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Comments on the Concept of Arbiter in Roman Law

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Abstract

This paper analyzes the notion of arbiter in Roman law. Based on the legal and literary sources of Roman law, the essay briefly describes the most important features of the legal institution of arbiter. The study emphasises that the notion of arbiter has at least two different meanings in Roman law. On the one hand, an arbiter could describe an expert judge who had special knowledge in a particular field and was entitled to decide the special debate of the parties, wherein the debate did not have a purely legal nature but could concern other issues as well. On the second hand, an arbiter as arbiter ex compromisso could mean a person chosen by the parties in the form of a settlement to decide their legal dispute as an arbitrator. The study also references some important elements of the subsequent fate of the Roman notion of arbiter.

Keywords: *arbitration; arbiter; historical-comparative; civil law; Roman law; history of law.*

Commercial arbitration as an increasingly used dispute settlement method (Tamás Sárközy) gains a relevant role nowadays in the world of big business. The arbitration clauses often play very relevant roles in the commercial agreements and contracts. Sometimes the appointment of the arbitration forum (*forum arbitrii*), which might be seated in a different country than the nationality of contracting parties, is the result of a multiple-round negotiation series in the presence of the legal representatives of contracting parties, and the clause usually contains the order of the nomination, appointment of the arbitrators, the number of the arbitrators, and also the language and the place of the arbitration procedure.[1] By comparison, we may recall the *prima faciae* surprising but still undisputedly true explanation of László Újlaki, which says: "*The cradle of the arbitration – as of many other legal institutions – rooted in Rome. Even in the early period of the evolution it was possible for the parties to submit their legal dispute under the decision of arbitration or arbitrators, avoiding the state courts, unless the nature of the dispute was a state matter or popularis actio.*"[2] We would like to draw up some comments on the legal institution of the *arbiter* as it existed under Roman Law, which can be considered to include but not limited to a preview of the arbitration.

I.

Although among the sources of the Roman Law we can find several rules on the *arbiter*, which are presented below, and that verify that the connection between *arbiter* and *arbitration* is not only etymological, we have to highlight that the antecedent of arbitration can be found in Greek law and in Greek literature.[3] The literature refers to Homer's Iliad as the classic

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1 See especially: REDFERN, A. – HUNTER, M., *Law and Practice of International Commercial Arbitration*. London, 2004[4] p. 156. Summary on the international commercial arbitration in Hungarian see: BOÓC, Á., *Nemzetközi kereskedelmi választottbíráskodás. A választottbíró megválasztása és kizárása. (The international arbitration. The appointment and the challenge of the arbitrator.)* Budapest, 2009.; On the history of the Hungarian arbitration in the newer Hungarian literature see: KECSKÉS, L., *A választottbíráskodás vallástörténeti és gazdaságtörténeti gyökereiről*. (On the roots of the religious history and economic history of the arbitration.) In: *A választottbíráskodás és más alternatív vitarendezési eljárások jogi szabályozásának alapjai. (The fundaments of the arbitration and other alternative dispute settlement procedures.)* (edited by: KECSKÉS, L. – TILK, P.) Pécs, 2018. p. 5-14. See especially on the roots of arbitration in Roman Law in the Hungarian literature: KECSKÉS, L., *A választottbíráskodás történeti alapjai. (The historical fundaments of the arbitration.)* In: KECSKÉS, L. – LUKÁCS, J.(edited): *Választottbírók könyve. (Book of the arbitrators)*. Budapest, 2012. p. 33-70.; KECSKÉS, L., Választottbíráskodás a római jogban. (Arbitration in the Roman Law.) In: Magyar Jog 60 (2013) p. 193-204. See especially on the antecedents of the Hungarian arbitration: FABINYI, T., *Választottbíráskodás (The arbitration)* Budapest, 1926.; BOÓC, Á., A Brief Introduction to Hungarian Arbitration Law. In: *Acta Juridica Hungarica* 43 (2008). p. 351-358. KECSKÉS, L., *A kezdetekről a választottbíráskodás az állami igazságszolgáltatással vegyes rendszerben jelent meg Magyarországon.(In the beginning the arbitration appeared in Hungary as a mix with the state jurisdiction.)* In: A Kereskedelmi Választottbíróság évkönyve 2018. (Annales of the commercial arbitration 2018.) (edited by: BURAI – KOVÁCS, J.) Budapest, 2019. p. 15-19.

