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The Problem of Establishing the Truth in International Arbitration Proceedings

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Abstract

The article analyses the problem of determining the truth in international arbitration. After reviewing the concepts of truth found in international arbitration proceedings, the article argues for a realistic approach to truth, which goes beyond a predefined concept of truth and considers truth as a subjective and realistic category that is not only compatible with international arbitration but also has positive consequences for the entire arbitration process.

Keywords

Truth, evidence, realistic approach, fact-finding, international arbitration.

I Introduction

The concept of truth has been the subject of long-standing debate. As far back as antiquity, philosophers were convinced that the philosopher should be most concerned with three things: goodness, beauty, and the truth.[1] Law also has a close relationship with truth. The requirement that any legal decision have to be based on a full evaluation of the circumstances of the case is as old as the law itself. International arbitration is no exception. The arbitrator's assessment of the evidence is a fact-finding exercise, and the arbitrator's approach to the concept of truth may well determine the entire outcome of the case. Accordingly, the issue of truth and its determination is also relevant to the international arbitration community.

This article aims to provide an overview of the issue of truth in international arbitration and stimulate debate on an alternative and not much discussed – realistic – approach to truth in international arbitration.

In order to fulfil the stated aim, each of the parts of the article seeks to fulfil the following objectives: (1) the second part of the article analyses the concepts of truth established in the international arbitration process; (2) the third part provides a critical analysis of the existing conceptions of truth and argue that we should adopt a realistic approach to the concept of truth in international arbitration; (3) the

1 Evaldas Nekrašas, Filosofijos įvadas, Mokslo ir enciklopedijų leidykla, Vilnius 1993, 126.

fourth part outlines some of the most important consequences of adopting a realistic approach to arbitration; (4) the fifth and last part of the article provide conclusions of the research.

II Concepts of Truth in International Arbitration

The objective of establishing the truth is inherent in the international arbitration process. As it is pointed out in the legal scholarship: “The general approach of international tribunals is to keep open all avenues for the submission of evidence that will assist the tribunal in establishing the truth with respect to disputed facts.”[2] On the other hand, merely recognizing this objective does not answer the fundamental question: what kind of truth should be determined in international arbitration?

The most authoritative sources on arbitration law are silent on the issue of truth. For example, the UNCITRAL Model Law on International Commercial Arbitration, the London Court of International Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, or the IBA Rules on the Taking of Evidence in International Arbitration do not provide a clear guidance on what truth should be determined. For this reason, it is inevitable that legal scholarship, arbitral case law and other legal sources, which can provide some guidance, must be considered. An analysis of the latter sources of arbitration law allows us to identify three concepts of truth that are recognized in international arbitration.

Firstly, the first concepts is the concept of objective truth. This concept is characterized by two aspects: (1) objective truth obliges the tribunal to accept as true only those factual circumstances which objectively exist in the external world; (2) objective truth obliges the tribunal to be active, *i.e.*, to gather evidence on its initiative and not to limit itself to the evidence provided by the parties.[3]

Unsurprisingly, the aim of establishing this notion of truth was a characteristic of the judicial process in communist states, which were characterized by inquisitorial courts with broad powers in the judicial process. Nevertheless, the objective truth has several advantages: (1) the objective truth has a solid philosophical basis since it is closely related to the classical conception of truth, which considers truth to be statements that correspond to the actual state of things;[4] (2) the objective truth, which requires absolute certainty as to the truth of the facts, is a stable guarantee of the legitimacy of the arbitral tribunal’s decision since the failure to establish the facts will lead to the incorrect application of the law and to the failure to achieve justice. The risk of failing to arrive at the objective truth is vividly illustrated by arbitrator Georges Abi-Saab in his dissenting opinion:

“In these circumstances, I don’t think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence […]. It would

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2 Robert Pietrowski, Evidence in International Arbitration, Arbitration International, 22 (2006) 3, 407.

3 Egidijus Laužikas/Valentinas Mikelėnas/Vytautas Nekrošius, Civilinio proceso teisė I tomas, Justitia, Vilnius 2003, 44.

