

A CRITICAL APPROACH OF LEGAL REGULATIONS IN ARBITRAL MATTERS*

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Abstract

The arbitral procedure is distinguished through the valuing and reinterpreting of the status of the individual as a law subject. It is only fair to allege that, in arbitral matters, the complexity and novelty of the regulatory process are due to care for the individual and also, to the combining of the subjective concept (derived from the individual's point view upon the conflict) and the objective concept (derived from the provisions of the rule of law). Consequently, legal provisions may present limitations and insufficient development regarding the class conflicts subjected to arbitration. In this point of our demonstration becomes lawful and legitimate the criticism of the arbitration regulations.

Keywords: arbitration procedure, the legal status of the individual, the complexity of the regulatory process, the criticism of legal regulations

CONTENT: Any rule exists under the duality zodiac. Whether we refer to religious, moral or juridical regulations, we are dominated by two thoughts: firstly, we are dominated by the respect and submission towards regulations, secondly, we are dominated by the manner in which the rule of law is perfected and configured.

The respect and desire for change are two poles apparently conversed that validate a single idea: there are no identical rules which can coexist in order to regulate social realities in favour of the same persons, territory and the same period. Human thinking excludes double standard, by virtue of the cohesion and unity of the community and also by virtue of the adherence of the community to the rules of law, arguing that, the concept that will always prevail is the singularity of the rules of conduct. Thereby, the individual resonates with and respects that particular category of juridical values that precedes his own social existence being aware of the fact that, a new regulatory process will be devoided of context and of the effectiveness of legitimacy. The manifest legal gaps uphold the human tendency of improving legal provisions, without resort to replacement.

The first and the easiest critique that we may understand is, in close connection with *the legitimacy of arbitration* – as a private alternative justice. At the juridical level, the institution of arbitration resides in the flexible regulatory process (the will of the parties), in the regulations of the Code of Civil Procedure, in the rules of the Court of

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International Commercial Arbitration of the Romanian Chamber of Commerce and Industry, in the international conventions that have as juridical object the arbitration activity, without finding, within the Constitution, in a direct and obvious manner, rules which shall address the arbitration matter.

Article 21 of the Romanian Constitution – dedicated by excellence to the principle of free access to justice – stipulates general provisions, without abiding upon arbitral justice: (1) *Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests.* (2) *The exercise of this right shall not be restricted by any law.* (3) *All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term.* (4) *Administrative special jurisdiction is optional and free of charge.*

Therefore, at the highest normative level (the constitutional level) there is no overview of legal regulations to address the arbitral matter. The void of constitutional references affects the legitimacy of the juridical institution of arbitration, raising significant question marks towards *ratio legis* and towards *finis legis*. The connection between constitutional texts reflects upon many aspects like: the manner of carrying out justice (through courts of justice established and organized by law), public judgement, pronouncing the decision in the name of law and especially, the prohibition of extraordinary courts; all these aspects question the legitimacy of the arbitrary justice. Articles 126 and 127 of the Constitution reinforce the idea expressed above.

Doubtlessly, the counter arguments which are bound to uphold the reason of being of the arbitration procedure are innumerable: *the confidential judgement* represents an advantage in the sense that, the parties pursue the conflict resolution secretly, preserving, hereby, privileged information regarding production and fabrication; the decision may be pronounced *in equity* – a manner in which the evaluation will be made by considering the interest of all parties, offering a decision in favour of both parties; *the court of arbitration is not a judicial court per se*, it shows a distinct typology, the typology of consensus and form, so, it presents a hybrid shape¹.

In the arbitral procedure, the hybrid feature extends over the entire judgement process, due to the fact that, the rules according to which the judgement is accomplished are *opus partium*, as the rules are generally governed by the will of the parties; the omnipotence of the parties ceases in the point where mandatory regulations interfere, unilaterally imposed, from which the parties cannot derogate.

Returning to the legitimacy of arbitration, the arbitral institution is legitimate although it lacks constitutional origin, as its practical opportunity is verified by means of the above presented arguments. Nevertheless, we appreciate that, the doctrinal polemics will grow high in the context of the lack of constitutional regulations, so that, *de lege ferenda*, the constitutional consecration of arbitral justice is a juridical need.