2 See: UJLAKI, L., A választottbírósági szerződés jogági elhelyezettsége és tipológiája (The position of the arbitration agreement in the branches of law and its typology.) In: *Jogtudományi Közlöny*. 46 (1991). p. 217.

3 See summary on this topic: ROEBUCK, D., *Ancient Greek Arbitration*. Oxford, 2001.

example of arbitration. Miroslav Bohácek considers the 186th line of the 23rd song as a real arbitrator nomination.[4] According to Bohácek, the word *istor* can mean the arbitrator. Examining the etymology of the Greek word, Bohácek takes the view that *istor* is a person who decides the case with his experience and knowledge, based on rational consideration, which is – as it is known – a specialty of the arbitration as well.[5] According to the ascertainment of Derek Roebuck, in the Eumenides, which can be considered as the third part of the Oresteia, written by Aeschylus, the father of the Greek drama as genre, the homicide – killing Clytemenestra – committed by Orestes, shows the possibility of the application of an intermediary-like, "mediatory" procedure, which Roebuck sees as the antecedent of arbitration.[6] Although the case of Orestes is obviously very far from the essence of the modern arbitration, we can agree with Roebuck that arbitration was a specific, natural, dispute--settlement procedure in ancient Greek culture, which could prelude or replace the court procedure, or even the ancient self--enforcement.[7] Bohácek – in his prior-referred work – mentions that, of course, the *istor* did not have the legal possibility to prevent the self-enforcement, in case the parties wanted to use it.[8] According to the prestigious British professor, Peter Stein, we can also see in the ancient law that the primary task of the arbitrator is to make a mutually beneficial, or at least mutually acceptable decision for both parties.[9]

In connection with the *arbiter* known and regulated by the Roman Law, we can find important standpoints in not only legal but especially literary sources. The first relevant meaning of the concept of the arbiter appears in the Roman Law sources, mentioned as *bonus vir*. According to this wording, *arbiter* is a person who is well-trusted to judge disputes without any state force.

In the paper *De officiis*, by Cicero, we can read the following thought: *"Homo autem iustus isque, quem sentimus virum bonum, nihil cuicquam, quod in se transferat, detrahet."*[10] In this source, in the moral category of the *bonus vir*, Cicero illustrated a person who is fair, trustworthy, and obviously does not steal anything from anybody. According to Cicero, the *bonus vir* who is appropriate to help others even to decide disputes is a person led by correct moral norms, and this is what enables him to carry out the tasks of a judge.

In *De agricultura*, Cato highlights that a *bonus vir* is able to decide the quality of a wine entered into a wine competition, whether it is good or bad[11]. In our point of view, this quotation is especially important because it refers to a very relevant legal aspect of the *arbiter*, namely the expert arbiter, which will be clarified below.

In the literary sources, Quintus Horatius Flaccus sums up the attributes of a *bonus vir* in one of his epistles: *„Vir bonus et quis?/Qui consulti patrum, qui leges iuraque servet,/Qui multae magnaeque servantur iudice lites,/Quo res sponsore et quo causae teste tenentur* (I.16.40)". According to this citation, a bonus vir follows the guidance of the senate, keeps the law, the name of the bonus vir appears on the list of the arbitrators, and the warranty of the bonus vir guarantees the success of civil cases or witnesses in criminal cases.

If we sum up the standpoint of Cicero and Horatius, we can assume that the *bonus vir* – who acts as an arbiter – is esteemed as a person with high moral character and as an outstanding member of the society. This arbiter overall frequently does not decide according to the written law, but more to the *bona fides* and the *aequitas*. (All this is connected to the secondary meaning of the arbiter; see below.)

II.

Taking into consideration the sources in Roman Law, we can assume that there are at least two meanings of the *arbiter*, different from each other. According to the etymology of the arbiter, the expression comes from the deponent *arbitror*, and may originate from the word *adbito* – meaning "goes" – which we can translate as assume, think, decide, state.

