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THE ROLE OF THE ARBITRATOR IN FINDING THE TRUTH

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Abstract: *The study on the role of the arbitrator in finding out the truth aims to highlight the specific elements of the arbitration procedure, considering that it must be carried out with the application and observance of the principles of the civil process dictated by the Code of Civil Procedure for all judicial procedures. The principle of finding the truth, however, has a specific applicability in private jurisdiction proceedings, given that within them a judgment in equity can take place and which differentiates them from the trial procedure before the common law courts. Finding out the truth is the goal of any judicial proceeding and leads to fair justice.*

Key words: *Referee, jurisdiction, justice, equity, truth*

1. Introduction

This article starts from the legacy left by the well-known genius of the 4th century Aristotle who said in his masterpiece Nicomanean Ethics that the things through which the human soul can reach the truth are five: art, science, prudence, wisdom, and intelligence.

These virtues are also carved on the premises of the Bucharest Court of Appeal, being

Legal epistemology reveals the real obstacles in finding out the judicial truth, and among them we should emphasize the fact that there are shadows in the knowledge of reality - the real must not be what we believe or intuit; not recognizing the fact that in science nothing is given, but everything must be constructed; ignorance of the fact that we cannot form opinions about things we do not clearly know, articulate or understand; to consider as true only the first experience; to argue by common sense or common knowledge, instead of demonstrating; to take as true what has not been clearly, distinctly, undoubtedly verified - the principle of evidence according to Descartes; not to go in the search for truth from the simple to the complex, so as not to omit anything – the principle of analysis and synthesis according to Descartes; to forget that truth ascends to evidence, while error descends to convictions - Bachelard; not to release the intuition of impurity.

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The judge and arbitrator must possess the three virtues of prudence, wisdom and intelligence.

Regarding prudence, Aristotle stated that suspicion and opinion can also have something false in their content. How easily a judge or arbitrator may fall into error through conjecture and preconceived opinion, if he will not have the prudence to guard against too great confidence in his intelligence or wisdom.

For the judge and arbitrator there is always the danger that in his ambition to be right he may acquire the same passion as the parties in the case, a fact which definitely prevents him from recognizing the truth. The fog of seeing the truth can set in because of exaggerated confidence in one's own ideas.

The judge and arbiter must pay attention to such wisdom as: the greatest enemy of scientific knowledge is not lies, but beliefs; applying the in dubio principle when the truth is beyond scientific doubt; to give reality an image according to the researcher's feelings; to be seduced by what is confirmed and not by what is criticized; to investigate by preconceived beliefs instead of reasonable doubt; to fall victim to dilettantism, lack of information, pride, opacity to counterarguments, suggestion, a priori convictions, routine, to slide towards what is easy to prove; exaggerated confidence in one's own strength, etc.

Regarding the last two virtues, the order is not random. Prudence and wisdom seem to be more important than intelligence. Prudence leads to a certain wisdom. Intelligence without prudence and wisdom prevents the judge or arbitrator from listening to other points of view which at first sight seem unarguable.

The judge and arbitrator must learn to doubt first, listen to others, and only then form a reasoned opinion using their own intelligence.

Aristotle said that it is clear that wisdom is the most perfect science. Therefore, the sage must know not only the conclusions from the principle, but also the truth about the principle. Thus, wisdom would be intelligence and science, a science which, so to speak, is placed as master over the others, and includes the most worthy elements.

Legal knowledge may be easily mastered and excellent demonstrations of legal logic may be made, but wisdom comes only with time and only if sought.

The judge must bend to know the inclination of his heart and strengthen his weak opinions. The best means of strengthening oneself on that point is to convince oneself of its weakness. Then he will see that man is more willing to know the truth than able to discover it, to close himself up and not let himself be guided by the movements of his own self-love which always prevents him to confess that he could have been wrong.

In order for the judge or arbitrator to more easily reach the truth in the cases he solves, it is necessary for him to be a tolerant, serene man, a man with a big soul, with a fear of injustice, a man who loves life in all its human coordinates, a man who trusts himself and consequently invests all human relations with confidence.

Important things must be judged with full knowledge and with a big heart.

2. The view on the principle of finding the truth in the civil process at the level of the member states of the European Union

With regard to finding out the truth in the process, two systems have crystallized, which reflect two different opinions regarding the role that the judge or arbitrator should play in the process.

