

# The Disqualification of Overdue Evidence in China

## -- From the Perspective of New Civil Evidence Rule

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### Abstract

The 2001 Civil Evidence Rule in China which provided for the loss of overdue evidence in civil proceedings did not function as a strict evidence disqualification system because of its practical difficulties and resulting poor operation. By 2019, the new evidence rule simply removed Article 34 of the original rule on statutory disqualification of overdue evidence. The system has been adjusted over the past 20 years, but it still does not work as well as it should, resulting in the system being left in vain. This is the result of the following reasons: insufficient attention to the status of the parties in civil litigation, the lack of supporting pre-trial procedural, and the disqualification of evidence affected by too many factors. The system of late lapse of evidence has a significant role in centralizing trials and avoiding sudden attacks on litigation. It is necessary to construct an effectively operating system. It needs to be based on the litigation dominance of the civil parties, based on a complete pre-trial procedure, and reasonable influencing factors to have a good development of the system.

### Keywords

disqualification of overdue evidence; Evolution of Civil Evidence Rule; Domination of civil parties.

## 1. Introduction

In 2001, the Supreme People's Court enacted "Certain Provisions of the Supreme People's Court on Evidence in Civil Proceedings", and the system of overdue evidence disqualification was established in China. However, it is not effective because it is too strict in practice and does not match the current national conditions. Over the past two decades, successive laws, regulations and judicial interpretations have been introduced to try to improve the system. However, the relevant legal provisions were removed directly after the enactment of the new "Certain Provisions of the Supreme People's Court on Evidence in Civil Proceedings (2019)". Disqualification of overdue evidence was once given high expectations by the academic circle, but is being relegated to a fringe system step by step in the judicial practice. [1] However, the new evidence rule has not solved the problem, but rather stirred up a thousand waves and caused a more violent debate in the academic community. The disqualification of overdue evidence system has been positively operated in both common law and civil law systems. To answer the question of why it is blocked in China, it is necessary to analyze the historical process of the system and find the answer to the question in the experience.

## 2. The Evolution of The Relevant Norms in China

The relevant provisions of disqualification evidence system in China have gone through a twenty-year-long evolution process. Starting from the evolution of relevant provisions of system in China, it is helpful to clarify the development ideas of overdue evidence in China and to identify the problems. In 2001, the Supreme People's Court on civil litigation evidence rules,

Article 34 "the parties shall submit evidentiary materials to the people's court within the period of proof, the parties do not submit within the deadline for proof, as give up the right to proof." This marks the establishment of the disqualification of evidence system in China, which clearly specifies that evidence submitted outside the period of proof is no longer qualified as evidence and the court will not examine the evidence in response. In other words, it means that the parties lose the right to request the court to organize the proof and cross-examination of the method of evidence, and the court will no longer conduct an evidentiary investigation into the overdue method of evidence. [2] The rule also marked the exceptions to the disqualification of evidence, of which the second paragraph of Article 34, Article 41 and Article 43 play the role of a proviso. These exceptions are the following three: first, no disqualification occurs when the other party agrees to cross-examine overdue evidence; second, no disqualification occurs for evidence discovered after the expiration of the proof period; and third, evidence that is still unavailable during the extended proof period and that would result in an obvious injustice if not examined. Except for the above three cases, all evidence should be submitted before the expiration of the deadline for proof. In order not to contradict the provisions of the 1991 Civil Procedure Law in force at that time, Article 44 of the Evidence Rules clarifies the "new evidence" provided for in the retrial, which refers to evidence that is only discovered after the end of the trial proceedings.

The 2007 revision of the Civil Procedure Law does not have any relevant provisions on the disqualification of the evidence. This may be because the evidence provisions are not actually applied in practice and have not had a practical impact. The new law amendment chose to ignore the issue of the period of proof and avoided the issue of the disqualification of overdue evidence.