If we want to solve the first meaning of the arbiter, the examination of the second form of the ancient civil procedure *legis actio*, the *legis action per iudicis seu arbitri postulationem* may bring us closer to the solution.[12] We can read the specifics of the *legis action per iudicis seu arbitri postulationem* in the Institutions of Gaius as follows:

Little of the Judicis Postulatio is known to us but the name, which has reference to an application to the magistrate to appoint a judge or arbiter to hear the case, after joinder of issue; and therefore, that it made provision for arbitration.[13]

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[4] In the third song of the Ilion we can read to following text: *Come now, let us wager a tripod or a cauldron, and as umpire betwixt us twain let us choose Atreus' son Agamemnon, as to which mares are in the lead—that thou may learn by paying the price." See: https://www.theoi.com/Text/HomerIliad23.html time of downloading: 23. 06. 2019, 21:46*

[5] See: BOHÁČEK, M: Arbitration and State – Organized Tribunal in the Ancient Procedure of the Greeks and Romans. In: *Iura* 3 (1952). p. 196.

[6] See: ROEBUCK, D., 'Best to Reconcile': Mediation and Arbitration in the Ancient Greek World. *Arbitration. The Journal of the Chartered Institute of Arbitrators*. November, 2000. p. 278-279.

[7] See: ROEBUCK: Op. cit. p. 286.

[8] See: BOHÁČEK: Op. cit. p. 201.

[9] See: STEIN, P., *Legal Institutions. The Development of Dispute Settlement*. London, 1984. p. 5.

[10] See the text of Cicero's *De officiis*: http://www.thelatinlibrary.com/cicero *time of downloading: 24. 06. 2019, 11:46.*

[11] See in connection: ROEBUCK, D. – DE LOYNES DE FUMICHON, B., *Roman Arbitration*. Oxford, 2004. p. 52.

[12] On the concept of the *legis actio* see a summary from the Hungarian literature: FÖLDI, A., Megjegyzések a legis actiók kérdéséhez. (Comments of the question of the legis actio.) In: *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae* 29 (1987). p. 47-64. On the concept of the legis actio sacramento in rem see especially: NÓTÁRI, T., Duellum sacrum — gondolatok a legis actio sacramento in rem kapcsán. (Duellum sacrum — Thoughts on the legis actio sacramento in rem.) In: *Állam- és Jogtudomány* 47 (2006). p. 87-113.

[13] See: http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesEnglish.htm#FOURTH%20BOOK Time of downloading: 23. 06. 2019. 22:00

If we study the source text, it is obvious that this meaning of the arbitrator is a person who has any – not necessarily legal – expertise that is essential to solve the procedure. This is confirmed by a source from Cicero, which can be read in Cicero's important state theory work, De re publica: *„Admiror, nec rerum solum, sed verborum etiam elegantiam. si iurgant, inquit. benivolorum concertatio, non lis inimicorum, iurgum dicitur... iurgare igitur lex putat inter se vicinos, non litigare."*

This citation talks about the *actio finium regundorum*, which shows a legal dispute between neighbours in which three arbiters acted who were proficient in surveying, and their task was to fix the property lines.[14]

In this source the word *iurgum* is used for the dispute, which also means that the dispute between the parties is often not of a legal nature – this is why no Latin synonym of lawsuit is used – and to solve the dispute a legal expertise is not necessarily required, but rather another kind of expertise, surveying for example.

From Gaius we can also read about the concept of *actiones arbitrariae*, that the *arbiter* also has a lawsuit-preventing and lawsuit-avoiding function:

(163) For, if he against whom the case is brought should demand an arbiter, he receives the formula which is called "arbitrary," and if, by the award of the judge, he is required to restore or produce any property, he either produces or restores it without any penalty, and thus is discharged from liability; or if he does not restore or produce it, he is compelled to indemnify the plaintiff for the loss sustained through his disobedience. The plaintiff, however, can, without incurring a penalty, bring an action against one who is not required to produce or restore any property, unless an action for vexatious litigation is brought against him to recover the tenth part of the property in question; although it is said to have been held by Proculus that an action for vexatious litigation should be refused to him who demands arbitration, because he is considered to have, as it were, admitted that he ought to restore or produce the property. We, however, make use of another rule, and very properly; for anyone who demands an arbiter rather shows his intention to litigate in a more moderate manner, than for the reason that he admits the validity of the claim of his adversary. (Inst. 4, 163 – 165)"[15]