In a system, the judge or arbitrator is not involved in the process, weighing only the evidence brought by the parties before him. In this system, the involvement of the parties is major, they have the right but also the obligation to build the process as a whole, respectively to propose, gather and administer evidence, to bring arguments to convince the jury. Finding the truth in this system depends on the skill of the parties involved in the process.

Supporters of this system start from the premise that the judge or arbitrator who has too much of an active role no longer maintains the appearance of impartiality, because he gets too involved in favor of one side or another.

From this perspective, the appearance of impartiality is fully satisfied, but taken to an extreme it limits the imperative to find out the truth.

In the specialized doctrine (Chiș, Moțu, 2008, p.175) it was shown that the imperative to find out the truth is also achieved through the active role of the judge or arbitrator who is obliged to administer all the evidence necessary to establish the correct state of facts in the case, even against the will of the parties, to communicate with the parties in the process, including their lawyers, in order to ensure the full realization of the rights and interests of the parties. Finding out the truth is the only exception allowed from the neutrality and impartiality of the judge or arbitrator who has the right but also the obligation to do everything in his power to find out the truth in the cases he resolves, without being accused of violating the appearance of impartiality.

In the other system, the judge must get out of passivity and have an active role in the case to find out the truth, without being satisfied only with the evidence brought by the parties before him.

The judge or arbitrator cannot leave room for confusion in the judicial activity. Thus, if the parties have not clarified the case in all aspects, the judge or arbitrator will have to come out of passivity and clarify the case by administering evidence ex officio.

In this conception, the judgment cannot be suspected of not reflecting the truth because everything possible would have been done for the administration of all the evidence.

The specialized doctrine (Boroi, Stancu, 2015, p.20) noted that the dilemma of orientation towards one system or another derives from the fact that, through the civil process, the legal protection of certain rights or private interests is sought which attracts a significant involvement of the parties, both in the initiation of the process and in its continuation, but it is also necessary to ensure a procedural balance that results in finding out the truth, and this presupposes the right of the judge to be able to influence the process, but under conditions expressly provided by law.

3. The principle of finding the truth in the Romanian legal system. Justice or equity?

Art.124 paragraph 1 of the Constitution of Romania entitled: Administering justice establishes that: Justice is administered in the name of the law.

Hence the conclusion that in the Romanian legal system the courts are obliged to apply the law to the cases brought to trial.

Art. 1 paragraph 1 of the Romanian Civil Code establishes that the law, customs and general principles of law are sources of civil law.

It clearly follows that the judicial precedent is not a source of law, and the judge is only allowed to judge in equity when the law allows him.

The Romanian Civil Procedure Code adopted in 2013 changed the conception of the principles of the civil process, eliminating the principle of the active role of the judge, which was replaced by the principle of the role of the judge in finding out the truth.

In the preamble of the Code of Civil Procedure, 19 principles were enacted, which are binding both for the parties in the process and for the judge or arbitrator.

According to art. 22 paragraph 1 of the Romanian Code of Civil Procedure: The judge resolves the dispute according to the rules of law that are applicable to him.

We note that the judge has the obligation to apply the law, he cannot always make a judgment in equity.

However, paragraph 2 of art. 22 of the Code of Civil Procedure establishes that: The judge has the duty to insist, by all legal means, to prevent any mistake regarding the discovery of the truth in the case, based on the establishment of the facts and by the correct application of the law, in order to pronounce a thorough and legal decision. For this purpose, with regard to the factual situation and the legal reasoning that the parties invoke, the judge has the right to ask them to present explanations, orally or in writing, to subject to debate any factual or legal circumstances, even if they are not mentioned in the application or in the response, to order the administration of the evidence that they consider necessary, as well as other measures provided by law, even if the parties object.

In other words, although the private law system reformed in our country between 2011-2013, chose to diminish the role of the judge in managing the process, eliminating his active role and choosing the system in which the judge has the role of assessing the evidence, the legislator created the possibility that the judge can propose evidence, even against the will of the parties, when it is necessary to find out the truth.

In this sense, in order to give effectiveness to this principle, art. 254 paragraph 5 of the Code of Civil Procedure provides: If the proposed evidence is not sufficient to fully clarify the process, the court will order that the parties complete the evidence. Also, the judge can, ex officio, discuss with the parties the necessity of administering other evidence, which he can order even if the parties object.