In 2008, the Supreme People's Court issued the "Notice of the Supreme People's Court on the Application of the Provisions on Evidence in Civil Proceedings", in which Article 10 added a new consideration to the disqualification of evidence system. Time is no longer a mere consideration, but the subjective fault of the parties is taken into account. At this point, although there are fewer cases of disqualification of evidence, the system of disqualification of overdue evidence still exists. In November of the same year, the Supreme People's Court issued the "Interpretation on Several Issues Concerning the Application of the Trial Supervision Procedures of the Civil Procedure Law of the People's Republic of China" (brief in "Interpretation of Trial Supervision Procedures"), in which Article 10 of the interpretation of new evidence in the retrial procedure began to negate the relevant content of the evidence rule. It is provided that in the retrial proceedings, the unexamined evidence in the original trial provided can be qualified as new evidence. This means that if a overdue evidence is disposed of in a loss of right in the original trial, the party can directly apply for a retrial and re-dispose of it by way of an application for a wrongful trial. The re-trial rate is linked to the judge's administrative assessment index, and a high re-trial rate will affect the judge's annual assessment, thus if the judge uses the disqualification of overdue evidence system is to add trouble to himself, he will not only accept the lack of understanding from the parties, question the fairness of the decision, but also accept the pressure from the evaluation of performance in the re-trial, thus the judges will not choose to use the disqualification of overdue evidence system.

In 2012, the Civil Procedure Law was again amended and the conditions for the adoption of overdue evidence were again broadened. At that time, Article 65 of the Civil Procedure Law pointed out that for late evidence only need to state the reasons can generally be used, the reasons are not justified or do not state the reasons, can be rejected, can be fined or adopted after admonition. The Interpretation of Trial Supervision Procedures is to restrict the use of the disqualification of evidence system in the first instance procedure from the side of the trial supervision procedure, and the amendment of the Civil Procedure Law is to further strengthen the determination to cancel the disqualification of overdue evidence system directly by

changing the provisions of the first instance procedure. This has revealed many problems such as inefficiency and delay in litigation, and in order to balance the problems, to pursue the efficiency of litigation and promote litigation. Although the time limit for proof was relaxed, the penalty of admonishment and fine was proposed for the period of evidence. The measure of penalty for late evidence to promote efficiency was proposed by Mr. Li Hao in the early years as an alternative to the disqualification of overdue evidence. He argues that "a fee sanction should be a more appropriate and balanced disposition, even though he may not be as strong a sanction as an evidentiary disqualification." [3] The cost sanctions, which were formally introduced into the law in 2012, have also been tested in practice, but the actual results have not been satisfactory.

The 2015 judicial interpretation of the civil procedure law, the issue of late-proof is once again complicated, and the judgment standard has been added to the condition that it is related to the material facts. Article 101 and 102 of the interpretation of the Civil Procedure Law state that if there are justifiable reasons for late proof, it is considered that there is no late; late without justifiable reasons, the party deliberately or significantly negligent late, and related to the material facts, admonition fine after the adoption. Judicial interpretation of the adoption of late evidence has increased more and more considerations, all considerations are increasingly widening the path of evidence into litigation. From 2012 to 2015, evidence that is not supported by reason can be disqualified, to evidence that is not supported by reason is not disqualified as long as it is related to the material facts, in fact, late evidence is increasingly not excluded in civil procedure. At this point there are three paths to overdue evidence, first, "no deliberate or significant negligence - adoption of evidence - admonition". Second, "deliberate or significant negligence - relevant to the fundamental facts - adoption of evidence - admonition or fine". Third, "deliberate or significant negligence - unrelated to the fundamental facts - disqualification of evidence".

In 2019, the new rules even directly delete the original 34 articles, the provisions that late proof will lead to the disqualification of evidence are all deleted. The direct deletion of the provision this time is a waste of 20 years of effort and the result of compromise with reality in the process of trying to find a way out. Even without the deletion of the provision, the contradiction between the various judicial interpretations has made the system exist in disguise. So it seems that our journey is back to the beginning, and we wonder what has gone wrong. The system of disqualification of evidence cannot be successfully implemented in China, the cost sanction as a compromise measure does not seem to enhance the efficiency of the litigation, the evidence is still always available to enter the proceedings, and the litigation process is still delayed.