On the other hand, we assess the legislator's initiative – the initiative of establishing, at the beginning of the provisions of *Chronical IV – About arbitration, Title IV – Arbitral*

¹ For further details, concerning the advantages of the arbitration procedure by comparison with state jurisdiction, see: Fl. Măgureanu, G. Măgureanu, *Drept procesual civil. Curs pentru masterat. Dreptul afacerilor* (Civil procedural law. Course for master's degree. Business law), 2nd edition, Publishing House Universul Juridic, Bucharest, 2009, p. 113 and following.; V. Roș, *Arbitrajul comercial internațional* (International commercial arbitration), Publishing House Monitorul Oficial, Bucharest, 2000, p. 25 and following.

procedure, Chapter II – The judgement – of the Code of Civil Procedure, references regarding the principles of the arbitral procedure as a positive initiative. We deem that, by means of article 575 and article 576 of the Code of Civil Procedure, the legislator will make a significant distinction between the *basic principles of the arbitration procedure* and the *rules of procedure applied to arbitration*. The discrimination between principles and rules is essential for the proper organisation of arbitration, given that, presenting the basic principles of the procedure, the legislator shows, by default, the mandatory procedural rules, whereas, by applicable norms, the legislator shows rules imposed by consensus – which the parties uphold by means of the arbitral convention.

By approaching the issue of the *principles of the arbitration procedure*, the civil procedure legislator is content with transferring principles from the common law procedure into the arbitral procedure, expressing its intention, in *article 575, paragraph 2* of the Code of Civil Procedure, in the following manner: (...) *the basic principles of the civil lawsuit, stipulated at (...) shall apply accordingly in the arbitral procedure*. Therefore, the legal text indicates only the principles which are compatible with both procedures: the arbitral and the common procedure, without enumerating the essential principles which are particular for the arbitral procedure. For reasons of rigour and also for ensuring the functionality of the arbitral procedure, we advance, *de lege ferenda*, the idea of the revision of the provision of *article 575, paragraph 2 of the Code of Civil Procedure*, in the sense of systematizing and expressly indicating the common principles of both procedures (eliminating the references based on the indication of article and paragraph numbers) and in the sense of explicitly mentioning the principles of the arbitral procedure.

Consequently to the revision of *article 575, paragraph 2 of the Code of Civil Procedure*, we advance the following content: *nevertheless, the basic principles of the civil lawsuit: the prohibition of justice denial, equality, the right of disposal of the parties, compliance with the obligations that the parties undertake during the lawsuit, truthfulness, the right to a defense, contradictory arguments, orality, immediacy, continuity, the respect for fundamental principles, the attempt to reconcile the parties, the active role of the judge in finding the truth, the respect for justice –are appropriately applicable to the arbitral procedure. The special principles of the arbitral procedure are: the principle of free will, confidentiality, flexibility and efficacy*.

A reformulation of the above mentioned idea is useful, for it clearly notifies the person subject to the jurisdiction of the court, two categories of principles: the common principles for the common law judgement and for the arbitral judgement. We deem as opportune qualifying the free will of the parties as a fundamental principle of the arbitral procedure because this principle accompanies the arbitral procedure from its genesis (if we embrace the contractual thesis and the contractual genesis of arbitration) until its finalisation (if we accept the joint thesis and the idea that, the parties engage into complying with the arbitral judgement on the basis of the arbitral convention). Likewise, we included into the enumeration of the principles of the arbitral procedure, confidentiality, flexibility, efficacy because the arbitral procedure cannot exist in absence of these rules provided that, these rules refer to the essence (and not to the nature!) of arbitration.

In other news, we will abide upon the *admissibility conditions of the reconvention in the arbitral procedure*. According to *article 574, paragraph 1 of the Code of Civil Procedure*, *if the defendant has pretenses against the plaintiff which derive from the same juridical relation, the defendant may introduce a reconvention*. In other words, the validation of the reconvention within the arbitral procedure is conditioned by the situation in which, the pretenses invoked by the defendant against the plaintiff shall reside in the same juridical relation as the relation from which emerge the pretenses that the plaintiff has against the defendant. With the view to underlie the criticism relating to reconvention, some comments are required.