4 Jan Szaif, Plato and Aristotle on Truth and Falsehood, in: Michael Glanzberg (ed.), The Oxford Handbook of Truth, Oxford University Press, Oxford 2018, 45.

be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication."[5]

Not surprisingly, some arbitral tribunals also accept this concept of truth. For example, in the arbitration case of *W. P. Parker v. United Mexican States*, the panel stated: "[…] the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted."[6]

Secondly, the second concept of truth is formal or legal truth which defines truth as that which is most probable in the light of the evidence presented by the parties in the case. This concept is called formal or legal because of its determination in a judicial trial or arbitration process in which the judge or arbitrator is not able to determine the whole or objective truth due to various aspects: (1) the adjudicators are unable to use any means of searching for the truth; (2) the unavailability of evidence; (3) the rules of admissibility of evidence that exclude certain evidence from the case, *etc*.[7]

In legal scholarship, we can find a number of positions in favour of the formal truth. For example, Luc Demeyere points out: "In both common and civil law systems, the result will inevitably be 'judicial truth'."[8] R. B. von Mehren takes a similar position: "As a practical matter, the tribunal does not have the authority or the facilities available to conduct – except to a very limited extent – its own inquiry into the facts. As a matter of necessity, it must rely on the parties to gather and present the evidence."[9]

Thirdly, the third concept is substantive (or sometimes referred to as material) truth, which is achieved when the tribunal is fully or almost fully convinced of the correctness of the decision. This notion is often associated with the school of social civil procedure. The founder of this school, Franz Klein, argued that the substantive truth will be established when the court has had the opportunity to ascertain as far as possible the disputed facts and, on that basis, to apply the substantive rules correctly.[10] The substantive truth presupposes not a passive but an active court, which in some instances must go beyond the evidence adduced by the parties and seek the truth itself.

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5 Dissenting opinion of Georges Abi-Saab, in: ICSID, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ARB/07/30, March 10, 2014.

6 Gary B. Born, International Commercial Arbitration, Third Edition, Kluwer Law International 2021, 2485.

7 Robert S. Summers, Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases, Law and Philosophy, 18 (1999) 5, 501–510.

8 Luc Demeyere, The Search for the "Truth": Rendering Evidence under Common Law and Civil Law, SchiedsVZ | German Arbitration Journal, 1 (2003) 6, 252.

9 Robert B. von Mehren, Burden of Proof in International Arbitration, in: Jan van den Berg (ed.), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, 7, Kluwer Law International 1996, 124.

10 Vytautas Nekrošius, Civilinis procesas: koncentruotumo principas ir jo įgyvendinimo galimybės, Justitia, Vilnius 2002, 37.

In international arbitration, we can also find some hints of this concept. For example, the Rules on the Efficient Conduct of Proceedings in International Arbitration (the so-called Prague Rules), which have been gaining considerable popularity, enshrine an active role of the arbitral tribunal. Article 3(1) of the Prague Rules provides: "The arbitral tribunal is entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute. This, however, shall not release the parties from their burden of proof". Although the Prague Rules do not explicitly state so, the sufficiently broad powers of arbitrators lead to the conclusion that the Prague Rules, if chosen to be applicable in the proceedings, orient arbitral tribunals not to limit themsleves only with evidence presented by the parties and strive towards determining the substantive truth.

Therefore, the analysis does not provide a clear answer to the question, which of the concepts of truth is accepted in international arbitration. In one case, arbitrators may find sufficient reason to limit themselves to the evidence presented by the parties and, consequently, to formal truth. In contrast, in another case, the arbitral tribunal may take a more active role and, in the absence of sufficient evidence by the parties, not close itself, in the words of Abi-Saab, in: "a virtual reality in order to fend off probable objective reality".

III A Realistic Approach to the Truth in Arbitration Proceedings

In this part of the article, we argue that the international arbitration process should not be limited to the concepts of truth outlined above but rather should adopt a realistic approach to truth.

A realistic approach means that arbitral tribunals should not limit themselves to a supposedly objectively definable notion of truth. A realistic approach does not regard truth as an exclusively legal, philosophical or sociological category but recognizes its relativity and subjectivity. Truth has no predetermined definition and should be understood as a certain relationship between the facts established in a case and the intellectual reasoning of the arbitrator, which enables him to ascertain the certainty of the fact. The following three arguments not only reveal the essence of this approach but also justify the favouring of this approach in international arbitration.