China's courts are under tremendous trial pressure, and a large number of cases and a small number of people is a common phenomenon in primary courts. First, improving the efficiency of litigation can prompt the judge to get out of the case faster and reduce the pressure of trial. Second, the centralized and rapid trial of cases, the judge can have more accurate and clear thinking, which helps to ensure the substantive justice of the case. Third, improving the efficiency of litigation is also desired by the parties, faster settlement of disputes can reduce the burden of litigation and restore the damaged social relations as soon as possible. We need a system to ensure that evidence is submitted, fixed and organized as soon as possible, to improve the efficiency of litigation. An effective and efficient way to deal with late evidence is indispensable. Before we explore its natural appearance, we first need to explore the reasons why the disqualification of overdue evidence system has not been effective for 20 years, and learn from the mistake and start again.

### 3. Exploring the Reasons for the Invalidation of the System

The changes in the law and regulations also reflect changes in judicial philosophy. The changing attitude toward the treatment of overdue evidence over the years is due to the lack of a good environment for the system to operate. The lack of party subjectivity in civil litigation, the poorly positioned function of pretrial procedures, and the need to consider too many factors in judging overdue evidence are the three main reasons why the system has become increasingly ineffective.

#### 3.1. The lack of party subjectivity

The evidence system has a strong dependence on the litigation system. The evidentiary system must be coordinated with the litigation system in order to promote and develop each other. [4] When the evidentiary system is counter to the litigation system, it becomes apparent that there is a problem. Regarding the litigation model, it divided the civil litigation model into an inquisitorial system and adversary system. China has been influenced by historical factors, civil litigation has been showing an authority model and inquisitorial system, the court dominates the litigation. The parties act more as passive parties in civil litigation. With the growing understanding of civil litigation, there is also a gradual recognition of the important role of the parties in civil litigation. The parties are not passive participants, but the subjects of the procedure. Thus, in civil litigation, the parties began to be continuously given more and more rights and improve the status of the parties in litigation. Taking the basic model of civil litigation in the civil law system as a reference, it has become a consensus in the academic community to construct a party-based litigation model in China. [5] And this is what we have been striving for over the years.

However, the existing subjective status of the parties is not sufficient to support the system of disqualification of overdue evidence system. The effective operation of the system has very high requirements for the subjective status, participation and scope of rights of the parties in the litigation. The rights and status of the parties in civil proceedings are not sufficient to afford the system. The operation of overdue evidence requires full awareness of the system by the parties. The pursuit of procedural justice in the disqualification of evidence may result in the impairment of substantive justice in a given situation, but the loss of substantive justice is based on a litigation contract previously agreed between the parties and is conducted under conditions where both parties have been clear about the rules of litigation. In party-based civil proceedings, the parties have the subjective status and procedural initiative to understand their rights and responsibilities in the proceedings, and the parties can collect and organize the evidence and complete the proof and cross-examination within the prescribed period through full procedural autonomy. Understand the consequences of overdue evidence. Rather than simply relying on the judge for all litigation activities.

We have not yet developed such a model. Our disqualification of evidence is not based on such a litigation model. Our disqualification of evidence system is as a heavy burden suddenly placed on the parties under the judge's authority. It is said to be a burden for parties, not an obligation, because there is no equivalent right to the parties. We can illustrate it with a simple example: the party collects evidence in some cases yet requires the help of the court, but the risk of not submitting the evidence on time is entirely shouldered by the party. The unequal rights and obligations naturally causes strong opposition from the parties to this model. Coupled with the low levels of operational capacity of our parties in civil litigation, parties do not have a good understanding of the reasons for the exclusion of overdue evidence. The parties believe that the outcome justice is the real justice. The exclusion of overdue evidence under such circumstances is generally not understood by the parties. The parties do not comprehend that the evidence is

excluded because of procedural justice and will just consider it as the judge's partial to the opposing party, thus creating a negative evaluation of justice.

The disqualification of overdue evidence system should be established on the base that the parties have a complete status of procedural subjects. In the relationship between the disqualification of overdue evidence system and the litigation model, the importance of the status of the parties is the cause and the obligation of the parties to provide evidence is the effect. The evidentiary system should be compatible with the litigation system. Increasing the procedural burden on the parties does not, conversely, promote an increase in the subjectivity of the parties. Only when the subjective status of the parties is first ensured and the movement toward a party-based model is made will the foundation be laid for an overdue evidence system. The relationship between the two, cause and effect, must not be reversed, but the system in our country is being established, precisely without understanding this truth, reversing cause and effect.

