Unilateral Arbitration Clauses

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I. George Washington's Last Will

Unilateral arbitration clauses were frequently used in wills during the 18th and 19th century.[1]) The most prominent example is the arbitration clause in George Washington's last will, which he drafted by his "*own hand*" with "*no professional character*" being consulted:[2])

> "*[...]all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants – each having the choice of one – and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.*"

Without doubt George Washington's lack of trust in the law, state courts, legal scholars, lawyers and – as it appears – female arbitrators may from today's perspective be perceived as bizarre. Also, the concept of a unilateral arbitration clause that prohibits another party from seeking relief at the state courts may at first seem quite remarkable: After all, the main principle of arbitration is the mutual agreement of the parties, as opposed to a unilateral agreement, to settle their disputes by arbitration.

However, considering that an heir is in an exclusively advantageous position, one's personal sense of justice may agree that the heir simply has to

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1) Especially in Germany; *see* Maximilian Burkowski, Letztwillige Schiedsklauseln 11 (2016) (unpublished doctoral thesis, Vienna University) (on file with the library of the Vienna University).

2) As stated in the will by George Washington himself; *see* Werner Vorhofer, Schiedsverfahren bei Erbstreitigkeiten 11 (2015) (unpublished doctoral thesis, Vienna University of Economics and Business) (on file with the library of the Vienna University of Economics and Business); a scan of George Washington's entire will is *available at* gwpapers.virginia.edu/documents_gw/will/will_manuscript_1.html.

accept his heritage "as is" and that the testator should be entitled to provide for a binding dispute resolution mechanism in respect of his estate.

Furthermore, arbitration clauses may be quite useful in probate proceedings: Such proceedings may take years, draining the involved family members emotionally and financially.[3]) A swift and confidential arbitration proceeding may be a welcomed dispute resolution mechanism in such situations, in particular if a family business is part of the estate.[4]) The same applies to family trusts, where delicate family matters are rather kept far from public court rooms.[5]) Nonetheless, it is quite unreasonable to expect that the heirs or beneficiaries of a foundation would agree voluntarily on arbitration once the family disputes are entrenched. Hence, an arbitration clause imposed by the testator or founder himself might be a practical solution.

Despite their usefulness, unilateral arbitration clauses are very rare in Austrian legal practice.[6]) As elaborated in the following, several legal issues on unilateral arbitration clauses are not yet finally settled. Despite his rather peculiar views, George Washington seems to have been ahead of his time.

II. Definition And Legal Framework

Unilateral arbitration clauses must not be confused with one-sided arbitration agreements. One-sided arbitration agreements provide that one party shall have the right to choose whether to settle a dispute before a state court or by arbitration. In contrast, the term "unilateral arbitration clause" does not refer to the content of the arbitration clause, but to how it came into legal existence. While arbitration agreements are based on the parties' agreement, unilateral arbitration clauses are set in place by a unilateral legal act,[7]) for example as a clause in a will.

The legal framework of unilateral arbitration clauses in Austrian law is set out in Sec 581 (2) Austrian Code of Civil Procedure (ACCP): "*The provisions of this Chapter*[8]) *shall apply accordingly to arbitral tribunals that are, in a legally valid manner, mandated by testamentary disposition or other legal transactions that are not based on agreements by the parties or through articles of association or incorporation.*"[9])

Systematically, according to current Austrian legal literature,[10]) Sec 581 (2) ACCP refers to the following categories of arbitration clauses:

- unilateral arbitration clauses ("*not based on agreements by the parties*"), which may be incorporated in
  - testamentary dispositions,
  - foundation deeds or
  - prize offers (*Auslobungen*), and
- bilateral or multilateral statutory arbitration clauses (which are not the subject of this article).

Unilateral arbitration clauses are not mentioned in any other provision of Austrian law. Furthermore, Austrian case law on unilateral arbitration clauses is rather limited.[11]) Since the legal sources on unilateral arbitration clauses are so scarce, many legal questions remain contentious, adding to the unpopularity of unilateral arbitration clauses, despite their obvious usefulness.[12])

III. Legal Nature And Basis

Sec 581 (2) ACCP, as the legal framework for unilateral arbitration clauses, is void of details. Nonetheless, current Austrian legal literature agrees that unilateral arbitration clauses are procedural provisions in nature,[13]) just as arbitration agreements are procedural agreements in nature.[14])

On the other hand, the issue regarding the legal basis of unilateral arbitration clauses is still not finally settled. In the following, this article seeks to provide a critical review of the current legal opinions.

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[3]) Wolfgang Hahnkamper, *Letztwillig angeordnete Schiedsgerichte*, ecolex 850 (2017).

