

## SMALL CLAIM AND SUMMARY PROCEDURE IN CHINA

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*In Mainland China, summary procedure is procedure applied at the first instance by basic-level courts and their detached tribunals. As simplified formal procedure, summary procedure can be classified into three types: 1) general / mandatory summary procedure, which is applied to cases with clear facts, unambiguous rights and obligations and minor disputes; 2) consensus procedure, which is applied to cases other than those to which mandatory summary procedure is applied, with the parties' agreement on the application; 3) special summary procedure, which is 'small claim procedure' applied to cases involving amounts lower than 30 percent of the previous year's average annual wages of workers in a given province and the judgment of the basic-level court or detached tribunal shall be final.*

*Keywords: civil procedure; small claim; small claim procedure; summary procedure; summary judgment.*

### 1. Introduction

In Mainland China, there are two kinds of procedures at first instance trials. One is formal procedure (officially translated as 'ordinary procedure') and the other is summary procedure. Summary procedure is the simplified procedure which used in basic-level courts and their detached tribunals. The Civil Procedure Law [hereinafter CPL] of 2012 provides three types of summary procedures: 1) general / mandatory summary procedure, which is applied to cases with clear facts, unambiguous rights and obligations, and minor disputes; 2) consensus procedure, which is applied to cases other than those to which mandatory summary procedure is applicable, with the parties' agreement on the application; 3) special summary procedure, which is 'small claim procedure' applied to cases with amounts lower than 30 percent of

the previous year's average annual wages of workers in a given province and the judgment of the basic-level court or detached tribunal shall be final.

The connection between small claim procedure, summary procedure and formal procedure is described as 'Matryoshka doll.' This metaphor makes lots of sense. Formal procedure is standard first instance procedure, while summary procedure simplifies some of its elements, such as composition of judicial tribunal, approaches of service, time limit of the trial, *etc.* The judgment entered with summary procedure can be appealed; but the judgments rendered in small claims are not allowed to be challenged by appeal. As a special summary procedure, small claims shall follow not only the rules of summary procedure, but also its own special rules. The amount of a small claim shall be lower than 30 percent of the previous year's average annual wages of workers in a given province, autonomous region or municipality directly under the Central Government (Art. 162); and the judgment of the basic court or detached tribunal shall be final, which means small claim procedure simplifies the appeal right through summary procedure. By simplifying the elements of procedure layer by layer, from formal procedure into summary procedure and further still into small claim procedure, there is a distribution of cases. This is the fundamental logic of the mechanism for the distribution of cases in distribution Mainland China.

Compared with the vague difference between summary procedure and formal procedure, small claim procedure is more revolutionary or constructively significant to the legislation in that it develops a brand new procedure for the trial level system and strikes the universal system of 'the second instance being the final,' since 1954 when the Organic Law of the Courts of the People's Republic of China first provided for it. However, this view seems to be shallow. Among the elements to be decreased layer by layer, some are fixed, quantifiable and non-discretionary, such as sole-judge or panel, time limit of trial, the amount of dispute, the right of appeal, *etc.*; while others are flexible, unquantifiable and discretionary, such as the conditions of application as mentioned above. Hence, the latter elements act as keys or channels to break through the boundaries between small claim procedure, summary procedure and formal procedure. For instance, since the conditions for the application of summary procedure, defined as 'clear facts, unambiguous rights and obligations and minor disputes,' are so flexible, the case can be legally transferred from the scope of summary procedure to that of formal procedure if the applicability is found to be actually unclear and ambiguous at some stage of the proceedings. So, even though there is a clear limit on the amount of the dispute, it is possible that small claim procedure will not be applied to the case for not complying with the conditions of 'clear facts, unambiguous rights and obligations and minor disputes' which are the basic requirements for applying the summary procedure; therefore the proceeding shall be transferred to the sphere of formal procedure and is no longer covered by the 'system of one trial being the final one.' In brief, cases involving small claims but that are difficult or complicated still have the chance to appeal by way of

a procedural shift. Moreover, there is the frequently applied procedure of ‘judicature supervision’ in Mainland China which may challenge all types of effective judgments, regardless of the type of procedure applied, if the errors committed fall under Art. 200 of the CPL of 2012. Thus, the three different procedures have no impact on the application of the supervision procedure.