Firstly, we understand the reconvention as the note of procedure that converts the dynamics of the defendant's lawsuit position by replacing the defensive stance of the defendant (expressed through his defense) with an offensive attitude – which aims to exploit one of the rights he has against the plaintiff.

Doctrinal studies² assess that, the reconvention is a procedural act made available to the defendant, by means of which the defendant exercises the faculty of exploiting his claims against the plaintiff. As it is a consequence of a faculty, of a prerogative which is recognized in favour of the defendant, we deem that, the reconvention must benefit from an adaptive procedural framework.

Therewithin, we feel that, the wording of the reconvention must be construed as a legal right guaranteed in favour of the defendant, exercised by the defendant if he invokes his own pretenses against the plaintiff. Being in question the exercise of a right – that is the right to introduce a reconvention, it would be opportune to extensively guarantee this right, by eliminating the condition that, the defendant pretenses against the plaintiff emerge from the same juridical relation. In our judgement, the provisions set out by common law –*article 209 of the Code of Civil Procedure* are more suitable, as these peculiar provisions extend the possibility of addressing a reconvention to those situations in which the pretenses of the defendant emerge from juridical relations that are closely connected to the juridical relation brought to justice. Doubtlessly, *the legal proposal that allows the defendant to invoke, by means of reconvention, his own pretenses against the plaintiff, deriving from legal relations closely linked to the juridical relation* may seem controversial, given the fact that, legal relations that are linked to the juridical relation brought to justice do not always have enclosed an arbitration clause. In order to cover this inconvenient, we advance another possible legal wording of *article 574, paragraph 1 of the Code of Civil Procedure*: *if the defendant invokes pretenses against the plaintiff, pretenses that derive from the same juridical relation or from other juridical relations which are closely linked to the juridical relation that is brought to justice, and if those juridical relations have enclosed arbitration clauses, the defendant may formulate a reconvention*.

In other news, the procedural act of the defense, brings into discussion a much controversial juridical fact. By reference to the defense act, the principle of free will-as guidance-principle of the arbitral trial, is excluded from the scope. The obliteration of the theory of free will is, somewhat explicable, by legal means: the legislator understands the

² I. Leș, *Tratat de drept procesual civil* (Treatise of civil procedural law), Publishing House All Beck, Bucharest, 2002, p. 71; Fl. Măgureanu, *Drept procesual civil* (Civil procedural law), XII edition, Publishing House Universul Juridic, Bucharest, 2010, p. 296 and the following.

procedural act of the defense as a procedural obligation of the defendant. The legal text that the legislator consecrates to the defense act, clearly stipulates the fact that: *within 30 days from the receipt of the copy of the arbitration act, the defendant shalll depose the defense act which will comprise the exceptions concerning the plaintiff's request, the answer in fact and in law to the request, the evidence proposed in defense and, other measures provided in article 571 for the arbitration request. The rules of arbitral procedure of the Court of International and Commercial Arbitration of the Romanian Chamber of Commerce and Industry stipulate in expresis verbis the fact that, the defendant will be notified with regard to the obligation of expressing his position concerning the plaintiff's request, by means of defense.*

The wording highlighted in the above mentioned citation (the defendant shall depose the defense) underlines the mandatory character of the defense act—a character that we named, *ab origine, controversial*. Notwithstanding the legal provisions, we abide by our initial review. Thereby, we estimate that, *the requirement of the defense act must be removed in favour of the possibility of the defendant of depose the defense act*. Our argument is based upon some peculiar aspects.

The first aspect consists in the fact that, the arbitral procedure is a special procedure which will be governed, due to its nature, by the principle of free will. Furthermore, arbitration can exist only where the parties manifest their will freely, in compliance with law, public order and morals. Likewise, arbitration is a juridical procedure which bears a special sociological symbolism. Through arbitration, the parties desire the conflict resolution by implementing consensus, social cohesion and solidarity, refusing the impersonal intervention of state jurisdiction. As the parties pursue righteousness in a private, free will justice it is fair that they benefit from the principle of free will during the entire procedure.