Firstly, the truth is relative. The conceptions of truth in arbitration are different and mutually incompatible. For example, formal and objective truth demand fundamentally different things from arbitrators. It is, therefore, impossible to define a concept of truth that is uniformly applicable and acceptable to all. After all, even if we accept that one or the other conception of truth should be established in arbitration, how can we know that we have made the right choice? In this respect, we can agree with A. Ross that legal concepts are meaningless, providing us with as much benefit as the terms used by members of a Pacific Island tribe among themselves.[11]

The relativity of truth finds its justification in the combination of postmodern pluralism and pragmatism, which allows for a healthy scepticism towards any

11 Alf Ross, Tű-Tű, Harvard Law Review, 70 (1957) 5, 822–823.

power or authority – and thus towards a predetermined definition of truth.[12] A realistic approach allows us to question and abandon the need to define a universally applicable concept of truth. We are not arguing that truth does not exist. The rejection of truth as a phenomenon would destroy any premise for the search for knowledge and its correspondence to truth. Hence, we are not proposing to abolish truth but rather to adopt a different – realistic approach.

International arbitration could replace the debate on the concepts of truth with Wittgenstein's "language game" theory, which proposes to replace the concept of ontological truth with a definition of certainty. Certainty as a category of thought is the minimum for constructive legal dialogue and is a fundamental prerequisite for a successful legal discourse. A primitive understanding of this "language game" could be captured by the following construction: "Just because it seems that way to me – or to everybody – does not mean that it is so. But perhaps we can ask ourselves whether it is possible to question this in any meaningful way?"[13] Similarly, arbitrators should not ask themselves whether they should determine objective or substantive truth but rather view fact-finding through the lens of certainty, *i.e.*, to critically assess the evidence presented by the parties and ask themselves whether they can doubt its credibility.

Secondly, a realistic approach is also underpinned by the flaws in current conceptions of truth since none of the above-mentioned concepts of truth is suitable for international arbitration.

At first glance, arbitration should focus on the objective truth. Unfortunately, in practice, the determination of objective truth is not implemented because of the establishment of objective truth in arbitration is not precluded by the other and more important objectives of the arbitral process. The arbitral process is not based solely on the establishment of truth. In some cases, other procedural values may be more important. For example, the objective of fairness in arbitration may lead to the exclusion of albeit relevant but illegally gathered evidence.[14] In such instances, it will be simply impossible to determine the objective truth.

Formal truth also has its shortcomings: (1) in some cases, arbitral tribunals cannot limit themselves to the evidence provided by the parties. The lack of evidence in a case should, in some cases, oblige the arbitral tribunal to use the legal instruments at its disposal, such as seeking the assistance of a national court, to obtain relevant evidence; (2) the determination of formal truth may appear as an attempt to formalize the concept of truth artificially. An arbitration process based on the determination of formal truth may resemble Plato's famous allegory "The Cave", where the arbitrators, like the people in the cave, can only see what is reflected from the wall of the cave (in the case of a trial, what the parties in the trial present) and nothing else.[15]

Substantive truth is also not appropriate for international arbitration. The substantive truth is often associated with a strict, inquisitorial, paternalistic judge.[16]

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12 Jaunius Gumbis, Legal reasoning: a realistic approach, available at http://web.vu.lt/tf/j.gumbis/legal-reasoning-en/, 2018, 90 – 91 (14 September 2023).

13 *Ibidem*, 91.

14 UNCITRAL Arbitral tribunal, *Methanex Corporation v. United States of America*, Award of 3 August 2005.

15 Platonas, Valstybė, Margi raštai, Vilnius 2001, 265.

16 Cornelis H. van Rhee/Alan U. Uzelac, The Pursuit of Truth in Contemporary Civil Procedure. Revival of Accuracy or a New Balance in Favour of Effectiveness? in:

These adjectives are not specific to the arbitral tribunal. The arbitral process is primarily based on the parties' free will and on the adversary principle.[17] Moreover, apart from the Prague Rules, the substantive notion of truth lacks support in other sources of arbitration law.