By making some comparisons between summary procedure and small claim procedure, and analyzing values and elements of small claim procedure in different countries, this article will discuss the role that small claim procedure is expected to take in the distribution of cases, which is neither embodied in the statutes nor realized in practice, against the background of Chinese style civil procedure. Consideration must be given to the distribution of cases and convenience of litigation in order to utilize and integrate the existing systematic resources in the specific context of China, and to establish a system with multiple elements and clear layers, explicit classification and different values. That is the unique mold of Chinese mediation and shortcut procedure.<sup>1</sup>

## 2. The Scope of Summary and Small Claim Procedure

Summary procedure may be applied in basic-level courts and their detached tribunals, but not in intermediate or higher courts. It can be applied to cases in first instance proceedings, but not second instance or retrial proceedings. CPL and judicial interpretations<sup>2</sup> of the Supreme Court provide different conditions for the application of mandatory summary procedure, consensus summary procedure and small claim procedure. The details follow below.

### 2.1. Mandatory Summary Procedure

Article 157 of the CPL provides the scope of the application of summary procedure as follows: basic-level courts and detached tribunals shall apply summary procedure to try civil cases ‘with clear facts, unambiguous rights and obligations, and involving minor disputes.’

Under Art. 168 of Several Provisions of the Supreme Court on the Application of CPL<sup>3</sup> (Opinion of the Supreme Court in 1992), ‘clear facts’ means parties have

<sup>1</sup> Yulin Fu, *Small Claims and Short-Cut Procedure*, 5(3) Tsinghua Law Journal 46, 47 (2011)

<sup>2</sup> See, e.g., *The Several Provisions of the Supreme People’s Court on the Application of Summary Procedures in the Trial of Civil Cases* (adopted at the 1280<sup>th</sup> meeting of the Adjudication Committee of the Supreme People’s Court on July 4, 2003), Public Announcement No. 15 [2003] of the Supreme People’s Court, available at <<http://en.pkulaw.cn/display.aspx?cgid=49521&lhb=law>> (accessed Jan. 29, 2015).

<sup>3</sup> *Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China* (discussed and adopted at the 528<sup>th</sup> meeting of the Judicial Committee of the Supreme People’s Court, and promulgated by Judicial Interpretation No. 22 [1992] of the Supreme People’s Court on July 14, 1992), available at <<http://www.cietac.org/index/references/Laws/47607cb9b0f4987f001.cms>> (accessed Jan. 29, 2015).

unanimously stated the facts in question and provided reliable evidence so that there is little fact-finding work to be done by the court in order to reach a decision. 'Unambiguous rights and obligations' means that, in the legal relationship of the parties to the dispute, the rights and obligations of the respective parties are clearly defined. 'Minor dispute' means that parties to the claim have no severe disagreement regarding core issues such as facts, right or wrong, and liability. Summary procedure must be applied to such cases, waiving the need for the consensus or application of the parties, or any other special procedure such as a report; therefore, this kind of summary procedure is called mandatory or legal summary procedure. In fact, with vague and flexible conditions, the application of mandatory summary procedure is mainly up to the discretion of the judge in specific cases. In this sense, mandatory summary procedure is actually (judicially) discretionary summary procedure.

## **2.2. Consensus Summary Procedure**

Article 157 of the CPL provides the scope of consensus summary procedure: where a basic court and its detached tribunals try civil cases other than those in the preceding paragraph, and where the parties may agree on the application of summary procedure.

