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The Principle of Facticity: Outline for a Theory of Evidence in Arbitration

Octávio Fragata Martins de Barros*

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* Doctor (in progress) and Master of Laws in International Law, Universidade do Estado do Rio de Janeiro - UERJ; Lecturer, Fundação Getúlio Vargas - FGV (Rio de Janeiro) and Escola Superior da Advocacia. Attorney in Rio de Janeiro. Partner, TozziniFreire Advogados, Rio de Janeiro office. The author thanks Isabel Leslie Rose for the translation of this article and Mariana Pedrosa Jungstedt for her assistance in the research for this article, both associates with the law firm Barbosa, Müssnich & Aragão Advogados.

Ⅰ. Introduction

All legal norms carry within them a posited law and a "presupposed" law: a certain situation, historically constructed by society, is presupposed by the norm, which establishes a command with respect to that situation.[1] The tridimensional theory of law, which had in Miguel Reale one of its great proponents, demonstrates that the Law is composed of three basic aspects bound together in an inseparable whole: fact, value and norm. Reale wrote that:

> … wherever there is a juridical event, there is, always and necessarily, an underlying fact …, a value, which confers a certain meaning to that fact … and, lastly, a rule or norm, which represents the relation or measure that binds one of these elements to the other, fact to value.[2]

To apply the Law means, therefore, to place a given factual situation within the value attributed to that situation by society, connecting one to the other by means of a legal norm. The norm expresses the relation that should exist between the two elements of fact and value.

Fact, value and norm are intertwined, and each makes demands on the others.[3] Allocating a given factual situation within the norm that is imposed by society, attributing to this situation the value given by justice, thus constitutes one of the decision-maker's more important tasks.

In order to individualize a given factual situation it becomes necessary to demonstrate its identity with the "presupposed" fact of the legal norm, so that the relevant legal norm can be duly applied, transforming a hypothetical legal situation into a real one.

In this exercise, proof, as an element for reconstruction of the facts, is of extreme importance.

Given the importance of facts in the application of the law, fact finding is essential to

1) Grau, Eros. *Direito Posto e Direito Pressuposto*. São Paulo: Malheiros, 2008.
2) Reale, Miguel. *Lições Preliminares de Direito*. 24th Ed. São Paulo: Saraiva, 1998. p. 65. My translation.
3) *Ibid.* p. 66.

the correct application of the law. After all, a right exists only to the extent it is proved, and not uncommonly, a good right does not prevail because of deficient evidence of the facts that constitute the legal situation alleged by the parties.

The difficulty in mounting a general theory of proof in the legal system represented by arbitration, and particularly international arbitration, can be attributed to the system's multi-cultural nature. Because of the peculiar characteristics of any arbitration proceeding, sometimes the taking of evidence will more closely resemble proceedings in civil law systems, and at other times the procedures are typical of common law systems. But more and more frequently, the taking of evidence in arbitration proceedings adopts procedures from both systems.

One distinction traditionally made between the two systems lies in the belief that the traditional common law systems, the judge – or in this case the arbitrator – looks for and bases his decision on the formal (or "legal") truth of the case, casting light and liability on the parties to the extent their rights are proven or not. In contrast, in the traditional civil law systems, the judge's function is to seek out the truth of the facts so as to achieve the "full distribution of justice". Here, in order to discover the substantive truth, the judge has the power to determine, often *sua sponte*, what evidence is to be produced, regardless of what the parties might wish.[4)]

In Brazil, for example, law students are taught in the first years of their studies that both civil and criminal proceedings, through the evidence-taking process, serve as an instrument for achieving a resolution based on the substantive truth of the facts. Substantive (or real) truth seeks to confirm what is said against what is, while formal truth is distinguished by its validation of a conclusion by strictly following procedural rules. Under this theory, truth is what is put before the decision-maker, and what the decision-maker must use as a basis for his or her decision.

It is the judge's active control of proceedings in civil law countries that makes it unnecessary to have rules on the production of evidence as such. In general terms, civil law jurisdictions require that the facts be contested; that the facts not be assumed to be true; that evidence not be prohibited; and that evidence be admissible.[5)]

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4) On the distinction between the two systems, see G.L.Certoma, "The Accusatory System v. the Inquisitorial System: Procedural Truth v. Fact?" Australian Law Journal, no. 56, 1982, p. 288; Thomas Wiegend, "Is the Criminal Process About Truth? A German Perspective", Harvard Law Journal of Law & Public Policy, no. 26, 157, 2003, pp. 160, 170-173; Robert S. Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding", (1999) 18 Law and Philosophy 497; Joseph M Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law/' (2009) 11 University of Notre Dame Australia Law Review 53, pp. 79-80.

