

WILLEMSTAD — The law of civil procedure can improve. President Karel Frielink advocated this during the celebration of the 35th anniversary of the Bar Curaçao. The Code of Civil Legal Procedure became effective seven years ago.

In his speech, Frielink elaborated on one subject, namely seeking the truth. The facts established by the judge in a civil procedure needn't necessarily correspond with the reality that exists outside this procedure. If one party states a fact and the other party acknowledges this fact or contradicts this insufficiently, this fact will be considered right and the judge will depart from the facts adduced.

Both requestor and defendant are obligated to produce the facts of importance entirely, in truth and as early as possible. However, it often happens that facts known before (or should have been made known earlier) are produced during replication or rejoinder, or even later; in other words, facts important for the decision. Of course, these facts could have been made known to the lawyer at a late stage but Frielink's impression is that often not mentioning certain facts is due to tactic considerations.

Hearing of witnesses

Often these proceed awkwardly. This is also because the judge usually does most of the hearing while the lawyers know exactly which information they are after. Moreover, nuances are lost when the judge recapitulates the statements made, or eventually only what the witness stated later on in the hearing is taken down even though he stated something else (partly) earlier in the hearing.

“You have undoubtedly experienced a situation where a witness states what you want to hear

but the lawyer of the other party explicitly asks the witness three times if he can really recall what happened. The result is that the witness wonders whether he said something wrong and states he's not entirely sure, and eventually that's what appears in the process-verbal." If it were up to Frielink one should consider improving the hearing of witnesses, including a more active role for the lawyers and the verbal rendering of the entire hearing.

Pre-trial

The American system almost has unlimited possibilities to collect facts (largely) without the judge, namely (pre-trial) discovery. The advantage for the lawyers is that they play a more central role in that process and that (most) of the facts are already known to all parties. The disadvantage is that 'discovery proceedings' could take a lot of time, that not all of the facts are important for the decision of the dispute itself and that high costs are usually involved.

As our law only has limited possibilities to 'discovery', in particular the provisional hearing of witnesses and the interim experts' report, other procedures are sometimes used to collect information. For instance, filing a report while hoping one starts a criminal trial and/or files a petition in bankruptcy so the curator can investigate or inform the supervisor (Central Bank) on alleged misconduct of for example a bank or investment fund.

With a bit of luck such procedures will reveal facts making it easier to decide to start the procedure or to use these in a civil process. Even if this party that considers starting a civil process doesn't have the (complete) dossier, it could reveal information that makes a temporary hearing of witnesses or a claim possible.

Right of perusal

The President of the Bar also elaborated on the right of perusal, also called the exhibition obligation. A party that has a lawful interest can demand perusal, a copy or excerpt. Lawful interest occurs for example when the requested documents or the derived information are used in a pending procedure (for evidence or refutation). "Considering the interest, which in my opinion must be assigned to determining the material truth as much as possible, I advocate for an ample application of the article that makes this possible."

Fishing expedition

The advantage of this possibility is that a request can be made without a principle procedure on the dispute being pending or in the prospect. The almost standard defense is that a requestor is accused of being on a 'fishing expedition'. This usually means that this party (actually) has no case but is looking for information that could help him get a case. "In itself it's a good thing that pure 'fishing expeditions' are discouraged."

Viewpoint

Although Frielink doesn't advocate (pre-trial) 'discovery proceedings as known in American, he thinks it's a good idea to consider how the law of civil procedure could also focus on the search for truth and make relevant facts available to both parties sooner in a dispute.

In this framework the president of the Bar refers to the 'public responsibility for a good administration of justice', which had led to heated discussions in the Netherlands, because this (also) regarded the role of lawyer's in the civil process. After all, a 'good' administration of justice requires that a lawyer doesn't only put the interests of his client first.