

Examination and Reconstruction of Evidence Loss System from the Perspective of Comparative Methods

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Abstract: The purpose of the system of evidence disqualification is to limit parties' abuse of litigation rights and avoid litigation delays. However, China's discretionary evidence disqualification legislation violates the essence of evidence disqualification and encourages the emergence of transactional litigation, making evidence disqualification in our country a minor issue. We must evaluate the substance of the evidence disqualification system and create evidence disqualification norms in other jurisdictions based on our national conditions in order to manage litigation procrastination and apply the concept of equality of parties. Remove the flaw while keeping the essence. Creation of the pre-trial procedure and application of the interpretation right should be the cornerstone to the system's construction, according to research. At the same time, based on China's national conditions, taking the loss of probative power as the consequence of overdue instead of fines and other substantive measures, we should be able to achieve the purpose of reshaping the system of evidence disqualification.

Keywords: Evidence disqualification; Comparative study; Pretrial procedures; Interpretation right; Probative force

Publication date: December 2021; **Online publication:** December 29, 2021

1. Introduction

The evolution of China's evidence loss system exhibits typical phased characteristics. From the evidence loss system established in the Evidence Provisions in 2002 to the legal evidence disqualification system enshrined in the Civil Procedure Law in 2012, it is clear that China's evidence loss legislation is easing. Theorists believe that, based on the provisions of articles 101 and 102 of the Interpretation of Civil Procedure Law, the system of evidence disqualification has been largely abolished in Chinese law, with only the situation where parties intentionally or grossly negligently fail to provide evidence irrelevant to the basic facts of the case remaining.

Is it worth evaluating if the system of evidence disqualification has fully lost its utility, to the point that it can no longer be used in China? The answer, according to the author, is no. After studying the overdue proof sanctions mechanism, it was discovered that the deterrent factors used by the overdue proof punishment measures may be money or personal freedom, but the only mechanism directly aimed at the time factor is evidence disqualification, which can only be used to prevent the litigation from being delayed at the source. Consider the following examples of common penalty measures in practice: If the parties believe that the benefits achieved by submitting evidence after the deadline outweigh the simple financial loss, they are very inclined to pursue such unethical ways of litigation in order to obtain bigger benefits. If the overdue proof can be adopted by accepting some sanctions, the actual cost exchange system will be

established, and the overdue proof will be difficult to be effectively controlled.

As a result, the evidence disqualification system remains the most efficient penalty mechanism for the party's overdue proof with subjective malice. However, there are certain issues with the establishment of an evidence disqualification system in China, such as legislative ambiguity and a lack of rationale in consequence setting, which effectively renders the evidence loss system ineffective in practice. In order to clarify the evidence disqualification reconstruction path, this study will examine the system's worth and flaws from the perspective of comparison approaches, in order to determine its right path.

2. Investigation and comparison of evidence disqualification system in various jurisdictions

In order to make a comprehensive comparative analysis of the establishment of evidence disqualification system in various jurisdictions, this paper selects four typical jurisdictions, Germany, Japan, the United States and Taiwan, as the analysis samples to study the requirements, exceptions and legal consequences of the evidence disqualification system, in order to explore the reference for the construction of our system. With regard to Germany, article 296 of the Civil Procedure Law of the Federal Republic of Germany stipulates that when the method of attack and defense is proposed after the relevant legal period. If, based on its free evaluation, considers that the late filing or notification is sufficient to delay the conclusion of the lawsuit, and the party has gross negligence in respect of the overdue period, the court may reject it. This article stipulates the exceptions and legal consequences of the system of evidence disqualification, that is, there are two constituent elements of evidence disqualification: First, whether the late submission of evidence will have consequences affecting the litigation process; Second, whether the parties have gross negligence in presenting evidence overtime. If the two elements are established at the same time, the evidence disqualification will occur. In addition, article 296 requires the parties to explain that they are not at fault. According to German law, such interpretation only needs to meet the degree that affects the judge's free evaluation of evidence, but does not rise to the probability standard ^[1].

With regard to Japan, Article 157 of the New Civil Procedure Law of Japan stipulates that when there is a risk of significantly hindering the litigation according to the trial plan, the court may, according to the application or its authority, rule to reject the attack and defense methods proposed by the parties after the period has passed, with the exception that the parties clearly have appropriate reasons. It can be seen from this provision that the design of evidence disqualification in Japan is similar to that in Germany. The difference lies in the effective standard of evidence disqualification, that is, Japanese law stipulates that as long as the parties who provide evidence overtime do not have gross negligence and explain the relevant acts of proof according to the provisions, generally speaking, the consequences of evidence loss will not occur. This interpretation is a special part of the evidence disqualification system in Japan, and is based on the request of the other party. If there is no such request, the evidence may directly enter the proceedings ^[2].