This is a new provision included in the amendment of CPL 2012. The CPL of 1991 only provided for mandatory summary procedure, but the application, choice of procedure and procedure shift were totally up to the discretion of the judge(s). In practice, summary procedure was largely abused due to the pressure of caseload which was rising at an amazing speed. On the other hand, some cases that did not qualify for the application of summary procedure, especially those involving large claims, were tried with the formal procedure although the parties to those case were willing to have a simplified and quick procedure. In view of these considerations, some courts made changes of their own accord by applying short-cut procedure to such cases when there were consensus of parties, achieving significant results. Said reforms were confirmed in the Several Provisions of the Supreme Court on the Application of Summary Procedures in the Trial of Civil Cases by the Supreme Court in 2003<sup>4</sup> [hereinafter Judicial Interpretation 2003]. Under the Art. 2, basic-level courts could apply summary procedure to the cases which should apply the formal procedure but in which parties agree on the application of summary proceedings. Then, amendment of CPL 2012 directly provides a consensus summary procedure in order to partly shift the right to procedural selection from the courts to the parties. Thus, the rule of autonomy of will is demonstrated, the balance between efficiency and due process is achieved so that the inflexibility of mandatory summary procedure is eased.

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<sup>4</sup> *Supra* n. 2.

### **2.3. Special Summary Procedure – Small Claim Procedure**

Special summary proceedings, or small claim procedure, is provided in Art. 162:

Where a basic court or its detached tribunal tries a simple civil case as described in Paragraph 1 of Article 157 of this Law, if the amount of the subject matter is lower than 30 percent of the previous year's average annual wages of workers in a province, autonomous region or municipality directly under the Central Government, the adjudication of the basic court or detached tribunal shall be final.

That is to say, only if a case meets both of the general application conditions of mandatory summary procedure, namely 'clear facts, unambiguous rights and obligations and minor disputes', and the special application conditions of the small claim procedure, *i.e.* a dispute amount lower than 30 percent of average annual wages. From this point of view, small claim procedure in China is not an independent or separate procedure, but special summary procedure dealt with by summary procedure.

It should be noted that the fact that the value which determines whether the case will be handled as a small claim is a contingent value (percentage), and not a fixed value, represents significant progress in legislative techniques. This contributes, as a good example or reference, to other legislations. China has a vast territory, with great economic inequalities between cities and provinces. In the CPL amendment process, the draft makers first determined that the amount be lower than 5,000 RMB and then increased it to 10,000 RMB. However, both of them were fixed amounts, which would not take into consideration either the economic differences or the recurring inflation in China. Finally, in accordance with the findings of the research and comparative investigations conducted, Art. 162 established that the amount be below 30 percent of the previous year's average annual wages of workers in a given province, autonomous region or municipality directly under the Central Government. It is more suited to China's reality.

### **2.4. The Exclusions of Application of Summary Procedure**

In order to regulate its proper application, the Supreme Court established clear situations excluding the applicability of summary procedure in the Judicial Interpretation 2003, which is still effective even after the amendment of CPL 2012. The exclusive conditions are as follows: 1) when the whereabouts of the defendant are unknown (if the plaintiff provides the accurate address for the service of notice on the defendant, but the court cannot directly serve the notice of response to action or leave the notice with the defendant) summary procedures shall be replaced by formal procedures; 2) when the case is remanded for retrial; 3) when there is a large number of people as a party or parties to a joinder; 4) when there are special procedures, procedures for trial supervision, procedures for supervising and urging the clearance

of debt, procedures of public summons for exhortation, or procedures of bankruptcy and liquidation of a business corporation shall be applied as provided for by law; 5) when the court deems it inappropriate to apply summary procedure in a trial.

### **3. The 'Simplification' of Summary Procedure and the Safeguards of Fundamental Procedural Rights**

Summary procedure is a measure used to develop a mechanism of case distribution, to implement a doctrine of cost-benefit balance, and realize access to justice in basic-level courts. By simplifying or omitting some steps and elements from the formal procedure, summary procedure attempts to work in a simple and convenient manner at first instance courts so that the process is easier and less costly, and the courts can therefore admit more cases, while the limited judicial resources are better used to settle the hard and complicated matters. However, simplification only cuts down on some of the procedural elements, while safeguarding fundamental procedural rights in order to preserve the fundamental rights of parties and the public credibility of courts. So there must be a balance between the 'simplification' (of the process) and 'fundamental' (of the rights).