In common law jurisdictions, the courts have little control over what is produced as evidence, and discovery is essential for the preparation of the parties, as a means of discovering facts related to the matter in dispute and of obtaining information about it.[6] In the United States, discovery is intended to ensure production of all relevant documents and equality of information between the parties, and, as a manner of ensuring a full defense, to prevent surprises during trial.[7]

Regardless of which procedural scheme is adopted, the role of the facts (and of the decision-maker and the parties in reconstructing them) during proceedings is a fundamental problem that has been the subject of much study in procedural law and that now is beginning to migrate to the arbitral arena. To obtain a more concrete perspective on the issue, it is first necessary to define the purpose and function of arbitration as a mechanism for resolution of disputes.

Ⅱ. The Philosophic Aspect of Proceedings (Judicial and Arbitral)

One of the greatest paradoxes in international procedural law is found in the belief that the adversarial model of legal proceedings is not designed, generally speaking, to establish the substantive truth, while inquisitorial systems, in which the judge has greater power to determine what evidence will be produced, are intended to seek out the real truth of the facts.

This is so because adversarial proceedings are generally seen as those in which the parties have the right to prove their claim, to determine the subject matter of the dispute, to develop their arguments, and to present all the evidence available to them, while the judge must rely – exclusively – on the arguments and evidence presented by the parties to decide on the claim. In contrast, proceedings will be inquisitional when all the power to gather evidence lies in the hands of the decision-maker, and the parties do not have the opportunity to be heard, as was the case when inquisitional proceedings were

5) E. Garsonnet and C. Cézar-Bru, *Traité théorique et pratique de procedure civile et commerciale: en justice de paix et devant les conseils de prud'hommes*, 3 ed., Paris: Receuil Sirey, 1912, p. 365. However, precisely because of judges' broad powers, it is necessary to create a mechanism to govern the exercise of those powers.

6) *Hickman v. Taylor*. 395 U.S. 495 (1947).

7) Bernardo Cremades, "Managing Discovery in International Arbitration", Dispute Resolution Journal, no. 72, 2002, p. 77.

originally introduced. However, under these definitions, no modern system of civil procedure could properly be called inquisitional, and, to a certain extent, all modern systems are adversarial, although they use different means in the exercise of the parties' procedural rights.[8)]

One of the most important factors in examining the problem of the parties' and the judge's role in reconstructing the facts is the existence of different systemic premises concerning the purpose and function of the process.

In this regard, we could say that the role of legal proceedings (and of arbitration as its corollary) can been divided between (i) those that believe that the purpose and function of a proceeding is to resolve disputes between private parties, meaning that certain legal and social systems have no real interest in the content of the decisions, as long as they are effective in resolving the disputes they are meant to put an end to, and (ii) those that believe that the main objective of a proceeding is to do justice, by correctly applying the relevant law to the facts of the case, which depends on a faithful reconstruction of the facts to which society attributes value and about which it has established a norm.

From the first perspective, a decision may be correct or incorrect, fair or unfair, but as long as it effectively resolves the dispute, the process has fulfilled its purpose. The parties' opportunity to have their say in the proceeding gives them not only the space to present their version of the facts and their interpretation of the law, but also effectively allows them to feel that they have been heard and were able, in some fashion, to influence the decision-making process.

The decision-maker, for his part, to the extent that he accepts or rejects the parties' arguments for coherent and logical reasons, is effectively playing his part. Here, since the purpose of the process is to put an end to the dispute, the procedural system is not concerned with a search for the truth. It is not surprising, therefore, that the principal value on which this perspective is based is the unrestricted and complete freedom of the parties in the context of the proceedings. Accordingly, the parties may reject certain types of evidence at the outset, and the decision-maker must respect this choice, because, after all, the proceeding affects the parties and they are the ones who define its content.