With the 2001 rule, we have stepped too far ahead. We attempted to pursue procedural justice and strengthen the subjective position of the parties by strengthening their burden in providing evidence. This has created a situation where the legal norms contradict each other and ultimately resulted in the overdue evidence disqualification system becoming a useless civil litigation system in reality. The disqualification of overdue evidence system should be based on the precondition that the parties have the status of the subject of litigation, and it needs to be based on the background of the parties' understanding of the procedure and respect for the parties' rights. Only from this will the parties' rights and obligations be equivalent, and only then will the disqualification of overdue evidence system be accepted in civil proceedings.

### **3.2. Insufficient function of the pre-trial conference**

In both common law and civil law systems, the review of overdue evidence is closely related to the pre-trial process. Both common law and civil law systems have functionally similar pre-trial procedures that prompt the parties to submit evidence, lock the evidence, exchange evidence, and organize the points at issue in the case before the formal trial begins. In pre-trial proceedings, these preparatory activities accelerate the efficiency of the formal trial and focus attention on the issues in dispute at the formal trial. It is the effective efforts in pre-trial proceedings that provide reasonable grounds for disqualification of overdue evidence. Thus, the time point for evidence to be expired generally exists in pre-trial proceedings, rather than in trial proceedings. Such pre-trial proceedings, in effect, divide the litigation into two stages, a preparatory stage and a formal stage. The former stage is the deadline for the submission of evidence, while the next step in the proceedings is initiated after the deadline for the submission of evidence. Without going through the deadline, the following proceedings do not start, this is with a clear time point.

In China, previously there has been no pre-trial procedure, only pre-trial preparation by the judge. Thus, there was also no clear time for the submission, organization and fixing of evidence. The deadline for the submission of evidence, the deadline for evidence, is confused with the court proceedings. Whether the evidence is submitted or not does not affect the development of the subsequent proceedings. Evidence periods are counted by a fixed number of days, which leads to the possibility to exclude a lot of evidence at the trial.

In fact, our pre-trial procedures are being constructed. The general reform direction of our civil procedure is also towards the evolution of a two-stage litigation model. Initially, civil litigation had only pre-trial preparation, which was centered on the judge and mainly focused on the convenience of the follow-up work of the judge. By 2015, the pre-trial conference was established in the judicial interpretation of civil litigation, which transformed the pre-trial preparation into a pre-trial conference. At this time it already possessed the awareness of exchanging evidence and fixing the debate focus in advance before the formal hearing. But the

pre-trial procedure and formal trial procedure are still not established, and the evidence submission and fixing are still not clearly required in the pre-trial conference. The establishment of pre-trial procedures is still our goal.

The purpose of pre-trial proceedings and trial proceedings, a two-stage model, is similar to the aim of the system of disqualification of overdue evidence. Fixing and organizing the disputed points in pre-trial proceedings can improve the efficiency of the litigation and can clarify the disputed points of the parties. Limiting the time period for providing evidence also improves efficiency and provides an analysis of the points in dispute based on the evidence that has been provided. The two are mutually complementary and their roles are coherent. Thus, the disqualification of overdue evidence requires the help of pre-trial proceedings in order to be able to perform its function positively.

At present, our pre-trial procedures have not been established, but the system of overdue evidence disqualification has existed for many years. Thus, the system of disqualification of overdue evidence lacks the procedural guarantee of civil litigation, and therefore cannot perform its function. Over the years, one of the reasons why the system of disqualification of overdue evidence has not been able to overcome its dilemma is that there is no supportive pre-trial procedures to assist, and the reform of pre-trial procedures has not followed the pace of the system.

The presence of pre-trial procedures tested by practice is in line with the objective principle, the establishment of China's pre-trial proceedings and trial proceedings co-exist in the civil litigation model has become a reform tendency. But the disqualification of overdue evidence, goes more and more useless, until in the new rules were completely removed. It can be seen that the civil litigation reform does not have an overall direction. The purpose of the reform of two system has created a deviation. The system of disqualification of overdue evidence, which is contrary to the principle of pre-trial procedure reform, gradually lost its dynamic until it was completely discarded by the new evidence rules.