Our second argument is built around the *scope of the defense*. As doctrinary studies assess, *by regulating the procedural act of the defense is pursued a procedural equilibrium of the parties (...), as the defense is a procedural act by means of which the defendant has the right to reply to the pretenses formulated by the plaintiff*³. We agree that, through the defense procedural act – an act which incarnates the defensive attitude of the defendant, it is exerted a facet of the right to defense (guaranteed by the Constitution and by law). We construe the deposit of the defense procedural act as a peculiar exercise of the right to defense. If we accept that, *per se*, the formulation of the defense procedural act constitutes a right of the defendant, the requirement of the defense procedural act is paradoxical.

Finally, returning to doctrinary studies, if by means of the defense procedural act, it is pursued a procedural balance between the parties, it would be unfair to apply in favour of the plaintiff the principle of availability (the plaintiff is allowed to address the arbitral court by means of an arbitration act) and, to apply against the defendant, the obligation of formulating the defense procedural act.

With regard to the defense act and its importance for the arbitral procedure, free will is more than a guiding principle of the arbitral procedure: it is the essence of the arbitration. Also, the connotations of the principle of free will upon the arbitral procedure

³ I. Leș, *op. cit.*, 2002, p. 370.

(whether they are initial or final connotations) are internal, essential aspects of arbitration. Our argument –against the mandatory character of the defense procedural act– lies within a personal point of view. Due to the desire of remaining loyal to our argument and, being unable to deny the legal thesis (that pleads for the requirement of the defense procedural act) we will assess the defense procedural act as an exception from the principle of free will but, as a possible not as a genuine exception.

On the other hand, a significant difference between the arbitral and the common law procedure resides in the evidentiary matter, that is, in the hearing of witnesses and experts. It is notorious the fact that, the common law procedure imposes the obligation of swearing an oath, the exceptions to the rule being mentioned in *article 320 of the Code of Civil Procedure: children who have not reached the age of 14 years and people deprived of discernment at the time of the hearing, without being under a ban, may be heard, without swearing an oath, if the court of justice will warn them to tell the truth and will take into consideration, at the time of the hearing, their special situation.*

Within the arbitral procedure, the legislator inverts the rule with the exception, establishing, in *article 589 of the Code of Civil Procedure* that: *witnesses and experts are heard without swearing an oath.* We deem this latter rule as inconsistent within the arbitral procedure and as objectionable for the entire law system. The civil lawsuit is designed, in its unfolding, similar to an activity that has the vocation of accomplishing justice and re-establishing order. The truth of the facts, the accuracy of the evaluation, the fair assessment are the only benchmarks that will lead the activity of the judge. The deposition of the witness and of the expert is a key-element in clarifying the facts and in establishing the truth, regardless if we refer to the common law or to the arbitral judgement. Correlative of this aspect, the swearing of the oath is a guarantee of authenticity of the facts that are declared by the person who is being heard (witness or expert), taking the shape of a *solemn promise made in front of the Court of the person who shall be heard*⁴. Without fail, the swearing of the oath is an exercise of the individual's consciousness, by which, the stated facts on the occasion of the hearing, rejoice of a higher degree of veracity. The interpretation according to which, the swearing of the oath is an act contrary to the law, to morals or even contrary to human dignity is malicious and fanciful. What type of pledge can be more valuable in the process of finding the truth than the solemn commitment assumed by the individual in front of divinity through the swearing of an oath? What other criterion of inter-human evaluation can be more broad than the voluntary individual promise that he will report the facts as they happened in the objective reality? The reasons of conscience or religion that prevent the person who will be heard of swearing an oath cannot void the high strength of the oath swearing, they merely costumize the problem. If the oath cannot be sworn by reasons of confession or consciousness, the sacramental formula – through which the individual is committed to tell the truth in front of the divinity – will be replaced by a moral commitment, according to which, the individual who is swearing the oath undertakes towards himself and, generally, towards the symbol of human dignity. Therefore, the swearing of the oath-classical or atypical, of moral feature-acts upon the deepest human springs, passing for an analysis parameter of human sincerity.

⁴ Costin, M.N., *Dicționar de procedură civilă* (Dictionary of civil procedure), Publishing House Hamangiu, Bucharest, 2007, p. 134-135.