#### **3.1. The 'Simplification' of Summary Procedure**

The basic characteristics of summary procedure are simplicity, convenience, and flexibility. Under CPL and the Judicial Interpretation 2003, the differences between formal procedure and summary procedure, *i.e.* the 'simplification,' are as follows:

1. *Simple and convenient at the stage of docketing* (referred to as Instituting and Accepting an Action). The plaintiff may institute an action verbally (Art. 158). When the plaintiff files a complaint orally, the court shall accurately record the parties' personal information, contact information, claims, facts and grounds, and register the relevant evidence provided by the plaintiff. The court shall read out the aforesaid records and registration in the presence of the plaintiff, who shall sign on the materials if he or she thinks there is no mistake. The filing of the action is then complete.

2. *Flexible forms of service of notice / subpoena.* A basic court and its detached tribunals may use simple ways to notify / summon the parties and witnesses (Art. 159). After the plaintiff files the suit, the court may serve notice on the parties and the witnesses by either a summons or other written forms, or any simple and convenient methods such as oral message, telephone, fax, and email, *etc.*; and the notice may be issued at any time.

3. *Sole judge system.* Under Art. 160, a case in which summary procedure is applied shall be tried by a sole judge. However, the court records must be taken by a court clerk and the trial judge is forbidden to act as the clerk.

4. *Brief pretrial preparations.* Both sides may appear at the same time before a basic court or its detached tribunal for the resolution of a dispute, which shall be tried

immediately or scheduled for another day. If the parties request permission to produce evidence at the hearing, such request shall be granted and will not be subject to the regulations governing the exchange of evidence. There is no requirement of written notice and public announcement 3 days prior to the hearing; but the claims of the plaintiff must be delivered to the defendant in advance either verbally or in writing.

*5. Simplification of the hearing.* When both parties are present in court, if the defendant agrees to oral pleadings, the court may start hearing immediately. When the defendant requires written pleadings, the court shall serve notice on both parties about the time limit for the submission of pleadings and the specific dates of the hearing, with an explanation of the legal consequences in case of failure to produce evidence within the time limit or to attend at the hearing; in addition, the parties shall sign (by means of a signature or fingerprint) the records and receipt of service of the summons. The hearing is not subject to the rules applied to formal procedure, provided it is public and fair, allowing the parties to produce evidence and be heard in adversarial proceedings. In principle, the case shall be concluded after one hearing, unless it is necessary to hold an additional hearing, and the judgment shall be entered and declared at end of the hearing.

*6. Shorter trial deadlines.* Under CPL, a court shall dispose of a case under summary procedure within 3 months of the case being docketed, with no extension (Art. 161). Where a court discovers, during the trial, that a case is too complicated to apply summary procedure, it shall rule to transfer the case to formal procedure (Art. 163), under which a case shall be disposed of in 6 months. However, such a ruling shall be entered before the expiration of the trial deadline, and the parties shall be notified in written form.

*7. Simplification of adjudicatory documents.* The court may appropriately simplify the fact finding, reasoning of the judgment, or any other adjudicatory documents related to summary procedure cases in any of the following situations: 1) the parties reach a mediation agreement and file a motion for entry of consent judgment; 2) a party, during the legal proceeding, expressly admits all or some of the claims of the opposing party; 3) the parties have little or no dispute over the facts of the case; 4) where the case involves personal privacy or business secrets, one party requests the simplification of the relevant contents in the adjudicatory documents and the court deems the grounds are justified; 5) both parties agree to simplify the adjudicatory documents.

*8. Emphasis on mediation.* With respect to the following civil cases, the court shall first conduct mediation before starting the hearing: 1) disputes related to marriage, family and inheritance; 2) disputes over labor contracts; 3) disputes over damages resulting from traffic or work accidents where the rights and obligations are relatively clear; 4) disputes over home sites and adjacent relationship; 5) disputes over partnership agreements; 6) disputes involving relatively small amounts. However, there are some exceptions to the above mediation where the case cannot or need not be mediated because of its nature and the actual situation of the parties. This provision creates a system which is called antecedent mediation

or mandatory mediation in China. This is the very beginning of a modern system based on categorization with diverse proceedings, in which some procedure takes into consideration the nature of cases, *e.g.*, marriage and domestic disputes and succession disputes, disputes over home sites and adjacent relationship, and disputes over partnership agreements; and some others emphasize the values orientation of small claims procedure in modern time, *e.g.*, damage compensation.