[4]) Brigitta Zöchling-Jud & Gabriel Kogler, *Letztwillige Schiedsklauseln*, GesRZ 79 (2012).

[5]) Kodek, *Schiedsklauseln als Instrument zur Konfliktregelung bei Privatstiftungen*, PSR 152, 153 (2013).

[6]) Zöchling-Jud & Kogler, *supra* note 4, at 79; Hahnkamper, *supra* note 3, at 851.

[7]) In theory, a unilateral arbitration clause may also be one-sided: An arbitration clause set in place by a unilateral act may provide that one side has the right to choose whether to settle a dispute before a state court or by arbitration.

[8]) The word "Chapter" refers to the entire fourth Chapter of the ACCP. The fourth Chapter contains the specific provisions on arbitration proceedings (Sec 577 to 618).

[9]) Taken from the translation *available at* >. In German (official wording): „*Die Bestimmungen dieses Abschnittes sind auch auf Schiedsgerichte sinngemäß anzuwenden, die in gesetzlich zulässiger Weise durch letztwillige Verfügung oder andere nicht auf Vereinbarung der Parteien beruhende Rechtsgeschäfte oder durch Statuten angeordnet werden.*"

[10]) Christian Koller, *Die Schiedsvereinbarung*, *in* SCHIEDSVERFAHRENSRECHT I 3/328 to 3/360 (Liebscher & Oberhammer & Rechberger eds., 2012).

[11]) Three decisions of the Supreme Court touch upon the matter: OGH, March 30, 1957, docket no. 1 Ob 171/57 (Austria); OGH, May 21, 1987, docket no. 6 Ob 590/87 (Austria); OGH, Dec 17, 2010, docket no. 6 Ob 244/10s (Austria).

[12]) Hahnkamper, *supra* note 3, at 851.

[13]) *E.g.* Hahnkamper, *supra* note 3, at 851; Zöchling-Jud & Kogler, *supra* note 4, at 79; VORHOFER, *supra* note 2, at 46, summarizing the current legal positions in Austria.

[14]) VORHOFER, *supra* note 2, at 52.

A. The Phrase "*In A Legally Valid Manner*"

The starting point of finding a legal basis for unilateral arbitration clauses is the wording of Sec 581 (2) ACCP: "*in a legally valid manner*".

In a decision dated 1927, the Supreme Court had to decide whether an arbitration clause in the articles of association of a cooperative was binding upon parties that had signed a statement submitting themselves to these articles.[15]) The main legal issue concerned the question whether the phrase "*in a legally valid manner*" requires an express provision in the law in order to confirm the permissibility of arbitration clauses in articles of association of cooperatives. This was relevant, because the Austrian Cooperative Act does not contain such an express provision for articles of association of cooperatives. The Supreme Court ruled that the phrase "*in a legally valid manner*" merely states that the respective arbitration clause is permitted as long as it does not conflict with the law. In other words, the Supreme Court clarified that this phrase is in its essence a tautological sentence: Whatever is not forbidden is permitted.

Interestingly, the Supreme Court pointed to the fact that although testamentary unilateral arbitration clauses are not expressly provided by law, this does not exclude their permissibility. In the same manner, the fact that the Austrian Cooperative Act does not explicitly state that an arbitration clause in the articles of association of a cooperative is permissible, does not mean that it would be forbidden to include such a clause. The Supreme Court elaborates that in the present case the parties had submitted themselves in writing to the articles of association of the cooperative. Thus, the parties' agreement served as the legal basis for the validity of the arbitration clause.

This is a crucial point: The Supreme Court did not require a special legal provision for the permissibility of an arbitration clause in the Austrian Cooperative Act. Nonetheless, it required a general legal basis for the validity of such a clause; in this case, the Supreme Court ruled that the agreement between the parties in the form of the articles of association on one hand and the statement of submission on the other hand served as a sufficient legal basis for the validity of the arbitration clause at hand.

B. "Direct-Basis-Approach"

Likewise, it is necessary to find a legal basis for the validity of unilateral arbitration clauses. The necessity for a solid legal basis for unilateral arbitration clauses is particularly revealed when discussing the reach of such provisions:

[15]) OGH, Dec 28, 1927, docket no. 1 Ob 1203/27, SZ 9/270 (Austria). This decision was rendered in respect of an older version of the current Sec 581 (2) ACCP. However, the older version had a comparable wording.

Who can effectively be unilaterally bound by an arbitration clause (*see* IV below)?

