ASSIGNMENT OF CONTRACTS, ASSIGNMENT OF CREDIT AND CIRCULATION OF ARBITRATION CLAUSE

(abstract)

This study deals with a widely contentious and still unresolved issue in legal doctrine and case-law: the circulation of the arbitration clause, when the contract in which it is inserted , or a part of it, is subject to a transfer.

In an attempt to provide a solution to this matter, the analysis starts from the exact framework of all the issues related to arbitration clause, by focusing on the nature of the clause, the relationship between the clause and the main contract, on the so-called principle of autonomy of the clause and its different interpretations.

Therefore, this study examines the succession phenomena from the arbitration perspective, by highlighting that this hypothesis of assignment differs from the general phenomenon of assignment in a legal relationship and acquires particular features according to the characteristics of the arbitration agreement; on the one hand, they presuppose a particular link to a substantial relationship, and, on the other hand, they have an unavoidable consensual basis.

Hence, the two most known cases of assignment in arbitration relationship will be examined: the assignment of contracts and the assignment of credits.

With regards to the assignment of contract, the analysis starts from the discipline provided by the Civil Code in relation to the circulation of arbitration clause, drawing particular attention to the role of consesus pertaining to assignment and to the regimen of the exceptions that can be enforced against the parties.

Therefore, at the core of the study, there is the debate raised in legal doctrine and case-law and concerning two different positions: on the one hand, there are those who support the theory according to which the assignment in an arbitration agreement is an effect of the all legal position transfer deriving from the contract assigned, and, on the other hand, there are those who assert that a specific declared intention is necessary for the obligation, arising from the arbitration clause, to have effect.

A similar method of investigation has been adopted with regards to assignment of credit and particularly to the following question: if the assignee of the credit succeeds in the arbitration relationship in the case of an assignment of claim deriving from a contract that contains an arbitration clause.

Starting from the assignment of claim discipline provided by the Civil Code, with specific relation to the nature, the object of the assignment and to the regimen of exceptions that can be enforced against the parties, we acknowledge, on the one hand, the thesis of legal literature and case-law in favor of the permanence of the arbitration relationship, on the ground that a legal act, concluded without the participation of the debtor cannot alter his legal situation; on the other hand an opposite minor opinion is taken into consideration, according which the assigned debtor cannot be forced to initiate an arbitral proceeding with a person other than the one the contract including the arbitration clause has been concluded with.

Ultimately, particular attention has been drawn to the solution given by case-law in support of a so called «one-way» circulation of the arbitration clause; such a solution engendered a considerable doctrinal debate and it has not been modified yet.

In conclusion, this study underlines how difficult it is to give a definite solution to the matter of the circulation of arbitration clause, because of the different theories supported by the legal literature and the case-law; these different theories produce uncertainties about the procedure the rights to be assigned are protected by. One of the consequences of these uncertainties is discouraging foreign economic operators to come and “litigate” in our country.