### **3.2. Safeguards of Fundamental Procedural Rights in Summary Procedure**

There are numerous simplified steps in summary procedure. However, the necessary safeguards of fundamental procedural rights are provided under the Judicial Interpretation 2003.

1. *The conditioned right of procedure selection of parties.* Where a party raises objection against the application of summary procedures and the court upholds the objection, summary procedure shall be replaced by formal procedure. Where both parties to the case which should have legally applied formal procedure choose to apply summary procedure on their own accord, the basic-level court may do so; but the court may not transfer such a case from formal procedure to summary procedure against the parties' free will.

2. *Guarantee of minimum due process, the parties' right to be notified.* As a basic aspect of due process, notice of litigation and hearing may be delivered by oral message, telephone, fax, or e-mail, *etc.*; but by whatever the means of notice, the court cannot use the mere service of notice as grounds to enter a default judgment or dispose of the case as a withdrawal (dismissal) unless the delivery of the notice has been confirmed or there is sufficient evidence to prove that the parties received the notice.

3. *Emphasis on the judge's duty of clarification to the parties who have no legal counsel at the trial.* The judge shall give the necessary explanation and description of the relevant contents of disqualification, confession, burden of proof, *etc.*, and shall, during the hearing, direct that party to correctly exercise procedural rights, perform obligations, and conduct proper litigation activities. This effort aims to balance the converse want of specialization and popularization and to ease the conflict between procedural safeguard and efficiency.

4. *Reservation of the right of appeal.* Judgments entered under summary procedure, except small claim procedure, can be reviewed by appeal. However, considering the context of judicial practice and legal culture in China, especially the fact that summary procedure has been the main choice of first instance, the reservation of the right of appeal is necessary to guarantee due process, justice and legitimacy.

5. *Improvement to the records of significant matters.* A court clerk shall record all the activities in the trial under summary procedure, as well as the following matters in detail: 1) important matters such as the judge informing the parties about their procedural rights and obligations, summarizing the issues of the dispute, affirming evidence, and declaring the judgment and order, *etc.*; 2) important matters such



as the a party's application for disqualification / avoidance, confession, withdrawal of action, settlement, etc.; 3) other statements made by the parties in the hearing which are directly related to the parties' litigation rights.

### **3.3. The 'Specialty' in Small Claim Procedure and the Relief to It**

Under Art. 162 of the CPL, small claim procedure is an independent procedure that parallels formal procedure and summary procedure; it is special procedure within summary procedure. Therefore, small claim procedure shares the general rules of summary procedure, with the 'simplification' and 'safeguard' of summary procedure, while the only 'special' thing is that the parties under small claim procedure are not entitled to appeal against the judgment entered by the basic court or detached tribunal, meaning the judgment of first instance shall be final.

However, the limitation applies only to the right of appeal, not to the retrial by way of 'trial supervision' (retrial or reopening proceedings) or other forms of relief. From a comparative perspective, even though the legislation may provide differently for each procedure, there are alternative forms of relief for small claims, such as appeals to higher courts or requests for retrial / appeal to ordinary / formal tribunal in the same court. In China, 'trial supervision,' as a form of relief for serious errors, which is more difficult to move than an appeal, is an appropriate way to remedy small claim judgments.

There is no rule providing whether small claim procedure could be transferred to formal procedure or not. However, since the application of small claim procedure not only meets the general requirements of summary procedure but also the special condition of the amount of a small claim, there must be some cases in which the amount complies with the condition but other aspects do not fit into the general requirements of summary proceeding, such as a case involving a serious dispute. In this case, one could not even apply summary procedure, much less small claim procedure. In such a situation, Art. 163 of CPL should be applied:

A court which, during the trial of a case, discovers that the application of summary procedure is not appropriate for the case shall issue a ruling to transfer the case to formal procedure.