In Austrian legal theory it is currently "*undisputed*"[16]) that Sec 581 (2) ACCP itself is the legal basis for unilateral arbitration clauses in testamentary dispositions ("direct-basis-approach").[17]) In support of this theory, Austrian doctrine[18]) presents as arguments *inter alia* that the Supreme Court confirmed the permissibility of testamentary unilateral arbitration clauses[19]) and that the preceding provision of Sec 581 (2) ACCP was implicitly accepted by the Austrian constitutional convention.[20]) In respect of unilateral arbitration clauses in foundation deeds, current Austrian legal literature also suggests that such provisions are permitted on the direct basis of Sec 581 (2) ACCP, since they are "*other legal transactions that are not based on agreements by the parties*".[21])

The direct-basis-approach may be *en vogue*, but in light of the aforementioned decision of the Supreme Court, this legal theory is surely not beyond reproach:

First, according to the interpretation of the Supreme Court, the phrase "*in a legally valid manner*" in Sec 581 (2) ACCP is tautological.[22]) Using a tautological phrase such as "whatever is not forbidden is permitted" as the legal basis of a right resembles a person pulling himself up by his own bootstraps. This phrase "*in a legally valid manner*" in Sec 581 (2) ACCP neither requires that an arbitration clause must be expressly permitted by a special norm in order to be valid, nor can it serve as the legal basis for the permissibility of an arbitration clause.

Second, unilateral arbitration clauses – as the principal and predominant rule – are not *per se* "*legally valid*". After all, the cornerstone of arbitration is the arbitration agreement.[23]) Absent an arbitration agreement, Sec 1 Austrian Court Jurisdiction Act (ACJA) applies: All disputes in civil matters are to be

[16]) In the words of *Hahnkamper; see* Hahnkamper, *supra* note 3, at 851; *Vorhofer* provides a broad overview on the legal opinions: VORHOFER, *supra* note 2, at 46.

[17]) *E.g.* Koller, *supra* note 10, at 3/351; Hahnkamper, *supra* note 3, at 851; Johannes Gasser & Michael Nueber, *Arbitration of Foundation and Trust Disputes in Liechtenstein*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2018 (Klausegger et al. eds., to be published in 2018).

[18]) VORHOFER provides a comprehensive summary of the opinions in Austrian legal literature: VORHOFER, *supra* note 2, at 46.

[19]) OGH, March 30, 1957, docket no. 1 Ob 171/57 (Austria).

[20]) Kodek, *Verfassung und Grundrechte*, *in* SCHIEDSVERFAHREN I, at 1/5 (Liebscher & Oberhammer & Rechberger et al. eds., 2012).

[21]) Kodek, *supra* note 5, at 154.

[22]) *See* above; OGH, Dec 28, 1927, docket no. 1 Ob 1203/27, SZ 9/270 (Austria).

[23]) SCHLUMPF has published extensive elaborations on the relationship between private autonomy and testamentary unilateral arbitration clauses from a Swiss law perspective: MICHAEL SCHLUMPF, TESTAMENTARISCHE SCHIEDSKLAUSELN 45 (2011).

settled by the state courts.[24]) A contractor may not unilaterally provide that his principal has to settle any claim against him only by arbitration. A car owner cannot escape the jurisdiction of the state courts by placing a bumper sticker on his car stating that in case of an accident, all claims have to be finally settled by arbitration. Also, the fact that an arbitration clause is included in a testamentary deed does not change this *per se*: As a general rule, a testator may not unilaterally impose an arbitration clause on the creditors of his estate.[25]) Therefore, unilateral arbitration clauses – as the principal and predominant rule – are not *per se* valid under Austrian law, or more specifically, as a general rule stand in violation of Sec 1 ACJA.

Third, the fact that the Supreme Court and the Austrian Constitution (implicitly) accept the existence of the right to unilaterally impose arbitration clauses on another party does not mean that unilateral arbitration clauses are generally accepted. It merely means that given certain exceptional circumstances unilateral arbitration clauses may be permissible. In other words: The validity of unilateral arbitration clauses in certain circumstances as the final conclusion has been confirmed; however, by this, the reasons for this final conclusion are not revealed. Neither the Supreme Court nor the Austrian Constitution has set out the legal basis for the validity of unilateral arbitration clauses – thus, it is our task to explore this legal basis.

In response to these voices opposing the direct-basis-approach, one may argue that since unilateral arbitration clauses are not mentioned in any other provision of Austrian law, a strict interpretation of Sec 581 (2) ACCP would result in the first part of Sec 581 (2) ACCP being redundant, with no particular scope of application. However, this is not true: Such strict interpretation would simply require the legal practitioner to search for a sound legal basis according to general legal theory for the validity of unilateral arbitration clauses.