Thirdly, a realistic approach to truth is further enabled by the fact that the arbitration process itself, by its very nature, is compatible with a realistic approach to truth.

International arbitration is a multicultural and multi-traditional method of dispute resolution. International arbitration is not limited to one national legal system or legal tradition. International arbitration is transnational legal order which is characterized by a mixture of legal traditions.[18] This feature of international arbitration prevents the process from being 'formalized' into a supposedly objectively determined concept of truth.

The different cultures of the participants in international arbitration strongly influence how they assess and process their environment, which is manifested in a certain tendency to believe or disbelieve certain facts. Moreover, in modern arbitration, we are often confronted with the need to translate the information presented in a case into English, which can have negative consequences in terms of inaccurate communication of the content of the evidence.[19] In addition, some disputes are characterized by complex and numerous factual circumstances and evidence. In such disputes, it is impossible for arbitrators to read, understand and evaluate all the facts presented.[20] Accordingly, arbitrators will often not even have the opportunity to reach the truth, regardless of how we define it. Hence, discussing one or another concept of truth in arbitration proceedings becomes an exercise in futility.

Therefore, the three arguments explained above – the relativity of truth, the shortcomings of conceptions of truth, and the compatibility of a realistic approach with international arbitration – provide a rationale for a realistic approach in international arbitration.

IV Implications of a Realistic Approach to Arbitration Proceedings

As argued above, international arbitration should adopt a realistic approach. A realistic approach does not deny the truth itself but recognizes that attempts to define truth universally in international arbitration are bound to fail. Recognition of

Cornelis H. van Rhee/Alan U. Uzelac, A. (eds.), Truth and Efficiency in Civil Litigation Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context, Intersentia, Cambridge 2012, xxv–xxvi.

17 Gary B. Born, International Commercial Arbitration, Third Edition, Kluwer Law International 2021, 2371.

18 Emmanuel Gaillard, Legal Theory of International Arbitration, Martinus Nijhoff Publishers, Leiden Boston 2010, 35.

19 Bernard Hanotiau, The Search for the Truth in Arbitration: Is it Possible to Start from a Definition of "Truth"? in: Luc Demeyere (ed.), Do Arbitral Awards Reveal the Truth? Kluwer Law International 2019, 4, 6.

20 Jörg Risse, An Inconvenient Truth: the Complexity Problem and Limits to Justice, Arbitration International, 35 (2019) 3, 307.

a realistic view of the truth has concrete legal consequences for the entire arbitration process. This article does not aim to provide a detailed overview of all the possible implications of this approach. Nevertheless, the following are some of the most essential implications which, in our view, would improve the international arbitration process.

Firstly, the concept of truth should be replaced by the aforementioned category of certainty, which obliges arbitrators to make brave factual hypotheses and to evaluate the presented evidence critically. A realistic approach is related to legal minimalism, which means that judges (or, in this case, arbitrators) should prefer rulings that are shallow rather than deep, narrow rather than wide.[21] As shown above, the question of the concept of truth has not been and is unlikely to be, resolved in human history. Therefore, it is neither efficient nor practical to find a consensus on these enduring concepts. This problem can be solved by incompletely theorized agreements, which occur when people agree on something important, even though they disagree on a lot. For example, Cass Sunstein states, "we know that murder is wrong, but disagree about whether abortion is wrong. We favor racial equality but are divided on affirmative action. We believe in liberty, but disagree about increases in the minimum wage."[22] Disagreement on some aspects and agreement on others enables legal minimalism, *i.e.*, to concentrate on the aspects of consensus while leaving aside the hard-to-resolve issues.[23]

While the international arbitration community may disagree on the concept of truth, no one is likely to argue that arbitrators are obliged to be critical of the evidence presented by the parties, to be intellectually courageous, to be moderate and transparent in their reasoning, and ultimately to be confident in their findings of fact. This agreement can be considered an incompletely theorized agreement, which allows not to be preoccupied with ineffective debates on the concept of truth but rather to focus more on developing the arbitrator's critical thinking and intellectual courage in the future.

Secondly, a realistic approach allows for greater attention to be paid to other aspects of the fact-finding.