The swearing of the oath is all the more important as it establishes, (at least at the intuitive level) the consideration of sanctions. Along with the formulation of a specific promise as the oath, the individual will be constrained at the psychological level, to report the truth, being known that, the reverse will bring either legal or moral punishment. In synthesis, the criticism of *article 589, paragraph 1 of the Code of Civil Procedure* aims to modify the above mentioned legal text in the following manner: *witnesses and experts shall be heard under the swearing of oath.*

In another token, we feel that, *the action in avoidance* should be subject to a thorough critic re-assessment. The action in avoidance, as an institution of the arbitral procedure, was not unitary conceptualized in doctrinal studies. Often, the action in avoidance was compared to the recourse because of the fact that, the decision that would be pronounced was indefeasible, being susceptible only of revision or of contestation of avoidance⁵. In other paradigms, the action in avoidance acquired the qualities of a civil remedy which is autonomous and extraordinary⁶. In a stricter sense – to which we resonate, it was concluded that, the action in avoidance is *the only viable remedy of the arbitral decision, as it is a remedy with no transferable effect because when the action in avoidance is brought to court, the court of justice will not revise the essence of the litigation nor other relevant legal aspects of the cause; the court will resume at checking if the arbitral decision is liable of voidance for one of the reasons shown in article 608, paragraph 1 of the Code of Civil Procedure*⁷.

Our criticism aims towards the reasons of introducing the action in avoidance, especially towards the reason stipulated in *article 608 of the Code of Civil Procedure, paragraph 1, letter b: the arbitral court has solved the litigation in absence of an arbitral convention or by virtue of an arbitral convention that is void or inoperative*. We appraise that, the first thesis of the article – *the arbitral court has solved the litigation in absence of an arbitral convention* – has not practical application and must be suppressed.

To support our opinion, we bring the argument according to which, *the lack of the arbitral convention equates to the lack of arbitration*. Addressing the contractual concept and, abiding upon the mechanisms establishing the arbitral procedure, we take notice that, the genesis of arbitration resides in the arbitral convention and the premises of the arbitral convention consists in the will of the parties. There is no means of imagining the practical situation in which, the parties are subject to the arbitral procedure as long as the parties did not express their will in this sense; the will of the parties shall be contained into an arbitral convention. Even if we admit the lack of the arbitral convention along with the passivity of the parties and their total compliance with the rules of arbitral procedure, the explanation can be easily found: the parties did not conclude an arbitral convention but still, they accepted to be subjected to the arbitral jurisdiction and they accepted the conflict resolution by means of the arbitral procedure – this equates with the implicit closure of the arbitral convention. More plain, we aim to show that, although the parties

⁵ Boroi G., Rădescu D., *Codul de Procedură Civilă Comentat și adnotat* (The Code of Civil Procedure Commented and Annotated), Publishing House All, Bucharest, 1994, p. 615.

⁶ Roaba R.M., *Acțiunea în anularea hotărârii arbitrale. Studiu de caz* (The Action in Avoidance of the Arbitral Decision), Publishing House Argonaut, Târgu Mureș, 2008, p. 2.

⁷ Boroi G., Spineanu-Matei O., *Codul de Procedură Civilă adnotat* (The Code of Civil Procedure Annotated), Publishing House Hamangiu, Bucharest, p. 769.

did not conclude an arbitral convention *stricto sensu*, there is the possibility to supervene the tacit agreement of the parties. Our argument is reinforced by the statements of doctrinal studies: *for lack of the arbitral convention, if the parties participate to arbitration with no reserve, this attitude can equate a compromise*⁸. Consequently, *de lege ferenda*, we advance the rewriting of the provisions of article 608 of the Code of Civil Procedure, paragraph 1, letter b in the following manner: *the arbitral court solved the litigation on the basis of an arbitral convention that is void or inoperative*.