C. Alternative Approaches And Theories

Austrian legal theory offers at least three different approaches or theories, which provide a possible legal basis for unilateral arbitration clauses.

The first approach, which the authors of this article would name the "testamentary-power-approach", can offer a sound legal basis in respect of testamentary unilateral arbitration clauses. This approach builds on the right of the testator to dispose of his estate regarding his substantive property. However, this right does not end there: Under this approach, the testator also has the right to decide on the procedural issues regarding the disposition of his estate, including future disputes.[26]) This testamentary power in respect of

[24]) OGH, Dec 28, 1927, docket no. 1 Ob 1203/27, SZ 9/270 (Austria).

[25]) Zöchling-Jud & Kogler, *supra* note 4, at 86.

[26]) Burkowski, *supra* note 1 at 37; Burkowski also summarizes the main legal positions in Austrian law regarding this point: Burkowski, *supra* note 1, at 26.

procedural matters may not be explicitly mentioned in the law; however, it derives directly from the testator's general right to dispose of his property, which is recognized as a fundamental right.[27]) Some authors seem to suggest that the testator's testamentary power in respect of procedural matters of the estate is set out in the wording "*in a legally valid manner, mandated by testamentary disposition or other legal transactions that are not based on agreements by the parties*".[28]) In the view of the authors this is incorrect: This wording does not set out any legal basis for the permissibility of testamentary dispositions; it simply acknowledges that testamentary unilateral arbitration clauses are permitted under Austrian law, without providing any hint to the legal basis of this permission. In particular, the wording does not indicate whether the direct-basis-approach or the testamentary-power-approach or the small-consent-theory (*see* below) would be the legal basis for the validity of testamentary unilateral arbitration clauses.

Notably, the testamentary-power-approach could of course only serve as a legal basis for unilateral arbitration clauses in testamentary dispositions. The testamentary-power-approach can, however, not serve as a legal basis for a unilateral arbitration clause *e.g.* in a foundation deed.

As a second approach, the "small consent-theory" could provide for a sound legal basis for the validity of all kinds of unilateral arbitration clauses. In respect of testamentary unilateral arbitration clauses, the small-consent-theory argues that the heir or legatee legitimizes the unilateral arbitration clause of the testator since, by not rejecting the legacy he receives under the testamentary disposition, he implicitly accepts whatever rules are included.[29]) *Kodek* applies the same rationale on beneficiaries of a foundation: The beneficiaries are bound by an arbitration clause set out in the foundation deed if they accept their rights as beneficiaries.[30]) The small-consent-theory presents convincing arguments: Under general legal theory, the consent of the parties qualifies as a sound legal basis for the validity of an arbitration clause.[31]) Also, the legal concept that the offeree of an exclusively advantageous offer may either decline or accept this offer "as is" has been confirmed by the Supreme Court regarding contracts for the benefit of third parties.[32])

[27]) Florian Harder, Das Schiedsverfahren im Erbrecht 67 (2007); *cf.* Christian Rabl, *Der Kampf um das Pflichtteilsrecht*, NZ 217, 218 (2014).

[28]) *E.g.* Burkowski, *supra* note 1, at 37, with further references.

[29]) Hahnkamper, *supra* note 3, at 853; Schlumpf, *supra* note 23, at 57; Burkowski provides a comprehensive overview on this approach: Burkowski, *supra* note 1, at 44.

[30]) *Kodek* states that the small-consent-theory allows the founder to unilaterally impose arbitration clauses on the beneficiary even without calling upon Sec 581 (2) ACCP; Kodek invokes the small-consent-theory directly as a legal basis; Kodek, *supra* note 5, at 156.

[31]) Hahnkamper, *supra* note 3, at 853.

[32]) OGH, June 13, 1995, docket no. 4 Ob 533/95 (Austria); Kodek, *supra* note 5, at 156.

However, an arbitration clause that is set in place by "small consent" is technically an arbitration agreement: By accepting his legacy, the heir or legatee accepts the terms under which they are granted.[33]) As the "written form", the signature of the heir or legatee is missing, arbitration clauses that are accepted by "small consent" are by nature more similar to "real" unilateral arbitration clauses than to arbitration agreements. Thus, it is legally justified to categorize arbitration clauses that are set in place by "small consent" as unilateral arbitration clauses in the meaning of Sec 581 (2) ACCP. This categorization has important legal consequences: For example, as unilateral arbitration clauses, they are not subject to the formal requirements of Sec 583 ACCP and also not subject to the consumer or employee protection provisions of Sec 617 and 618 ACCP (*see* below VI.B).