With regard to Taiwan, Article 196 of the new Civil Procedure Law stipulates that if a party delays in providing evidence due to intentional or gross negligence, which hinders the conclusion of the lawsuit, the court shall reject the overdue evidence; If the intent of the party's means of attack and defense is unclear and the necessary clarification is not made, the court shall not accept overdue evidence. According to this provision, it can be seen that the condition for the evidence disqualification in Taiwan is that the parties violate the obligation of litigation promotion, has the subjective sense of accountability, and leads to the consequences of litigation delay, the judge can reject it based on free evaluation of evidence. At this time, it is also necessary for the parties to explain the legitimate reasons for their existence.

As for the United States, it is more special. Article 26 of the Federal Rules of Civil Procedure of the United States stipulates that both parties to the lawsuit have the obligation to show relevant information and evidence to the other party in the discovery procedure. If the parties do not produce relevant information

without sufficient reasons, they are not allowed to use the unproduced witnesses or testimony and their information materials as evidence in court hearing, over or application. The United States excludes all evidence without evidence discovery procedure from the trial link in order to maintain its centralized trial system^[3].

It can be seen from the legal provisions of the above countries and regions that most of them adopt the system of evidence disqualification, which gives judges greater discretion to judge whether there are consequences of loss of power by considering the subjective immutability of the parties and whether it leads to litigation delay. Compared with China, the provisions of evidence disqualification in other jurisdictions pay more attention to the effect of loss of right itself, and are more operational. First of all, with regard to the exception of evidence disqualification, Germany sets the standard as not causing delay in litigation and no gross negligence of the parties, Japan, Taiwan and other jurisdictions also take litigation delay into account, while China takes “reasonable reason” as the standard to judge whether the parties need to accept disciplinary measures, fines and other punishment measures, which is questionable in feasibility and clarity. Secondly, with regard to the consequences of late proof, Germany, Japan and Taiwan have set up a procedure for the parties to explain their faults and give them the possibility of relief, while China directly stipulates that the parties without justifiable reasons should be admonished and fined without explaining the procedure. From the perspective of system design, there may be a suspicion of improper legislation with loose rules and strict consequences, and the punishment measures may conflict with the institutional purpose of evidence disqualification.

Therefore, by comparing with the provisions of other jurisdictions, the author finds that the biggest difference between China’s evidence loss system and the provisions of other jurisdictions may lie in the provisions of exceptions and explanation rules. From the perspective of China’s legislative trend, pre-trial procedure is more and more frequently discussed by the theoretical circle, which is complementary to the evidence disqualification system. If we want to reshape the system of evidence disqualification in China, we should analyze the above differences and explore the essential defects and paths of evidence disqualification in China.

3. Value analysis and problem presentation of discretionary evidence disqualification

According to the legislative intent of the system of evidence disqualification, it promotes the parties to provide evidence overtime by stipulating the evidence disqualification proof except in exceptional cases. In essence, the idea of discretionary loss of right of evidence and the consequences of overdue proof in China may be contrary to this basic intent, which makes the system of loss of right of evidence in China actually become the “balance” to measure the benefits of proof. In order to further clarify the due legislative model of the evidence disqualifications system, the author believes that the defects of the system itself can be summarized to clarify the approach.

According to the provisions of the Civil Procedure Law, there are three legal consequences arising from the parties’ overdue proof: First, the overdue evidence with reasonable reasons is adopted; Second, the overdue evidence without reasonable reasons has the effect of losing rights; Third, overdue evidence without reasonable reasons was adopted after being admonished and fined. According to this provision, it can be found that the effect of evidence disqualification has almost no place in China’s legislative system, which essentially makes all overdue evidence can participate in the proceedings. This provision has also had many adverse effects in practice:

First, the disputes in the case cannot be fixed. According to the general litigation process, in the pre-trial preparation stage, the parties will exchange and fix the evidence they hold, and clarify the focus of the dispute on the basis of understanding the facts of the case, so as to improve the trial efficiency and quickly resolve the dispute. The current situation of the absence of the validity of evidence disqualification in China

makes it possible for new evidence to be put forward at any time in the whole litigation process, which will then affect the determination of the focus of dispute in the case. It will not only make it difficult to establish the pre-trial preparation procedure in our country, but also affect the construction of the centralized trial system in our country.

Second, it affects the authority of court judgment. The purpose of the system of loss of right of evidence includes limiting the parties' abuse of litigation rights and ensuring their equal status. In fact, the discretionary evidence disqualification adopted in China makes the parties who do not provide evidence overdue suffer no interests and violates the principle of equality of the parties. Moreover, from the above analysis, it can be seen that the use of disciplinary measures such as admonition and fine to regulate the overdue proof will lead to the emergence of interest measurement litigation means, which will essentially damage the due value of procedural justice ^[4].