From the second point of view, which is intended to "do justice", the correct

8) The procedural law of many countries traditionally referred to as adversarial allows judges to order the production of evidence. In the United States, for example, the judge can summon witnesses that were not called by the parties (Rule 614(a) of the Federal Rules of Evidence) and may appoint an expert in situations that require specialized knowledge (Rule 706). See, for example, Michele Taruffo. "Investigación Judicial y Producción de Prueba porlas partes", Revista de Derecho, vol. XV, December 2003, p. 206.

application of a juridical norm depends, necessarily, on a faithful reconstruction of the facts, for the simple reason that no norm can be correctly applied if the facts are not correct. Here, a good decision is not one that does no more than resolve the dispute, but one that respects the law and the values instituted by society.

Although the analysis of this important philosophic aspect of dispute resolution systems is intimately tied to, and has a direct influence on, the conclusion arrived at, both adopt an important position with respect to the search for the truth. While the first adopts a position that is said to be more pragmatic, realistic, assigning to the parties the duty to present their case in the most convincing manner possible, the second seeks to conduct a faithful analysis of the facts, in pursuit of an unreachable (at least in absolute terms) substantive truth.

For this reason, before we can determine into which of the two perspectives the institution of arbitration can be said to fall, we must go a little further into the question of what, in reality, is this important and fictional element called the truth.

Ⅲ. What is Truth?[9] - Francis Bacon

While the idea that a judgment based on the substantive truth of the facts is attractive, achieving such a judgment in practice shows itself to be almost impossible. Aside from the obstacles created by the need for proceedings to be effective and of a reasonable duration,[10] which in itself will impose a temporal limit on reaching the substantive truth, the Civil Code of Procedure, in establishing rules on inference, burden of proof, and reversal of the burden of proof, recognizes that substantive truth is unachievable.

The difficulty in reaching the substantive truth of the facts reveals itself to be a problem not only in Brazilian law, but also in common law jurisdictions. In response to a

9) The Essays of Francis Bacon. Of Truth. Bacon goes on to say "… But I cannot tell; this same truth, is a naked, and open day-light, that doth not show the masks, and mummeries, and triumphs, of the world, half so stately and daintily as candle-lights. Truth may perhaps come to the price of a pearl, that showeth best by day; but it will not rise to the price of a diamond, or carbuncle, that showeth best in varied lights. A mixture of a lie doth ever add pleasure. …" Retrieved 17 May 2013, <http://www.gutenberg.org/files/575/575-h/575-h.htm#link2H_4_0001>.

10) Indeed, proceedings have a finality that is public in nature, which is to ensure "the full effectiveness of rights. The proceeding is an instrument of juridical production and an unceasing form of realizing rights." See Eduardo José Couture. *Introdução ao Estudo do Processo Civil.* (trans. Mozart Victor Russomano). 3rd ed. Rio de Janeiro: Forense, 1998. p. 46.

comment by one of his dinner guests on how marvelous it must be to dispense justice, the Australian Appeals Court Justice, **Sir Owen Dixon**, cynically (or exasperatedly) said:

> I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.[11)]

Despite this sceptical affirmation, the interviews given by **Imre Kertész** to his friend **Zoltan Hafner** on this theme profoundly disturb his friend and interlocutor, who wishes to be faithful to the facts and tries to bring the dialogue back to what really happened. This discordance marks the thought-provoking style of *Dossier K*, a book that tells of **Kerstész**'s time in a concentration camp during World War II. A few paragraphs from that work are transcribed below:

> *Isn't that what happened?*
> In the novel, yes, it did. But then a novel is fiction…

> *So, it was the reality that you wrote down after all. Why are you so insistent on the term "fiction"?*
> Look here, that's a pretty basic issue. A couple of decades later, when I decided that I was going to write a novel, I was obliged to sort out, for my personal use so to say, what the difference was between the genres of the novel and the autobiography, "memoirs," if only to stop me from adding yet another book to what already back in Sixties had swollen into a library of, how should I put it…

11) Philip Ayres. "Owen Dixon's Causation Lecture: Radical Scepticism", 77 Australian Law Journal 2003, 682, p. 692. Still, on another occasion, in the same text in which he cites Francis Bacon's "Of Truth", **Sir Owen Dixon** asserted that the search for the truth was the objective to be pursued by the courts: "For some eighteen years I played my part as counsel at the Bar, that is to say I was a humble auxiliary in the courts that seek day by day in case after case to come at the truth both of law and the facts in the faith which we are all taught that that is justice."