### 3.3. Too many institutional considerations

There is a great consensus among the countries and regions of the civil law system on the elements of disqualification of overdue evidence, all requiring two elements: the element of delay in litigation and the element of imputation by the parties. [6] The element of delay is required to determine whether the party's non-submission of evidence on time will cause delay in the litigation. If the party's submission of new evidence will cause the prolongation of time in the case, then it is an element of delay in the litigation. There are different theories for the recognition of the element of delay in litigation. In Germany, for example, there is an absolute theory. In the other words, when it is more time efficient to reject late evidence than to admit the late evidence, it is considered as delay in litigation. [7] The party attribution elements, judged by the size of the subjective fault of the parties, for the delay in the submission of evidence caused by non-human controllable and other factors, the law also gives full consideration to humanity, generally do not default on this type of evidence. The smaller the subjective fault of the parties, the smaller the probability of disqualifying the evidence; the greater the subjective fault of the parties, the greater the probability of disqualifying the evidence.

In common law countries, the collection of evidence is concentrated in the pre-trial stage, with the discovery system as the core, and evidence beyond the pre-trial stage will not be adopted by the court except in some cases, which is known as the "pre-trial closure principle" [8]. The essential nature of the principle of pre-trial closure is a consideration of time, and a separate consideration of time, which cuts off when it reaches the point of pre-trial termination. The time consideration of the delay element of the litigation is a more comprehensive process

consideration, which requires the entire litigation process as a reference object. However, no matter which element, the essence is time.

In the evidence rule of 2001, there are both time element and imputation element. Although the rule at that time is not mature, it has a good beginning. By the announcement of the interpretation of the Civil Procedure Law in 2015, China's overdue evidence system added a new element of consideration, that is, "related to the essential facts". How to understand this new element? Because at this time the rules of retrial have been modified, overdue evidence can be considered as grounds for retrial, so when the requirement of "relevant to the essential facts" arises, the practice is to make a broad understanding. Try to ensure that overdue evidence will not be disqualified, so as to avoid the occurrence of retrial, which may impact the judge's assessment at the end of the year.

It is clear from the practical judgment that "relevant to the essential facts" is considered to be an examination of the strength of the evidence, and unless the evidence is almost useless in proving the facts of the case, the evidence will not be found to be irrelevant to the essential facts. [9] In this way, the element of essential facts does serve the purpose of pursuing substantial justice, but it reduces the function of the disqualification evidence system again. Therefore, if you want to use the system to promote litigation, the element of "relevant to the essential facts" will become a barrier, at least it will become a barrier in practical understanding.

In addition to the system itself being affected by complicated factors, there are many very involved factors that affect the system in its practical operation. For example, in the evaluation of judges' performance, some courts have linked the appeal and retrial rates to the judges' ability in their work. In order to avoid adverse effects on their job evaluation, judges will try to avoid retrials. So when the 2008 judicial documents were published, the omission of evidence in the original trial could be used as a reason for retrial. Judges, of course, chose to reject the system of disqualification overdue evidence because it could better pursue the truth of the case and was necessary to protect their evaluation. Another example is the problem of the parties' attitude. In practice, most of the parties lack knowledge of the procedure and cannot understand the disqualification of evidence. Once the judge applies the system of disqualification of the overdue evidence, the parties may make noise in the courtroom or gather in front of the court to protest. This sense of public oppression is also an influential factor in the failure to exclude overdue evidence. These complex practical reasons affect the efficiency of the system of disqualification of overdue evidence. The complexity of the elements of the system and the complexity of its practical application make the system virtually non-functional.

#### 4. The Consequential Exploration of the System

In summary, it is clear that the system of disqualification of overdue evidence is not useless, on the contrary, it is important for civil proceedings. We cannot try to eliminate it just because it did not work well before. It would not be a wise choice. It is not that we do not have the conditions to operate the system, but because of the lack of an overall consideration in the design of the system. So there are contradictions and incompatibilities. In response to the reasons above, some personal thoughts are presented below. Hopefully, they can help in the development of the system of disqualification overdue evidence.