The essence of the lawsuit-preventing function is that by his/her decision, the arbiter is able to redound the agreement of the parties. The acting arbiter does not make a judgment (final decision) by the way, but more a decision based on a fair moral position. And, if the person does not fulfil the obligation coming from the decision, then the decision-maker might act as a *iudex* in the further dispute and make a judgment (final decision).[16] In the Latin source text the word *calumnia* means the unnecessary litigation, which, in the Gaius-translation of Lajos Bozóky, was translated to Hungarian as "patvarkodás" (a word which means a reasonless litigation without any rational arguments), illustrating the difference between the two words.[17] Apart from the especially legal sources, it is worth mentioning another source in the literature, the work of Gellius, *Noctes Atticae*. The author, who lived in the 2nd century B.C, writes about a procedure where he had to act as a *iudex* (judge jury) and make a decision in which one of the parties met the moral requirements of the *bonus vir* him/herself. According to the Roebuck – Loynes de Fumichon's book which recounts the story in detail – using *actiones arbitrariae* – instead of the iudex, designated by the praetor, the parties were allowed to agree about the action of a *bonus vir*, acting as an *arbiter*.[18]

III.

The secondary meaning of the arbiter, in a sense, is closer to the modern concept of the arbitrator. According to this meaning, it is applicable as an alternative of the state jurisdiction, where the designation of the arbitrator is based on the agreement of the parties (*compromissum*), in order to decide the dispute of the parties.[19] Bearing this in mind, Max Kaser, in his monumental work on Roman civil procedure stresses that the arbitral dispute settlement is a civil law nature, and not part of the state jurisdiction. For this reason, he only briefly mentions it.[20]

According to this meaning of the word *arbiter* in case of a dispute, parties make a *compromissum*, in which they also agree that they will subject themselves to the decision of the arbitrator.[21] It is very important that before the *compromissum*, meaning prior to the designation and the statement of acceptance of the arbitrator, the arbitrator is not entitled to act. This is confirmed by the following source fragment as well: *„Arbiter ex compromisso sumptus cum ante diem, qui constitutus compromisso erat, sententiam dicere non potest"* (Alf. D. 4, 8, 50.). This fragment *expressis verbis* declares that the arbitrator cannot act – so obviously he/she is not entitled to make a decision – until the litigants fail to conclude the arbitration agreement in the form of *compromissum*.[22] According to Reinhard Zimmermann, the *compromissum* is basically an offer to a third person to act in the dispute of

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[14] In Hungarian see: Cicero: *Az Állam. The State.* (trans., HAMZA, G.) Budapest, 1995. p. 178.

[15] See: http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesEnglish.htm#FOURTH%20BOOK Time of downloading: 23. 06. 2019. 22:02

[16] On the concept of *actiones arbitrariae* see especially: LEVY, E., *Zur Lehre von den sog. actiones arbitrariae.* Weimar, 1915.

[17] See: *Gaius Római jogi Institutióinak négy könyve latinul és magyarul. (Four books of the Institutes of the Roman Law of Gaius in Latin and Hungarian.)*(trans., BOZÓKY, L.) Budapest, 1886. p. 421.

[18] See: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 67-69.

[19] See: ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, 1996. p. 514.

[20] *„Da dieses Verfahren* [sc. die private Schiedsgerichtsbarkeit] *kein gerichtliches ist, liegt es außerhalb des Gegenstandes dieser Darstellung."* See: KASER, M – HACKEL, K., *Das römische Zivilprozessrecht.* München, 1996[2]. p. 639.

[21] See: KASER, M., *Römisches Privatrecht. Ein Studienbuch.* München, 1968[4]. p. 180.

[22] See also: BOÓC, Á., Megjegyzések a választottbírónak az eljárásból való kizárásáról (Comments on the challenge of the arbitrator.) In: *Állam- és Jogtudomány* 47 (2006) p. 451. Regarding the procedural guarantees of arbitration see from the recent Hungarian literature: NOCHTA, T., *About guarantees of a fair trial in arbitration proceedings.* In: A Kereskedelmi Választottbíróság évkönyve 2018. (Annales of the commercial arbitration 2018.) (edited by: BURAI – KOVÁCS, J.) Budapest, 2019. p. 381-386.

the parties as an arbitrator. In the source of Paulus, which we can find in the Digesta, those people can make *compromissum* who are entitled to conclude *contractus*, but at the same time, if the arbitration clause is concluded through *procurator*, the *arbiter* can oblige the principal of the *procurator* to personal presence.[23] J.A.C. Thomas stresses that if the parties have not fixed their agreement on the arbitration in *compromissum*, then the decision made by the arbitrator cannot be binding.[24]