> *But you can't mean to say that you invented Auschwitz?*
> But in a certain sense that is exactly so. In the novel I did have to invent Auschwitz and bring it to life; I could not fall back on externalities, on so-called historical facts outside the novel; everything had to come into being hermetically, through the magic of the language and composition. Look at the book from that point of view. From the very first lines you can already get a feeling that you have entered a strange sovereign realm in which everything or, to be more accurate, anything can happen. As the story progresses, the sense of being abandoned increasingly takes hold of the reader; there is a growing sense of the losing one's footing …[12)]
>
> *The scene in Fatelessness where Köves catches sight of an abandoned station through an opening covered with barbed wire and reads the word "Auschwitz" in the splendour of the morning: fiction or reality?*
> It is, truly, reality, and it served especially well as structure for fiction …
> But now can you tell me why you assume that air of triumph each time you surprise me describing a true, concrete detail or, as you say, reality.
>
> *Because with your theory of fiction, you disguise the truth. You exclude yourself from your own story.*
> By no means. It's just that my place is not in the story but behind my desk.[13)]

In his study on this question, **Eduardo Vidal** writes that **Kertész** at no time makes concessions to the demands of reality, elevated to the function of guarantee of the truth. As a writer, his place is based on the recognition of facts within the dimension of

12) These paragraphs are from the translation by Tim Wilkinson of Dossier K found at <http://www.newyorker.com /online/blogs/books/2013/05/imre -kertesz- on-imre-kertesz.html>, retrieved 17 May 2013.
13) My translation. Imre Kertész. *Dossier K*. Arles: Actes Sud, 2008. pp. 12-25.

language, not denying reality but recreating it. Vidal concludes by saying that "reality brandished as truth constitutes a constriction and a barrier to the real. Reality is invented; reality does not precede the act of writing, because it is the unforeseeable spark that jumps between the lines of what is written."[14)]

What Vidal means by this is that all writing is embodied in and expressed through human language, taking on the peculiarities and private choices of the person who writes. The truth often assumes distinct and different details and versions, depending on the narrator. To the extent that all acts pass though language to exist, they necessarily become an element of fiction. And, in this particular, fiction is not the opposite of truth, but rather the truth that cannot be expressed without the fiction.

Jeremy Bentham used the term *fictitious* to describe legal bodies that rely on language to exist. They are elements of discourse that cannot be suppressed without the risk of destroying the discourse itself. Fiction creates the language used to name and bring into being the legal bodies. In **Bentham**'s conception, the subject is inserted in the discourse by the use he makes of language when he formulates the statements with which he expresses himself. According to **Bentham**, logic, as the determiner of the rules of thought, is necessary in the function of ordering legal bodies that are produced with elements of language. And, to the extent that thought and subject are elements indissociable from language, fiction is part of them. As **Eduardo Vidal** says: "To produce a sentence requires passing through the dimension of fiction. Any proposition is rooted in fiction and this has repercussions in the field of the truth."[15)]

Much earlier, **Heidegger** had said that "in language man dwells", and the famous French psychoanalyst **Jacques Lacan** asserted that "it means that language was there before man, and that is obvious. Not only man was born into language in precisely the way he is born into the world; he is born through language. … It is because language exists that truth exists, as everyone can come to see."[16)]

This parenthesis serves to reveal the "fictionality" of truth: given that every human act is manifested through an element of language created by man as a means of expression (oral, documentary, etc.), the act is nothing more than an element of fiction, making the search for truth a search for fiction.

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14) Eduardo Vidal. "Facticidade", *Memórias e Cinzas: vozes do silêncio*. Edelyn Schweidson (org.) Ed. Perspectiva: São Paulo. 2009. P. 157. My translation.

15) *Ibid*, p. 158.

16) Jacques Lacan. *My teaching*. London: Verson, 2008. Pp. 27-29.

Ⅳ. The Truth in Legal Proceedings

Although there are other points of view, the truth in the adversarial system can be reduced to two propositions. The first, well-known to students of procedural law, is that the adversarial model is not concerned with the substantive truth but with "procedural truth" or "legal truth".[17] The second is that the adversarial model provides mechanisms that allow a search for substantive truth which is moderated by restrictive procedural rules and other prevailing social norms.