The legislator does not hold the privilege of clarity with regard to the representation of the parties. Article 546, paragraph 1 of the Code of Civil Procedure stipulates: *In arbitral litigation, the parties can formulate requests and can exert procedural rights in person or through representative. They can be assisted by other specialists*. At first sight, the text retakes the general provisions of common law in the matter of conventional representation. Reminding the common law provisions in the field of representation, we retain the following rules: *the procedural rights of the parties can be exerted in person or through representative; there are three categories of representation: legal representation (natural persons without legal capacity), conventional representation (persons who detain legal capacity may stand in justice through representative – attorney or a non-attorney proxy – in this case his powers are limited) or judicial representation (a category of legal representation due to the fact that, the court of justice appoints a representative within lawful limits and conditions)*⁹; *in the case of legal or judicial representation, assisting the proxy (by means of the activity of an attorney) is not mandatory; the legal or judicial representative, even non-attorney, may formulate conclusions upon the exceptions and upon the essence of the litigation but he must be assisted by an attorney in recourse*.

Taking into consideration only the conventional representation of natural and legal persons, the rules in the matter must be searched in articles 83-84 of the Code of Civil Procedure. Therefore: *before first courts of justice and before courts of appeal, natural persons may be represented by an attorney or by another proxy; if the mandate is assigned to another person than to an attorney, the proxy cannot formulate conclusions upon the exceptions and upon the essence of the litigation except through an attorney, in the stage of judicial research and in the stage of judicial debate; if the proxy of the natural person is a spouse or a second degree relative, he can formulate conclusions in front of any court of justice, without being assisted by an attorney provided that, he has a bachelors degree in law; in drawing up the application and the grounds of the recourse and in exerting and upholding the recourse, natural persons will be assisted and, where necessary, represented, under the nullity sanction, only by an attorney, in accordance with the law, except for the situation in which the party or the proxy of the party-spouse or second degree relative has a bachelors degree in law; legal persons can be conventionally represented in front of courts of justice only by means of juridical counsellor or attorney even in the case of drawing/motivating/exerting and sustaining the recourse*.

⁸ Deleanu I., Deleanu S., *Arbitrajul intern și internațional* (Domestic and International Arbitration), Publishing House Rosetti, Bucharest, 2005, p. 297.

⁹ Ciobanu V.M., Boroî G., Briciu T.C., *Drept procesual civil. Curs Selectiv. Teste grilă* (Civil Procedural Law. Selective Course. Grid Tests), Publishing House C.H. Beck, Bucharest, 2011, p. 95.

We reiterated the common law provisions that apply to the field of conventional representation due to an excessive care towards the general framework that we will use for presenting our critical observations. In case of *article 546, paragraph 1 of the Code of Civil Procedure*, the analysis of the legal text proves particularly laborious, in this way opines a large part of doctrinal studies. First, we notice the demonstrative pronoun *they* which establishes a state of juridical confusion of the reader with regard to the legislator's reference. More specially, we do not know if the legislator refers to law subjects that participate as parties to the arbitral trial or, contrariwise, the legislator refers to the parties representatives. We deem that, the most plausible solution is the solution by means of which the legislator refers, by the pronoun *they* to the parties' conventional representatives. If the legislator's intention was to refer to the parties, it would have been more appropriate and more in accord with the standards of grammar to use the pronoun *these*.

Hereinafter, the legislator alludes to *other specialists* that may assist the parties representatives in exerting their attributions, without being expressly indicated. In order to exceed legal uncertainties and, by default, in order to grasp a better understanding of legal provisions, we advance, the reformulation of *article 546, paragraph 1 of the Code of Civil Procedure*, with special regard towards elaborating the notion of *specialist* that assists the parties conventional representatives.

Another *criticism* that aims to complete the legal provisions takes into consideration the effects of the award. *Article 606 of the Code of Civil Procedure* is enlightening in this matter: *the award that is communicated to the parties is final and binding*.

Within this context, our proposal for reformulation is born on the background of a complex set of arguments:

Primo, the arbitral procedure implies a judgement within which the rules of the common law judgement -that are promoted by state jurisdictions-are recognized and applied. So, we can affirm that arbitral procedure accomplishes a judgement in the true sense of the word.

Secundo, although the arbiters are appointed by the parties (as a consequence of concluding the arbitral convention), arbiters shall not be biased, they shall not act as advocates of the rights of the parties that initially assigned them, conserving the features of impartiality and independence. In synthesis, arbiters are private judges who, through responsibilities and competences, resemble state judges.