In the light of the legal text mentioned above, the judge can play a role in the process, having the right to remove the parties from passivity or ignorance.

The ordering of evidence by the judge, following his request addressed to the parties to complete their evidence, is not an obligation for him, but a possibility.

Similarly, art. 479 paragraph 2 of the Civil Procedure Code provided a possibility for the court of appeal to restore or complete the evidence, if it considers it necessary for the settlement of the case and not an obligation.

This solution, wise in our opinion, comes to eliminate the suspicion of the judge's impartiality, if he could have played an active role, but in order to assume the responsibility of the decision to be pronounced, the framework for finding out the truth was created for the judge.

For the ex-officio administration of evidence by the judge, the conditions required by law for the administration of evidence proposed by the parties must be met, respectively: the evidence must be admissible, according to the law; the proof must be necessary for the resolution of the case, i.e. it must be conclusive; the evidence be put in the adversarial discussion of the parties.

In this sense, the provisions of art. 14 paragraph 5 and 6 of the Code of Civil Procedure become relevant and stipulate that: The court is obliged, in any process, to submit to the discussion of the parties all requests, exceptions and factual or legal circumstances invoked. The court will base its decision only on reasons of fact and law, on explanations or on evidence that have been subjected, beforehand, to the adversarial debate.

The Romanian Civil Procedure Code, although it established the principle of availability of the parties, established in their favor both rights and obligations.

Thus, according to art. 9 paragraph 2: The object and limits of the process are established by the requests and defenses of the parties, and according to art. 10: The parties have the obligation to fulfill the procedural documents in the conditions, order and terms established by the law or the judge, to prove their claims and defenses, to contribute to the proceeding without delay, also aiming for its completion. If a party has a means of proof, the judge can, at the request of the other party or ex officio, order its appearance, under the penalty of paying a judicial fine.

According to art. 22 paragraph 4 of the Civil Procedure Code: The judge gives or restores the legal qualification of the acts and facts brought to the judgment, even if the parties have given them a different name. In this case, the judge is obliged to discuss the exact legal qualification of the parties.

We note that the application of the law is the exclusive attribute of the judge. However, this right of the judge cannot override the express will of the parties. Thus, according to paragraph 5 of art. 22 of the Code of Civil Procedure: However, the judge cannot change the name or the legal basis if the parties, by virtue of an express agreement regarding rights that, according to the law, they can dispose of, they established the legal qualification and legal reasons on which they understood to limit the debates, if the rights or legitimate interests of others are not violated.

As we have shown, judgment in equity is allowed to the judge only when the law expressly provides. Thus, according to art. 22 paragraph 7 of the Code of Civil Procedure: Whenever the law reserves the judge's discretion or requires him to take into account all the circumstances of the case, the judge will take into account, among others, the general principles of law, the requirements of fairness and good faith.

This principle that governs the civil process is combined with the principle of free access to justice, established by art. 5 of the Code of Civil Procedure. Thus paragraph 2

of this article establishes that: No judge can refuse to judge on the grounds that the law does not provide, is unclear or incomplete.

In other words, in the absence of legal norms, the judge will judge according to the general principles of law, according to equity and taking into account good faith, which is currently a principle of public order in civil law.

In this regard, paragraph 3 of art. 5 of the Code of Civil Procedure provides: If a cause cannot be resolved either on the basis of law or custom, and in the absence of the latter, neither on the basis of the legal provisions regarding similar situations, it will have to be judged based on the general principles of law, taking into account all its circumstances and taking into account the requirements of equity.

The Romanian legislator completely excludes the application of judicial precedent as a source of law. In this sense, art. 5 paragraph 4 of the Civil Procedure Code provides that: It is forbidden for the judge to establish generally binding provisions through the decisions he pronounces in the cases submitted to his judgment.

The principle established by art. 22 of the Code of Civil Procedure brings a welcome change in the prerogative of the Romanian civil process, but it does not eliminate the arduous process of finding out the truth.

Considering that the Romanian legislator did not impose the obligation of legal assistance or representation of the parties in the civil process, often their ignorance cannot be fulfilled by ordering some evidence ex officio by the judge. In such situations, finding out the truth often remains a desideratum.

As for the role that the Romanian legislator understood to assign to the judge in the civil process, in relation to his rights and obligations, I would interpret it in terms of him ensuring more the role of carrying out an act of justice Unfortunately, there are situations in which an injustice is done by carrying out an act of justice.