The first position was convincingly put by **Sir Frederick Pollock**, who said:

> Perhaps the greatest of all the fallacies entertained by lay people about the law … is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusions: and this is by no means the same thing.[18]

Likewise, **Viscount Simon LC** emphasized that "a court of law … is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it."[19]

The relation between this first proposition and the adversarial system arise directly out of a decision by the House of Lords dealing with the "privilege" of not producing certain evidence for reasons of public interest. At first instance, the trial judge, **Lord Bingham**, had ordered production of certain documents involving deliberations of Ministers and

17) On "procedural truth" see G.L. Certoma, "The Accusatory System v. the Inquisitorial System: Procedural Truth v. Fact?", Australian Law Journal no. 56, 1982, p. 288; Thomas Wiegend, "Is the Criminal Process About Truth? A German Perspective", Harvard Law Journal of Law & Public Policy no. 26, 157, pp. 160, 170-173. On "legal truth" see Robert S. Summers, "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding", (1999) 18 Law and Philosophy 497, Joseph M. Fernandez, "An Exploration of the Meaning of Truth in Philosophy and Law" (2009) 11 University of Notre Dame Australia Law Review 55, pp. 79-80.

18) Sir Frederick Pollock, *Essays in the Law*. Oxford: Macmillan and Co., 1922, p. 275.

19) *Hickman v. Peacey* [1945] AC 304 at 318.

high-level public servants regarding the cabinet decision at issue in the case, on the grounds that inspection of the documents was necessary to the better administration of justice, because they could furnish "substantial assistance to the court in determining the facts upon which the decision in the cause will depend."[20]

On appeal, the Court of Appeal held that the trial court's decision was mistaken. The question was not whether the documents would help the court to determine the facts, but whether there was a probability that the documents would assist in proving the claim made by the party that requested the document. The House of Lords agreed with the Appeal Court, and **Lord Wilberforce** described the distinction in these words:

> In a context purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties – a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance.[21]

Although **Lord Wilberforce** refers to the fictitious notion of "justice", he says that the "independent truth" is irrelevant to doing justice between the parties, adopting a meaning of "justice" that is much more closely related to process as an instrument for resolving disputes than as a means for achieving justice in its broad sense. Furthermore, an

20) *Air Canada v. Secretary of State for Trade (No. 2)* [1983] 1 All ER 161 at 167.
21) Idem, pp. 438-439.

unrestrained search for the truth may affect other fundamental values adopted by the society in question.[22] As early as 1846, in a decision that **Lord Chancellor Selborne** would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court", **Vice-Chancellor Knight Bruce** said:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still for obtaining of those objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ··· Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.[23]

This study is not intended to suggest that the search for truth is not a fundamental cultural value which, at least in western civilisation, is a necessary component of social cohesion and progress because society would never accept that "justice" can be attained by a "forensic" game without any connection to reality, fictional or not (although sometimes it may seem to be).

Society demands a system for resolution of disputes that is based on facts that have actually occurred in real life, subject only to the fairness of the process and consistency with other public values. For this reason, the law should seek to reflect that fundamental value and incorporate it into the core of its processes.

Certainly, the procedural rules and limitations on the production of evidence that result in the exclusion of relevant evidence are numerous. Some of these rules, in the adversarial model, are: (i) the professional privilege of lawyers and journalists, (ii) public interest immunity, (iii) exclusion of illegally obtained evidence, (iv) the privilege against self-incrimination, (v) the bar against production of new evidence on appeal, (vi) limited inference from the witness's silence, (vii) exclusion of lay opinion evidence, and (viii)

22) Viscount Kilmuir, "The Migration of the Common Law" (1960) 76 Law Quarterly Review 41, p. 43. See also *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394, p. 411.

23) *See Minet v. Morgan* (1873) 8 LR Ch App 361, p. 368.

exclusion of hearsay evidence.[24] In addition to these rules, there is also a series of principles that are designed to ensure a fair trial.[25]

Many of the rules that limit admission of evidence in the adversarial model were developed at a time when a jury was the tribunal of fact in both civil and criminal cases. Some were adopted precisely because of the susceptibility of juries to the influence of evidence that had little relevance. Others were adopted because juries do not give reasons for their decisions and it was not possible to correct or adjust mistakes in the application of the law or weighing of the evidence after judgment was rendered.[26]

In addition to the limitations imposed by procedural rules, there are questions of a practical order in each system. It is commonly asserted, regardless of the assertion's truth, that the critical difference between the two systems lies in the search for the truth, which, supposedly, is not the objective of the adversarial system, while it is in the inquisitorial system. This proposition is based in large part on the different roles that he parties and the decision-maker assume in each of the models discussed here.