Then, by being transferred to formal procedure, the case with small claim but complicated issues shall get a judgment that can be challenged by appeal to a higher court.

## **4. The Value Orientation of Small Claim Procedure and Searching for Mechanism of Split / Distribution of Cases**

In China, small claim procedure is considered as an effective way of handling a large number of cases and alleviating the caseload. The point of view was criticized

due to a misunderstanding of the function and value of the small claims system.<sup>5</sup> Nonetheless, with the aggravation of the caseload problem and mechanism of case distribution still faltering, small claim procedure became a hot topic again during the drafting of the new version of the CPL 2012. From the very beginning, fierce debate over Chinese small claims procedure has resulted in an overwhelming number of motions, values, goals and functions.

#### **4.1. The Core Value of Small Claim Procedure is Not the Distribution of Cases**

In the amendment of the CPL of 2012, the drafters from the Law Committee of the National People's Congress of the People's Republic of China clearly stated that the value or goal of small claims procedure is not to distribute the caseload, but to rectify the defects of formal procedure with regard to access to justice. Its intended purpose is to serve 'users' of the system (parties), not 'runners' of the system (courts). Yet, in practice, its multiple goals lead the system to fail to give due consideration to a diversity of functions, finally finding itself in a quandary.

In a comparative context, the value orientations of small claim procedure in different countries are relatively unanimous even though there are some differences with regard to amount, agency, requisite documents, time and / or venue. In addition, they also share some features and elements, including: high professionalism as background, access to justice as a goal, limited case types, obvious tendency of mediation, informal process, special relief by objection or retrial, optional rights, encourage *pro se* representation with adequate assistance of the courts, enough information provision, fundamental procedural safeguards, etc. With all of these characters or limits, small claim procedure cannot be an important way to split cases used by the courts. In view of these characteristics and limitations, small claims procedure cannot be deemed to be an important mechanism for the distribution of cases among the courts.<sup>6</sup>

Small claim procedures can be split into two types: voluntary and mandatory. The former is typical of that used by a justice of the peace or a magistrate's court in a common law system, which is independent and separate from ordinary courts. There are two different points of view: on the one hand, an oral trial ensures great convenience and speed albeit with high risk and some difficulty to review the decision; on the other hand, formal procedure and retrial requiring records and written documents, would imply greater complexity, delay, professionalism (accuracy and standard) and dependence on lawyers. Therefore, voluntary small claim procedure does not try to combine convenience and security in the same

<sup>5</sup> Fan Yu, *Studies on the Legal Procedure of Small Claims*, 3 Social Sciences in China 141, 141–53 (2001).

<sup>6</sup> Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Adrian A.S. Zuckerman, ed.) (Oxford University Press, 2005); Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F.L. Rev. 315, 317 (2003), available at <<http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/A223.pdf>> (accessed Jan. 29, 2015).

procedure. On the contrary, the system establishes two different types of procedure, small claims procedure and formal procedure, giving the parties the right to select one in advance. In fact, relief to small claim procedure is *ex post facto* in that appeal, in this context, is retrial brought by parties to the formal procedure. One reason for the party to choose small claims procedure and waive greater procedural guarantees is that formal procedure is much more costly and takes a long time, having the mandatory representation of a lawyer and a complex process. Meanwhile, the technique to restrain the abuse of small claims procedure to settle claims involving huge amounts (by splitting a large amount into several small ones) is the strict rule of estoppel, standard object of action and mandatory joinder of claims.<sup>7</sup>