In our opinion, the civil justice system should be reformed through measures that give greater satisfaction to litigants and greater proximity between the objective private social reality and judicial truths established by court decisions. Currently, there is an increasing distance between them, and from this derives the consequence of the reduction of public confidence in justice, the increase in the feeling of mistrust and the tendency to administer justice outside the courts.

The reform could consider the effective specialization of judges in areas of law, or the participation in judgment of third parties who hold such specializations and who have the right to participate in the adoption of court decisions, as it happens in the civil law justice systems of other member states of the European Union, such as France or Italy.

4. Application of the principle of the active role in finding out the truth in the arbitration procedure

In the specialized doctrine (Boroi, Stancu, 2015, p.24), it was shown that by resorting to alternative means of resolving disputes, the courts would be relieved and the parties would obtain mutually convenient and sustainable solutions.

The Romanian Civil Procedure Code regulated the arbitral procedure in Book VI entitled: On Arbitration.

Thus, in art. 541, arbitration was defined as: an alternative jurisdiction having a private character.

In our private law system not all disputes are arbitrable. However, the rule is that all civil disputes are arbitrable, and the exception is the domains excluded from arbitration.

Thus, according to art. 542 of the Civil Procedure Code: Persons who have full legal capacity can agree to settle disputes between them through arbitration, apart from those regarding marital status, the capacity of persons, the succession debate, family relations, as well as rights on which the parties cannot decide. The state and public authorities have the power to conclude arbitration agreements only if they are authorized by law or by international conventions to which Romania is a party. Legal entities under public law that have economic activities as their object of activity have the faculty to conclude arbitration agreements, unless the law or their articles of association or organization provides otherwise.

Regarding the judgment in the arbitration procedure, the legislator established that most of the principles of the civil process are mandatory, including the principle of the role of the judge in finding out the truth.

Regarding the settlement of the dispute, according to art. 601 Civil Procedure Code: The arbitral tribunal settles the dispute based on the main contract and the applicable legal rules, according to the provisions of art. 5. Based on the express agreement of the parties, the arbitral tribunal can settle the dispute in equity.

The most prestigious form of institutionalized arbitration exists within the Chamber of Commerce of Romania, and according to art. 30 paragraph 3 of the Arbitration Procedure Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania adopted by the College of the Court of International Commercial Arbitration: The arbitral tribunal will be able to rule in equity (ex æquo et bono) or as amiable compositeur only with the express authorization of the parties.

Most arbitration disputes in Romania occur in commercial matters, and the most common aspects are related to the execution and termination of contracts or contractual liability.

Very often, the contractual clauses included in the contracts concluded between the parties are not of a nature to be sufficient to resolve the differences between the parties that may arise in connection with their execution.

That is why the arbitration procedure supports the participants in the commercial circuit.

For example, in the period following the declaration of the Sars-CoV-2 virus pandemic by the World Health Organization, as of March 11, 2020, in the commercial circuit, the balancing of contractual benefits was often raised.

The legal means for restoring the contractual balance is, in our system of private law, unpredictability.

According to art. 1271 of the Civil Code titled Contingency: The parties are required to perform their obligations, even if their performance has become more onerous, either due to the increase in the costs of performing their own obligation, or due to the decrease in the value of the consideration. However, if the execution of the contract has

become excessively onerous due to an exceptional change in circumstances that would make it manifestly unfair to compel the debtor to perform the obligation, the court may order: a) the adaptation of the contract, in order to fairly distribute the losses and benefits that result from the change of circumstances among the parties; b) termination of the contract, at the time and under the conditions it stipulates.

Although the substantive law legislator gave the possibility to the judge to intervene in the contracts, nevertheless in the judicial practice of the courts it is found that most often such actions were rejected or if the court decisions were admitted they did not create a state of mutual convenience for the parties.

We observe that the arbitration procedure offers greater satisfaction to the litigants, the parties being able to opt for a trial in equity, an aspect that is not found in the trial procedure before the courts.

The arbitration procedure ensures a greater applicability of the principle of the role in finding out the truth, the parties pursuing this right from the moment of concluding the arbitration agreement in the form of the compromise or compromise clause.

When they agree that the judgment should also be carried out in equity, the goal of finding out the truth and adopting a fair and just judicial decision is more and more attainable.

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