The different approaches seen in the two systems may have their origins in the relationship and support that the citizen expects of the State.[27] Common law countries traditionally reflect a much stricter conception in matters of state interference in private life. The adversarial model gives primacy to the autonomy of the individual and the preservation of personal liberty, such that none of the arms of the State – including the judiciary – should control or direct the conduct of the individual's affairs. In civil law countries, in contrast, the State is more dominant, although, in most nations, the difference has balanced out, particularly after World War II.

As we have seen, countries of the common law tradition have a series of rules that limit the admissibility of certain evidence, regardless of its relevance to the judgment of the case. Even though they do not have the same type of trial process, civil law jurisdictions have similar rules that limit the production and use of certain types of evidence. Rules on illegally-obtained evidence, extending to illegal searches and seizures, wire taps, and a series of violations of due process, for example, all reflect the principle

24) For a broader vision of the limitations on admission of evidence, see LANDAU, Larry. *Truth, Error and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press. 2008.

25) J J Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 Australian Law Journal 29.

26) Many of these rules are still in effect today, despite the abolition of the jury in civil proceedings.

27) Matthew T King, "Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems" (2001) 12 International Legal Perspectives 185 esp at 193-207.

of a fair judgment.[28] Various legal provisions prohibit the use of evidence obtained in violation of these principles. In fact, in Germany, the rules that restrict the use of illegally-obtained evidence date to the 19th century, far earlier than any similar principle was adopted in common law jurisdictions.[29]

For the more sceptical common law lawyers, the very absence of a discovery mechanism in civil law jurisdictions, for example, simply contributes to the questionability of the real possibility of attaining the actual truth.

There is no question as to the importance given in the inquisitorial system to the powers of the judge to order production of evidence, but a practitioner from a common law jurisdiction would say that access to the internal documents of the other party, disclosed in the discovery process in function of the professional obligations of lawyers for that other party, is a much more effective means of determining the substantive truth. This process is not, generally, available in most civil law systems. **J.A. Jolowicz** notes that:

> The "inquisitorial" civil law does more to protect a party's privacy and to insist that the parties must prepare their own cases for themselves, than does the "adversarial" common law. The latter, in effect, requires the parties to open their files by revealing what documents they possess and, in the absence of compelling reasons to the contrary, to lay them open for inspections.[30]

In general, civil law jurisdictions do not accept the conclusion that the "maximum access to facts" will lead to a greater probability of attaining the substantive truth of the facts. As one observer said, with respect to the German system:

> There is no assumption that justice is likely to be directly proportional to the access of a party to fact. Indeed, it is the ability of the system to focus

28) See PAKTAR, Walter, "The Exclusionaty Rules in France, Germany and Italy" (1985) 9 Hastings International & Comparative Law Review 1; MA, Y, "Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany and Italy" (1999) 22 Policing: An International Journal of Police Strategies & Management 280

29) FRASE, Richard S., "The Search for the Whole Truth about American and European Criminal Justice" (2000) 3 Buffalo Criminal Law Review 785, p. 821.

30) JOLOWICZ, J.A.. "Civil Procedure in the Common and Civil Law" in Guenther Doeker-Mach and Klaus A. Zieger (eds) Law, Legal Culture and Politics in the Twenty First Century. Stuttgart: Franz Steiner Verlag. 2004, p. 69.

> on determining those facts which are relevant to the legal issues that is considered critically important. … The central notion is that procedural justice is primarily secured by the informed professionalism of the judiciary. It is the judge's skill and experience in evaluating evidentiary material which is considered likely to lead to the 'truth', not the gathering of immense quantities of factual information by attorneys who are then free to present or not present such information and to manipulate its presentation to serve their own ends.[31]

Defenders of the adversarial system contend that the fact that the decision depends on the capacity of the party to analyze the available evidence, to find in that evidence support for his case, and present the evidence in a convincing manner simply allows a better assessment of the party's chances of success, and at the same time allows facts to be uncovered. This is preferable, they would say, to the risk of leaving the fact finding process in the hands of the judge who faces a variety of problems, most significantly an excessive caseload.

Ⅴ. The Arbitrator's Duty and the Search for the Facts

The function of an arbitrator is a question that can be examined from various perspectives. One perspective is the power that the arbitrator has over the production of evidence in the exercise of his jurisdiction; another is the legal nature of arbitral proceedings.