Compared with a common law system, in the civil law system, which lacks the magistrate's court's obvious separation from formal procedure, there is no mechanism prompting parties to choose accordingly. Hence, small claims procedure is provided in statutes and applied in a mandatory way or under judicial discretion. Since there is no legitimacy without the parties' right to select procedure, given that it restrains important rights such as appeal, there is some risk of violating the constitution. Therefore, for one thing, small claim procedure has to be limited to a very small amount of claims, and for another, there must be flexible discretion (such as in Germany and Japan) and some means of transferring cases between small claim procedure and formal procedure has to be reserved (such as in Japan). Furthermore, the civil law system still offers some flexibility regarding the restriction imposed on the appeal and retrial. For instance, there is relief by objection in Japan; in Germany, there are permissive appeals on significant legal issues and special complaints made to constitutional courts; and in France, the right of appeal is generally afforded except for special cases and even when there is no right to appeal for small claim procedure, the parties still have the opportunity to revoke the judgment in the Cassation (Supreme) Court on the grounds of violation of the constitution. The elements used to control all the relief channels, so that they are not abused by parties, still bear a high cost in formal procedure in the context of highly professionalized justice, and meanwhile judicial discretion must be relied on. Judicial discretion, in turn, depends on the appointment of judges and on the review of the constitutionality of the procedure.

By contrast, in China, it is neither necessary nor feasible to develop a small claim procedure. As to the background of system, there is no 'formal' procedure with a strict doctrine of disposition (*jus disponendi*), antagonistic or adversary proceedings which heavily relies on a lawyer for its formal, professional, time-consuming and expensive application. On the contrary, the whole procedure system is simple, informal, nonprofessional, and relatively speedy, cheap and convenient. It was

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<sup>7</sup> Stephen N. Subrin et al., *Civil Procedure: Doctrine, Practice and Context* (translation into Chinese) (Yulin Fu et al., trans.) (China University of Political Science and Law Press 2003).

constructed on the basis of traditional minor disputes, and judicial mediation is conducted by the same judge who enters the judgment. Hence, it will be unattractive for the parties to utilize a small claim procedure in common law style. Nonetheless, it will be more difficult to set forth the mandatory small claim procedure like in Germany and Japan. This is because the advantages of mediation and *pro se* representation in small claim procedure are already contained in Chinese ordinary / formal procedure, in which mediation and trial are found in the same procedure and there is no compulsory representation even in the Supreme Court. Furthermore, the cancellation of the right of appeal in small claims will give rise to more problems against the background of a petition system and political policy of social harmony, especially with so little confidence in the courts.

#### **4.2. Summary and Short-Cut Procedure Aiming for the Distribution of Cases**

Since distribution of cases is not the common goal of small claim procedures in all systems, and the distribution effect is quite different due to the differences in its basic structure and scope of application, the development of mandatory small claim procedure is of greater political significance than of practical value. Actually, the distribution of cases in a civil law system is achieved by means of diverse short-cut procedures which generate their respective advantages. Take Germany as an example, the primary means of prevention and distribution of cases is a well-developed non-contentious system and procedures for supervising and promoting the clearance of debt. The latter dealt with more than 7,000,000 cases of which 90 percent are no longer in litigation. So, actually, there are fewer than 3,000,000 cases which have to be settled at first instance; in contrast, small claim procedure is too insignificant to contribute to the distribution of cases. In Japan, mediation and non-contentious procedure are very important in the distribution of cases.

Even in the common law countries where small claim procedure plays an important role, there are still other important paths to distribute cases from formal trial, such as summary judgment, pretrial settlement and mediation with lawyers, fast track with restrictive steps and multi-track (in UK) and multi-door (in US) with comprehensive case management. In the US, by promoting a policy of pretrial settlement and sanction rules by cost shoulder, about 95 percent cases could be dealt at pretrial stage with no need to proceed with an expensive trial. In the UK, courts provide three mechanisms for the parties to select: traditional small claim procedure, short-cut procedure with simplified steps according to a timetable, and multi-track combined with diverse forms of case management. Then, in 2009, nearly 50 percent of 316,000 cases were settled or withdrawn before being distributed, 93,000 went to small claim procedure, 61,000 to fast track, and 25,000 to multi-track proceedings.<sup>8</sup>

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<sup>8</sup> Civil Judicial Reform in the UK 344–61 (Qi Shujie, ed.) (Peking University Press 2004).