Regarding the *compromissum*, parties had relatively free options for the agreement and the selection of the arbiter, and determined their number. The Roman Law sources say, ordinarily two *arbiters* were designated. According to the conceptions of arbitration of our age, this is at least strange, but even stranger, the following source in the Digesta: *„Si in duos fuerit sic compromissum, ut si dissentirent, tertium adsumant, puto tale compromissum non valere; nam in adsumendo possunt dissentire. Sed si ita sit, ut eis tertius adsumeretur Sempronius, valet compromissum, quoniam in adsumendo dissentire non possunt"* (Ulp. D. 4, 8, 17, 5.). According to this source, if the parties agree that they designate two *arbiters*, and if the *arbiters* cannot make a decision in the case, then they have to nominate a third one, which is invalid because they cannot know who the third one will be (by name). This can only be valid if the *compromissum* includes the name of the third *arbiter* as well.[25]

It is a very important feature of the *compromissum* that the *arbiter* is only entitled to act in the dispute that already existed at the time, when the *compromissum* has been concluded, but not in disputes arising thereafter.[26]

Regarding the survival of the *compromissum* – primarily in South-American countries – we would like to refer to the opinion of Bernando Cremades. According to the Spanish Cremades, the most relevant problem, which makes the arbitration procedure more difficult or sometimes impossible, is the problem of the *cláusula compromisoria*. According to this clause, an arbitration procedure can be initiated based on a previously concluded arbitration agreement, only if the parties confirmed the agreement in form of the *compromiso* (in Portugal: *compromisso*), which often had to be approved by the ordinary court.[27] This could be problematic, especially if any party does not wish to sign the *compromiso* after the emergence of the dispute. The refusal or the prevention of the signature of the *compromiso* – which often includes relevant information in connection with the designation of the acting arbitrators – can be an obstacle to the arbitration procedure. In some South-American countries, there is a possibility to have the *compromiso* signed using the ordinary courts. In other cases, the arbitrator procedure cannot be done. It is important that the origin of the *compromiso* is the concept of the *compromissum*, also involved in the designation of the arbitrators.[28]

The *compromissum* could determine the deadline before which the arbitrator had to make the decision, but according to the Digesta, the best way is to give an opportunity to the arbitrator to extend the deadline of the procedure.[29] Basically, the *compromissum* defines the fundamental rules and frameworks of the procedure. This is also related to the fact that the arbiter does not – or not exclusively – decide only on the rules of the law, but also on his/her sense of equity, morals, and general principles of the law. In *Pro Roscio Comoedo*, Cicero says that if the *iudex* decides, then he/she has to make a decision based on the formula issued by the praetor, while the *arbiter* is much more flexible in the decision.[30]

For the arbiter, not only the conclusion of the *compromissum*, but the quasi acceptance-declaration of the arbitrator procedure (*receptum arbitrii*) also plays a very important role in the procedure. In the civil law system of Roman Law, the *receptum arbitrii* is among the *pactums*.[31] The essence of the *receptum arbitrii* is that the arbitrator accepts the arbitrator position, and thereby commits to decide the dispute as an *arbiter* according to the referral of the parties. In a certain point of view, the *receptum arbitrii* can be considered the prefiguration of the acceptance declaration of the modern arbitrator. Regarding this perspective, Zimmermann comments that the continuation of the *receptum arbitrii* is relevant. Despite the example that the BGB does not include it as a contract, Zimmermann still stresses that it is widely accepted that the arbitrator is entitled to act in the dispute based on a legal relationship between him/her and the parties, and of which a fundamental element is the *receptum arbitrii*.[32]

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[23] See: *„Si domini, qui invicem stipulati sint, procuratores suos agere apud arbitrium velint, potest iubere ipsos etiam adesse."* (Paul. D. 4, 8, 32, 18.)

[24] See: THOMAS, J. A. C., *Textbook of Roman Law.* Amsterdam – New York – Oxford, 1976. p. 320.

[25] See especially related to this: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 114.

[26] See: *„De his rebus et rationibus et controversiis iudicare arbiter potest, quae ab initio fuissent inter eos qui compromiserunt, non quae postea supervenerunt"* (Paul. D. 4, 8, 46.).

[27] See especially on this: CREMADES, B.M., Resurgence of the Calvo Doctrine in Latin America. In: *Business Law International* 7 (2006). p. 53-72.

[28] See summary on the law of the arbitration of South-America: KLEINHEISTERKAMP, J., *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries.* New York, 2005. From the Hungarian literature see especially: BOÓC, Á., A kereskedelmi választottbíráskodás egyes sajátosságai Dél – Amerikában.(Specific features of the commercial arbitration in South-America.) In: *Állam- és Jogtudomány* 48 (2007) p. 289-332.