Basically, the question resides in whether arbitrators' powers are limited to deciding on the basis of the facts and argument presented by the parties, as a neutral observer (adversarial), or whether the arbitrator can (or should) make his own investigation in the facts and rights involved, in order to have complete conviction as to the substantive truth of the facts and their application in the law (inquisitorial). In other words, the essence of the adversarial model is in the decision-maker's analysis of the evidence and the arguments put forward by the parties, in order to decide on them. The decision-maker

31) GERBER, David J. "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States" (1986) 34 American Journal of Comparative Law 745, pp. 768-769.

should not, therefore, proceed to seek out facts not raised by the parties.[32] Conversely, all these initiatives may be exercised by the decision-maker when the process is modeled on the inquisitorial system.[33]

Another possibility is to make a critical examination of the legal nature of arbitration, which can be characterized as *contractual*, and therefore limited to the powers fixed by the parties in the arbitral contract, or *jurisdictional*, where the arbitrator performs the role of a state court, and is free to decide outside the limits fixed by the parties to the arbitration, subject to the requirements imposed by the *lex fori*. Notwithstanding the relevance of these questions, which have not yet been fully analyzed, an arbitrator's powers must be assessed according to the context in which the arbitrator was called upon by the parties to resolve a specific dispute. This means that the function of arbitrators must be assessed in function of the purpose of their mandate.

In addition to putting an end to the dispute and extinguishing the arbitrator's mandate, the arbitral award and, particularly, the grounds for the ward, have an unparalleled importance in maintaining a peaceful society. In an interesting article entitled "Reasons for Reasons to have Reason", **Lord Bingham** points out that the grounds for the award are relevant because (i) the parties have the right to know the reason why they won or lost their case, leading to greater acceptance by the party that lost, (ii) they are a true bar to arbitrariness ("justice should not only be done, but should manifestly and undoubtedly be seen to be done"), (iii) they serve as a guide for future conduct by the parties, and sometimes as a precedent for decisions in similar cases, and (iv) they allow the parties to understand the logical and coherent reasoning that lead the decision-makers to their decision, based on the evidence presented by the parties.[34] The last "reason for reasons" he names is the intellectual discipline of the decision-maker. In other words, in order for a decision-maker to arrive at a decision, he naturally must review the arguments presented by the parties, analyze the evidence submitted and the testimony of the witnesses, and discuss the case with his colleagues on the tribunal to support a given conclusion. This intellectual discipline is essential if the decision (whether judicial or arbitral) is to fulfill its other functions.[35]

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32) BERNARDINI, Piero. "The Role of the International Arbitrator," *in* Arbitration International, volume 20, number 2, 2004. p. 113

33) STAUGHTON, Lord Justice. "Common Law and Civil Law Procedures: Which is More Inquisitorial? A Common Lawyer's Response," in Arbitration International, volume 5, 1989. p. 352.

34) In proceedings before the ordinary courts, the reasons for decision also allow the second instance to come to the same conclusion or even serve as an obstacle to revision of the judgment.

Thus, the arbitrator must approach fact-finding with a view to ensuring that his award will fulfill its intended purposes. It is this operative analysis of reality that is of interest to the law. The responsibility of the arbitrator (or arbitrators) will be to provide coherent and logical reasons for their decisions, based on the facts presented by the parties. And it will be through this exercise, in which the parties have the duty of sustaining their allegations with the facts, that the truth will appear. The facts of the case or, to put it another way, that which is put before the arbitral tribunal by means of an ample fact-finding procedure which respects due legal process, is reality: it is only through legal discourse that reality floats in the world of the law.

And so the arbitrator's function should not be directed to a search for truth, but simply for factual elements that will allow him to reach a coherent, logical decision, fully supported by the documents and other evidence submitted by the parties, thus creating a true principle of facticity.

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ABSTRACT

The Principle of Facticity: Outline for a Theory of Evidence in Arbitration

Octávio Fragata Martins de Barros*

International Arbitration has distinguished itself as a method for dispute resolution that pleases both common and civil law practitioners. It, however, is not free of criticism, especially when fact-finding and evidentiary issues are at play. Perhaps because fact-finding is very closely linked to the culture in which they lie, perhaps because of the lack of a clear evidentiary rules governing international arbitration, a theory of evidence in international arbitration is still far fetched. Through the analysis of the distinctions between dispute resolution systems and the search for truth paradigm, this paper aims to develop and present an outline for the development of a theory of evidence in international arbitration.

Key Words: Arbitration, International Arbitration, Evidence, Proof, Fact-Finding, Function of the Arbitrator, Theory of Evidence, Facticity, Procedural Truth, Material Truth, Common-Law, Civil-Law.