One possible criticism of a realistic approach is that neither the arbitrator nor the parties to the proceedings can know what truth is to be determined, leading to legal uncertainty. Moreover, a realistic approach can turn the whole process into a subjective imagination of the arbitrator. B. Cardozo, writing about the abolition of the external standard, points out that in such cases, the law can turn into 'Die Gefühlsjurisprudenz', *i.e.*, a jurisprudence of sentiments or feelings.[24]

In this particular instance, these concerns are unfounded since a realistic approach would allow us to concentrate on other, less controversial aspects of the evidentiary process. One of them is the standard of proof, defined as the degree of conviction of the judge that, once reached, entitles the party to a finding of fact in his favour.[25] Although the standard of proof is also the subject of considerable debate. The impression is that international arbitration recognizes the balance of

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21 Cass R. Sunstein, Legal Reasoning and Political Conflict, Second Edition, Oxford University Press, Oxford 2018, xii.

22 *Ibidem*, 35.

23 *Ibidem*, 44.

24 Benjamin N. Cardozo, The Nature of the Judicial Process. Dover Publications, Inc, 2012, 102.

25 Richard Glover, Murphy on Evidence. Oxford University Press, Oxford 2017, 124.

probability standard, which allows a fact to be proved when it is more likely than not that the fact existed.[26] Nevertheless, the standard of proof is not fully developed yet. Arbitrators often either do not address the standard of proof or avoid the issue.[27] A realistic approach would allow for a greater focus on uncovering and developing the requirements of the standard of proof.

Thirdly, a realistic approach provides a favourable procedural environment for reconciling different values.

Establishing the truth or the facts is not, and cannot be, the primary objective of the arbitral process. Legal principles such as fairness, expedition and efficiency must be reconciled with the truth. As W. W. Park points out: “To fulfill its promise of enhancing economic cooperation, arbitration must aim at an optimum counterpoise between truth-seeing and efficiency.” [28] A realistic approach would help to ensure this balance. Without being limited to conflicting concepts of truth, arbitrators could be much more effective in trying to strike the right balance between fact-finding and other procedural objectives.

Therefore, the above analysis does not reflect all the possible consequences of a realistic approach. The analysis is limited to the conclusion that a realistic approach can potentially steer the international arbitration process in a more qualitative direction. This is not to say that a realistic approach is the ideal approach. No, the very name of this approach implies that it is not perfect since it is realistic. However, the analysis presented in the fourth part of the article provides at least a few arguments that would allow us to develop this approach further and to try to benefit from it in the future.

V Conclusion

The scientific analysis carried out in this article leads to the following conclusions:

Firstly, international arbitration is characterized by at least three truth concepts: objective, formal and substantive. This diversity of concepts means that in one case, arbitrators may find sufficient justification for limiting themselves to the evidence of the parties and, thus, to formal truth. In contrast, in another case, the arbitral tribunal may take a more active role in attempting to establish substantive, or sometimes even objective, truth.

Secondly, international arbitration process should adopt a realistic approach to the truth. A realistic approach recognizes that truth has no predetermined, objective definition and should be understood as a relationship between the facts established in the case and the arbitrator’s intellectual reasoning to ascertain the certainty of the facts. The relativity of truth itself, the shortcomings of the existing concepts of truth and the compatibility of a realistic approach with the international

26 *E.g.*, see Gary B. Born, International Commercial Arbitration, Third Edition, Kluwer Law International 2021, 2488.

27 Jennifer Smith/Sandra Nadeau-Séguin, The Illusive Standard of Proof in International Commercial Arbitration, in: Jan van den Berg (ed.), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, 18, Kluwer Law International 2015, 134.

28 *William* W. Park, Arbitration of International Business Disputes: Studies in Law and Practice. Second Edition, Oxford University Press, Oxford 2012, 71.

arbitration process provide further justification for the applicability of this approach to the arbitral process.

Thirdly, a realistic approach is not and cannot be considered an ideal approach; its very name implies that it is not perfect but realistic. On the other hand, using this approach would positively affect the whole arbitration process. A realistic approach could replace the concept of truth with the category of certainty, which would encourage the development of the arbitrator's critical thinking and intellectual courage, would allow for greater attention to be paid to less controversial aspects of the fact-finding, and would create a favourable procedural environment for the reconciliation of different values.

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