[29] See: D. 4, 8, 32, 21.

[30] *„Iudicium est pecuniae certae, arbitrium incertae; ad iudicium hoc modo venimus ut totam litem aut obtineamus aut amittamus; ad arbitrium hoc animo adimus ut neque nihil neque tantum quantum postulavimus consequamur."* According to the citation, the judgement – the iudicion – is about a certain amount of money, the arbitration procedure is about an uncertain. According to the citatum we initiate the court procedure with the expectation of gaining or losing the whole sum, and the arbitration procedure with the expectation of not gaining nor losing the whole sum. Cites and comments the work of Cicero: ROEBUCK – DE LOYNES DE FUMICHON: *Op. cit.* p. 161. The content of this quotation is reminiscent of modern arbitration, that also one of the specialties of the modern arbitration is to strive for the settlement of the litigants with a deal. See also., REDFERN – HUNTER: *Op cit.* p. 1.

[31] See also on this: FÖLDI, A. – HAMZA, G., *A római jog története és Institúciói. (History and Institutes of Roman Law).* Budapest, 2012[17] p. 542.

[32] See: ZIMMERMANN: *Op. cit.* p. 514.

Although based on the sources of the Romal Law, in theory, it was not out of the question that somebody decided in his/her own case as arbitrator, but – mostly in cases of *bonus vir* – there was a fundamental interest that the arbitrator should be unbiased. Peter Stein diagnoses during the examination of the antic laws that the essence of the arbitration – mediation dispute settlement procedures that the decider person should be regarded as unbiased.[33] According to emperor Antonius in the cases, if it turned out that the acting arbitrator was obviously biased, hostile, and/or he/she made a decision in the dispute despite the explicit request of the parties, the *exceptio doli mali* could have been used.

The above-mentioned points obviously raise the possibility of an appeal against the decision of the arbitrator. According to the sources, it is usually not possible to appeal against the decision of the *arbiter*.[34] The text of the source even foresees the payment of a penalty amount, stating that there is no appeal against the arbitration decision nor initiation of an ordinary judicial procedure.

Regarding the purpose of the arbitration procedure, we refer to the standpoint of professor László Kecskés, the former president of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry:

The basic purpose of the arbitrium was the final termination of the legal disputes. It was based on the fact that the parties to this procedure, by agreement (compromissum) voluntarily submitted themselves to the arbitrator's decision, whatever it would be. To this refers the fragment (D. 4,8,1) of an edictum from the Digest of Justinian, but probably interpolated – so it is from after the VI. century – according to which the goal of the compromissum is to get the dispute to „ad finiendas lites". This means that the decision of the arbiter had to settle all the rights and obligations of the parties permanently and fully, so there shall be no possible way of any appeal or legal remedy, the implementation and the acknowledgement of the decision is the obligation of the parties, arising from the moral (mos) of Rome, which meant a very serious obligation.[35]

We have to mention the role of the *praetor* in connection with the validation of the arbitration agreement. The *praetor* decided if it is possible to initiate an arbitration procedure based on the arbitration agreement. And, if it is, then the *praetor* allowed the procedure for the arbitrator designated by the parties, if the arbitrator accepted the referral. The *praetor* did not force anybody to accept the arbitrator referral, but if he/she accepted it, then he/she had to do the procedure. The *praetor* was even entitled to enforce that the arbitrator does the procedure.[36] According to Max Kaser, the Praetor may have used compulsion against the arbitrator in order to make a judgment on his duty.[37]

Regarding the continuation in the Middle Ages of arbitration, the concept of the *arbiter ex compromisso*, and the rule that the *arbiter ex compromisso* is not bound to the explicit rules of the law, have very important roles. The arbitration in the Middle Ages, especially the ecclesiastical arbitration, was not consistent with the rules of Roman Law. For this reason, in the Middle Ages, two different kind of arbitrators have been formed, different from each other, the *arbitrator* who did not necessarily act based on the rules of the law, and the *arbiter*, who was obliged to apply the rules of civil procedure and follow them in his/her final decision as well.[38] This is confirmed by Durantis, in his work *Speculum Iuduciale*, in which we can find this relevant distinction: *„Arbitrator vero est amicabilis compositor, nec sumitur super re litigiosa, vel ut cognoscat: sed ut pacificet, et quod certam est, dividat. Nec tenetur iuris ordinem servare: nec statur eius sententiae, si sit iniqua: sed reducitur ad arbitrium boni viri...Nam arbiter est, quam partes eligunt ad cognoscendum de quaestione, vel lite."*[39] It is very important to examine if the activity of *consiliators* of the Italian city-states, the advisory activity of the commentators, is considered as arbitration or arbitration-like activity.[40]

