the final judgement as they did in the past. This determines that we lack the basis of applying the American Discovery pattern; but we are also not able to copy the German legal system because in China the judges are not independent and easy to be bribed by the parties.

Thus, in China, fundamentally we can learn from the German style of evidence collection. With the introduction of the party-presented principle to constrain the abuse of power by judge, we should empower judge in the process of evidence collection. At the same time, the procedure should be carefully designed to assure the parties' participation into the court's initiative evidence collection and sufficient remedy should be provided to protect the parties from being injured by the court. Accordingly, the specific mechanisms should also be reformed to guarantee the justice and efficiency.

Author

Yanrong Zhao，Master of International and European Law (Vrije Universiteit Brussel) and Master of Civil Procedure Law (China University of Political Science and Law)，Ph.D candidate (China University of Political Science and Law), now works at China University of Political Science and Law. Her research focuses on the reform of civil procedure law system and evidence rules. Her theses include 论中国民事再审程序之重构 (Reconstruction of Chinese Civil Retrial Procedures, 2008), 论中国法院调解制度改革的模式选择 (The Reform Pattern of Judicial Mediation System in China, 2008).