Civil procedure in Mainland China has severe defects due to the simple structure and the unitary type. Before the 1980<sup>5</sup>, when the reform and opening-up policy started, traditional civil cases were the majority, and court mediation and a judge's control in fact investigations were the main characteristics of civil procedure, which worked just like small claim procedure. Nevertheless, this type of procedure was obviously unfit for judicial practice as there was an increasing number of commercial cases, which were characterized by professional, complicated, contentious and speedy claims involving large sums. Then, in an initial reaction to the new situation, some types of commercial cases were separated, as an exception or special issue, from the ordinary (traditional) proceedings, and dealt with by separate maritime courts, intellectual property divisions, and security tribunals to which relatively more specialized judges were appointed.

Then, as the number of commercial cases further increased dramatically and become the prevailing concern of the courts, especially because the problems that arose in commercial cases were new, difficult and complicated, the whole civil procedure started a single-track reform to adjust to the market regime. This resulted in the whole procedure becoming adversarial, formal, professional, and costly which is not suitable for small claims and traditional cases. The consequence of the above reform led to the criticism of the modern procedure doctrine and to the counter reform around the turn of the 21<sup>st</sup> century.

Obviously, such uniform procedure patterns cannot satisfy diverse practice, no matter which direction the reform maintains or turns to, because while it fits one type of case it is not suitable for the others. Therefore, the only solution is the classification of procedures, designing a diversity of procedural patterns to undertake different value and realize different goals. Commercial cases should apply commercial proceedings, family cases should go to family proceedings, small claims to small claim track and non-contentious cases apply non-contentious procedure.<sup>9</sup> In the judicial reform and procedure design, the status of small or traditional cases are equally important with specialized or commercial cases as diverse requests from society, and the government has to provide different but suitable services to the 'markets.' According to this concept, the reason why small claim procedure does not need to be standard, formal or professional is that, for the parties, the benefits are not comparable to their costs. For the judicial system, reasonable design of diverse procedure shall lead people to be rational in selecting judicial products. However, if the parties are willing to access formal justice despite the cost and other disadvantages, then it does not make sense to forbid them to apply formal procedure and provide no relief simply because the value of the claim is small. This is definitely not the essence of small claim procedure in western countries; and it does not match the reality of China either.

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<sup>9</sup> Subrin, *supra* n. 7.

To solve the evident problems in the types and shift of procedures, reform should focus on the classification of procedures, specifically as follows: 1) to expand the scope of non-contentious proceedings which apply the system 'the first instance also being the last;' 2) to separate family proceedings from ordinary procedure; 3) to remove the tie of solo-judge trial and summary proceeding so as to create formal procedure with solo-judge, designing procedure in the light of case characteristics, not trial organization, and controlling the flexibility and randomness of procedural steps; 4) to improve short-cut proceedings for commercial cases, including cases involving large sums. Short-cut procedure for commercial cases is different from small claim procedure in demand of convenience and efficiency, value orientation and problems met in the trial; it may take great advantages in distribution of cases and further improve formal procedure with autonomous features.

Short-cut procedure for commercial cases can be designed in diverse ways. It can, for instance, be developed to improve the existing order of payment, to explore arbitral commercial trial, and to normalize the mechanism of 'mediation & short-cut judgment' with Chinese characteristics. If the current small claim procedure is considered to be legal short-cut procedure to achieve the goal of convenience, then commercial cases which involve amounts over the legal small claim limit may be allowed to waive the right of appeal by consensus of parties. The point is that the agreement to waive the right of appeal is binding on the parties, just like arbitration clause excluding the right of litigation. If there is no consensus, appeals should be allowed. Of course, short-cuts attract the parties to select partly rely on some encouraging rules, such as court fees and compensation of attorney fees. The manner of the parties' consensus may be flexible, either by some provisions as in arbitration, or by showing clear intention in filing forms or pleadings. As in the latter case, the parties shall have all the details about short-cut procedure clarified and completely understand the relevant legal consequences. Under consensual short-cut procedure, if the parties cannot reach a settlement in the legal time limit and do not apply for further mediation in written form, the case should be transferred to formal procedure at the expiry of the mediation time. The case shall be disposed of according to formal procedure and the plaintiff should be charged court fees under the rules of litigation expenses.

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