Regarding the arbitrator, as a person who decides based on moral principles of equity, the above-cited source mentions the concept of the canonical *amicabilis compositor* and also refers to the institution of the *bonus vir* as well. But at the same time, the arbiter is not obliged to follow the rules of the explicit law in the final decision, but – coming from the Roman Law – has to uphold the procedural rules as well. From the difference between the arbitrator and arbiter originates the concept of the *arbiter ex aequo et bono*, also known as *ius commune*, evolving in the later law evolution. Helmut Coing refers to the fact that the concept of the *arbiter ex aequo* et bono, defined by the *ius commune*, was influenced by the institution of *amiable compositeur*, known under the French law.[41] As is known, the *arbitrator ex aequo et bono* procedure still plays an important role in arbitration procedure in some South-American states.[42] We highlight Zimmermann's opinion, which states that in German law it is also known that the *Schiedsrichter*, who decides on honesty and equity and not on the explicit rules of the law based on the

[33] *„Whatever the form of mediator, he must be accepted as impartial."* See: STEIN: *Op. cit.* p. 5.

[34] See: C. 2, 55, 1.

[35] See: KECSKÉS, L., *A választottbíráskodás római jogi gyökereiről. On the Roman Law roots of the arbitration.* In: *Studia in honorem Gábor Hamza: Ünnepi tanulmányok Hamza Gábor 70. születésnapja tiszteletére. (Celebrating studies in honor of the 70th birthday of Gábor Hamza.)* (edited: BOÓC, Á. – SÁNDOR, I.) Budapest, 2019. p. 171.

[36] See also: HUMBERT, M., Arbitrage et judgement à Rome. In: *Droit et cultures* 28 (1994). p. 59 – 60.

[37] See: KASER – HACKEL: *Op. cit.* p. 639.

[38] See also on the difference between *arbiter* and *arbitrator*: COING, H., *Zur Entwicklung des Schiedsvertrages im Ius Commune. Die amicabilis compositio und der Schiedsspruch ex aequo et bono.* In: Festschrift für Heinz Hübner zum 70. Geburtstag am 7. November, 1984. (hrsg., BAUMGÄRTEL, G. – KLINGMÜLLER, E. – BECKER, H.J. – WACKE, A.) Berlin – New York, 1984. p. 35 – 36.

[39] *Speculum Iudiciale* of Durantis (Pars I. Lib. I. Partic. I., § 1,3. és § 1,2.) cites: ZIMMERMANN: *Op. cit.* p. 529.

[40] See especially: KECSKÉS, L., *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben. (The evolution of the civil law in the major jurisdictions of the continental Europe.)* Budapest – Pécs, 2004. p. 114 – 121.

[41] See: COING: *Op. cit.* page 37.

[42] See on this: BOÓC: *International Commercial arbitration...* p. 305.

parties consent, which comes from the concept of the *arbiter ex aequo et bono.*[43]

The schematic presentation of the Roman Law's *arbiter* also demonstrates, in my view, that there are many similarities and links between modern arbitration and each meaning of the Roman *arbiter*, confirming the universality of the survival of Roman Law, and the influence of Roman law as the *ius commune* to the legal system of modern times.[44] Accordingly, bearing in mind the rules and perceptions of the Roman Law's *arbiter* might be useful in the 21st century, for the modern arbitrators as well, and it can also contribute to the further development of a procedure aimed at successful settlement of disputes between parties.

[43] See: ZIMMERMANN: *Op.cit.* p. 530.

[44] See also: HAMZA, G., *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján (The evolution of the European civil law. The emergence of the modern civil law systems based on the Roman Law traditions.)* Budapest, 2002. p. 44-45. From the recent Hungarian literature see: BOÓC, Á. – FÁBIÁN, F. – SÁNDOR, I. – TÖRÖK, G., *A civilisztika dogmatikája. (Dogmatical questions of Civil Law.)* Budapest, 2009. p. 35.