4. Analysis of remolding ideas with the improvement of pretrial procedures as the core

In order to solve the contradiction between China's evidence disqualification system and the improvement of pre-trial procedure, a deeper analysis of the loss of power system itself may not be able to achieve the root effect. If it is supplemented by the discussion of the improvement of the pre-trial procedure, the improvement of the pre-trial procedure to derive the perfect path of the evidence loss system, and the analysis of the details of the judge's interpretation right, exceptions and legal consequences, it may be useful. This paper will take the United States, which has a relatively complete pretrial procedure, as an example.

The United States applies the principle of centralized trial and completely distinguishes the pre-trial procedure from the trial stage, so as to ensure the equal adversarial status of the parties at the trial. Its pre-trial procedure is divided into three stages, namely, litigation and response procedure, discovery procedure and pre-trial meeting: The first is the litigation and response procedure, which aims to clarify the focus of disputes between the two parties and determine whether the case can enter the court trial stage by organizing the parties to exchange petition and reply. The second is the discovery procedure, which has three purposes: preserving the testimony of witnesses who cannot appear in court, clarifying the points of contention and discovering other evidence. One party is given the right to directly request information and evidence related to the facts of the case from the other party outside the court, which reduces the possibility of litigation raid and helps to realize the principle of litigation equality. The last is the pre-trial meeting, that is, the accused judge makes a pre-trial ruling according to the previous content, lists the scope of the dispute points, the catalogue of evidence and other matters, and serves as the basis for the parties to carry out subsequent litigation. The United States advocates the procedural concept of "judges' active management and active intervention," which avoids the possibility of the parties abusing the pre-trial meeting to delay the litigation to a great extent ^[5].

Therefore, the functions of pre-trial procedure are mainly set in the following three aspects: First, it can sort out and fix the dispute focus to prevent the parties from changing the dispute focus by presenting new evidence after entering the court proceedings, resulting in litigation delay; Second, it can prepare evidence for the trial procedure. In order to maximize the efficiency of proof and cross examination in the court trial procedure, we should collect and exchange evidence around the facts of the case in the pre-trial procedure, so as to clarify the litigation claims of the opposite party and help them further collect strong evidence; Third, it can serve as a pre-dispute resolution procedure. Through the exchange of petitions and replies, both parties have a further understanding of each other's claims, so that they can have a deeper understanding of the rationality of their claims, which provide conditions for the judge to create space for the parties to ease disputes, and make some disputes with clear case conditions be solved in advance ^[6].

According to the above ideas, the author believes that the key to reshaping China's evidence

disqualification system lies in three aspects: the connection between pre-trial procedure and court procedure, the application of judge's interpretation right and the setting of the consequences of overdue proof, which will be discussed one by one below.

First, there should be an independent pre-court review process. In order to improve the specialization of litigation, avoid the random change of dispute points and improve litigation efficiency, we may study the separation of functions between trial judges and pre-trial judges. Firstly, the pre-trial judge should control the contents of pre-trial links such as evidence collection and dispute determination in an all-round way, so as to reduce the possibility of evidential defects. Secondly, the pre-trial judge and the trial judge form a connection to avoid the tendency of the trial judge to form a prepositive psychological evidence before the opening of the trial. Under this setting, the impact of evidence disqualification on the discovery of true value should be mitigated.

Second, the applicable standard of interpretation right should be clarified. The application of interpretation right includes two aspects: On the one hand, it lies in the exercise of the judge's interpretation power. In the pre-trial procedure, the pre-trial judge should comprehensively elaborate the requirements of proof and the adverse consequences of overdue proof, and guide the parties to complete all the acts of proof, so as to create and reconstruct an evidence environment for the subsequent court proceedings. On the other hand, it lies in the application of the parties' interpretation right. Foreign law usually stipulates that the parties have the obligation to explain the situation of overdue proof, which can be used for reference, but should be strictly limited. The consequences of overdue proof should not only restrict the parties who maliciously delay the litigation, but also restrict the behavior of proof that has no maliciously but adversely affects the other party in essence. Therefore, the "reasonable reasons" should be clarified and the judgment criteria should be set. Thus, only those who fail to submit evidence after exhausting reasonable means within the specified period can be regarded as the exception of overdue proof.

Third, the determination of the probative force of evidence should be taken as the consequence of the exceptional adoption of evidence disqualification. As can be seen from the preceding analysis, China's discretionary evidence loss system, when paired with scolding, fines, and other measures, is essentially opposed to the evidence loss system's basic principle and should be altered. To improve the implementation of the system of loss of right of evidence, we should stick to the legislative notion of treating late evidence as an exception and using legal consequences as a procedural punishment mechanism. The impact of late proof on the probative force of evidence can be considered at this time. If evidence is produced late at the court stage and cannot be explained properly, the evidence will lose its probative value, which will serve as a warning to the parties. At the same time, it also corrects the legislative defect of regulating procedural defects with substantive punishment ^[1].

Disclosure statement

The author declares no conflict of interest.

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