First, the basis for the operation of the system of evidence disqualification is to attach importance to the litigation status of the parties and give them more litigation rights. The more important the parties are in the litigation, the more they participate in the litigation, and the more they know about the proceedings, the better it is to establish time limits for the submission of evidence. These factors influence each other. It is important to pay attention to the fact that to improve the procedural subjectivity of the parties, they should be guaranteed sufficient rights in the first place. Starting from giving the parties more rights, not from

increasing their responsibilities. The parties should have the right to control the process of the procedure by themselves after the civil proceedings start. They should decide what evidence to collect, how to collect the evidence, and whether they need the court's help, as well as the confirmation of the litigation request. Reduce the influence of the court's authority and strengthen the extent of the parties' procedural freedom. Civil litigation is the rights and obligations between private subjects, as long as they do not involve national interests, social public interests, the parties should be given the freedom of disposal as much as possible to protect the autonomy of the parties. Because the parties have more rights in the procedure, they will actively participate in the civil litigation in order to obtain a better outcome of the judgment. The more the parties participate in the litigation, the more they know about the procedure. The improvement of the general knowledge of the law in the society will also give sufficient guarantee for the evidence to be submitted on time.

Second, the two-stage procedure is necessary and is an inevitable trend in the development of litigation procedures. Two-stage proceedings facilitate the submission of evidence and have a clear division of time. The pre-trial procedure is dependent on the division of time, and the evidence disqualification system also relies on the division of time. Both need to rely on time. With the help of pre-trial proceedings, the overdue evidence disqualification system will have a firm basis for operation. From the development of China's litigation procedures, although we have not yet established two-stage litigation procedures, the orderly and productive step-by-step advancement from pre-trial preparation to pre-trial conference shows that pre-trial procedures are the future development trend. The reform direction of pre-trial procedures is correct. In line with the reform trend, the system of disqualification of overdue evidence will be established relying on pre-trial proceedings. It can play a better role in exchanging evidence and fixing the points of contention, which can effectively promote litigation and facilitate litigation efficiency. Matters related to evidence are the complicated matters in litigation. By addressing the complex evidence aspects in pre-trial proceedings, the judge is ensured to focus on the key issues in the formal trial. This not only improves the efficiency of the trial, but also better ensures the accuracy and fairness of the case. Thus, there is a need to construct a complete pre-trial procedure for civil litigation to operate the disqualification evidence system. Finally, reduce the interference of unnecessary factors. It is important to reduce both the interfering factors in the legal elements and the interfering factors arising from the practical operation. Among the existing elements of China's evidence disqualification system, it is worth discussing whether the "relevant to the essential facts" factor is necessary. In Taiwan, one of the considerations in the disqualification of overdue evidence is "obvious unfairness", which in fact has the same purpose as "essential facts related". Both are to ensure the fairness of the substantive results. There are various doctrines on "obvious unfairness", but in general, the doctrine of "obvious unfairness" is the overall evaluation of the process of litigation, unlike our "related to the essential facts" only focus on the strength of evidence. [10] As you can see, the element of "relevant to the essential facts" can make a big difference depending on the interpretation. After a comprehensive pre-trial procedure is established, we can combine the practice data to determine whether the element is unnecessary and how to interpret the issue, and let the practice tell us the answer. In response to the interfering factors in the operation of practice, they will be excluded. In this way, we can organize the law provisions about disqualification of overdue evidence, so that they are no longer contradictory to each other.

## 5. Conclusion

The overdue evidence disqualification system has gone through several changes in China, from its appearance in the evidence rule in 2001 to its disappearance from the evidence rule in 2019. The several changes have failed to make the system find a way out. As a matter of fact, the



overdue evidence disqualification system is of great significance for improving litigation efficiency, pursuing procedural justice, and promoting fair hearings. The construction of a useful system of overdue evidence is in line with the goal of our judicial reform. It is important not to reject the system itself entirely because of the design of the system that was ahead of its time in the early years. The disqualification of overdue evidence system does not operate independently, it is closely connected with the litigation model and litigation procedures. It is necessary to ensure the subjective status of the parties, build an effective pre-trial procedure, adjust the factors which affect the disqualification of overdue evidence. A scientific way for the system of disqualification of overdue evidence should be found from a macro perspective.

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