Tertio, the award wreathes the activity of the arbitral trial, expressing a procedural act that is essentially jurisdictional and, that accurately restores all of the effects of a juridical judgement. The classic mechanism of obtaining a judgement, *da mihi facto, dabo tibi jus* is fully applicable to both arbitral and common law procedure. The judge and the arbiter assume the role of solving the matters of juridical features that parties evoke, applying juridical norms or the rules of equity, as a consequent to the presentation and demontsraton of the facts¹⁰.

Quartus, the judicial sentence and the award are two jurisdictional acts and thus, they will respond to the same identification criteria: *the formal criterion* (which refers to the taking into consideration of the body or the person who accomplishes the act; the

¹⁰ Vizioz H., *Études de procédure* (Studies of Procedure), Publishing House Bière, Bordeaux, 1956, p. 241.

recognition by the legislator, of the jurisdictional value of the act; the compliance with the inner form of the act and, in a broader extend, the compliance with the external form of the act that refers to principles of the unfolding of the trial)¹¹, the *functional criterion* (implies the existence of a contestation, of a litigation that demands resolution; the power of judgement that prevents the re-assessment of the conflict resolution)¹², the *material criterion* (signifies the interpretation of the law by determining, in abstracto, the applicable rules and the concret resolution of the problem by refering to the fact situation)¹³.

The similitudes between the award and the judicial judgement are expressed also by reference to the effects that they engender. Doctrinal studies¹⁴ acknowledge that, the effects of the judicial decision have a correspondent point in the effects of the award, considering the peculiarities of the latter procedure. Lato sensu, there are acknowledged procedural effects (the des-investing of the court of justice of the task of solving the litigation; acheiving, from an evidentiary perspective, a trusty deed; obtaining a writ of execution; applying the principle of the power of final decision; converting the nature of the prescription of the right to action when it is acheived a writ of execution) and substantial effects (adjudicative, constitutive, joint or cancellation)¹⁵.

Therefore, de lege ferenda, we propose the reformulation of *article 606 of the Code of Civil Procedure* in a more extensive manner as follows: *The award, once communicated to the parties produces the same effects as the judicial decision.*

Finally, we can appraise that, the modeling of the rule of law does not sanction the failure of the initial norm, rather it demonstrates the fact that, when it is imposed in a descending manner (from top to bottom), the rule of law will never fully correspond to the human needs that emerge in an ascending manner (from bottom to top). Likewise, we reinforce the idea according to which, law improvement is not a synonym for replacement, it is rather an instrument for the reviewing and updating the legislation as a response to social dynamics.

The rule of law is born under flexible social coordinates. The modification of the initial coordinates will determine, by default, the mutation of the original result of the coordinates in question. By observing the particular features of the law it is clear that, the modification and the improvement of the legislation are both premises under which are born the rule of law and individual powers of the individual – who is the direct recipient of the law.

¹¹ Guillien R., *L'acte juridictionnel et l'autorité de la chose jugée. Thèse pour le doctorat* (The Jurisdictional Act and the Authority of Judgement. Doctoral Thesis), Imprimerie de l'Université, Bordeaux, 1931, p. 221.

¹² Guinchard S., Ferrand F., *Procédure civile. Droit interne et droit communautaire* (Civil Procedure. Domestic and Community Law), Publishing House Dalloz, Paris, 2006, p. 233.

¹³ C. Bléry, *L'efficacité substantielle des jugements. Thèse pour le doctorat* (The Substantial Efficacy of Judgements), Publishing House LGDJ, Paris, 2000, p. 15.

¹⁴ P. Lacoste, *De la chose jugée en matière civile, criminelle, disciplinaire et administrative* (About the Judgement in Civil, Criminal, Disciplinary and Administrative Matters), Publishing House Recueil Sirey, Paris, 1964, p. 56.

¹⁵ Esmein P., *Des effets des décisions de justice sur la reconnaissance et la création des droits* (Effects of judicial decisions upon the recognition and creation of rights), Publishing House Recueil Sirey, Paris, 1974, p. 55.

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