The small-consent-theory may be criticized as artificial or an arbitration agreement in disguise.[34]) However, even if the small-consent-theory would be redundant in respect of testamentary arbitration clauses due to the testamentary-power-approach, it certainly provides a legal basis for the validity of unilateral arbitration clauses that are not set out in testamentary deeds, as *e.g.* unilateral arbitration clauses in foundation deeds and their effect on the beneficiaries of a foundation (*see* below IV.B).[35])

The third approach is the "creator-approach", which may offer a sound legal basis in some cases. This approach, which has not yet been fully examined in Austrian legal literature,[36]) is built on the small-consent-theory. The creator-approach states that a creator may generally design his creation as he sees fit, while the creation has to accept its given life "as is" within the framework of mandatory law. For example, the creator-approach may be relevant when drafting a foundation deed: The founder may include a clause in the deed stipulating that if any dispute between the foundation and the founder arises in the future, such dispute shall be finally settled by arbitration. In this case, the foundation is required to pursue any claim against its founder by arbitration. The authority of the founder to legally bind his foundation is based on his position as creator: Without his legal action to create the foundation, the foundation would not come into existence in the first place. It is therefore his natural right and privilege to design his own creation as he sees fit.

The important aspect of these three theories, the "testamentary-power-approach", the "small-consent-theory" and the "creator-approach", is that they offer a legal basis for the validity of unilateral arbitration clauses independently of the statutory provisions included in Sec 581 (2) ACCP. On the basis of these

[33]) As pointed out *e.g.* by Burkowski, *supra* note 1, at 44.

[34]) *See* Burkowski, *supra* note 1, at 45.

[35]) This has also been confirmed by the Court of Appeal in Liechtenstein: *see* Gasser & Nueber, *supra* note 17, with references to case law in Liechtenstein.

[36]) Kodek seems to provide a hint to this theory by stating that the founder may set out certain provisions in respect of the inner organization of the foundation by virtue of his position as creator of the foundation; Kodek, *supra* note 5, at 154.

theories, even absent the provision set out in Sec 581 (2) ACCP, unilateral arbitration clauses would be permitted under Austrian law.

D. Conclusion

In summary, given certain circumstances, unilateral arbitration clauses are permitted by and valid under Austrian law. However, according to the opinion of the authors, the question of the legal basis of unilateral arbitration clauses is still not yet finally resolved; the direct-basis-approach seems to suffer from serious insufficiencies. This is surprising: After all, the legal basis of unilateral arbitration clauses is crucial in order to determine their reach, as set out below.

IV. Reach Of Arbitration Clauses

In essence, the issue of the reach of a unilateral arbitration clause concerns two questions:

- First, on whom a unilateral arbitration clause can be imposed;
- Second, regarding which subject matters a certain person can be bound to under a unilateral arbitration clause.

To better explain this issue, consider the following scenario: A mother has two children that are fighting against each other since years at various courts. The family has suffered under the burden of these useless lawsuits. Fearing that her children will not miss the opportunity to fight over her estate as well, the mother consults a lawyer. The lawyer suggests that the mother may include a unilateral arbitration clause in her last will. This arbitration clause shall unilaterally require her children to settle all disputes in respect of her estate by arbitration. By this, any claim could at least be resolved speedily and privately. Furthermore, the lawyer suggests drafting an even broader clause: The arbitration clause shall stipulate that all disputes between her children have to be finally settled by arbitration. Is such a broad arbitration clause valid?

It is important to note that the question regarding the reach of the arbitration clause does not concern the issue of objective arbitrability. If an arbitration clause cannot be successfully imposed by means of a unilateral declaration, the parties concerned could generally still enter into an arbitration agreement in respect of that matter. In our example, the children could, in any case, enter into an arbitration agreement and mutually agree that all future disputes between them have to be finally settled by arbitration.

A. Testamentary Arbitration Clauses

Austrian legal theory generally accepts that a testator may unilaterally impose arbitration clauses

- on his heirs or legatees (first requirement)
- in respect of their heritage or legate (second requirement).[37])

Both requirements have to be fulfilled: The testator may not impose unilateral arbitration clauses on creditors of his estate, since they do not fulfill the first requirement.[38]) The same applies *vice versa*: The broader version of the arbitration clause included in the mother's will in our example is not valid as far as the subject matter does not concern the heritage received by her children.[39])

As discussed above, the testamentary-power-approach or the small-consent-theory may offer a legal basis for this right of the testator; in any case, the heir or legatee may escape the legal effects of such a provision by refusing to accept his heritage or legate.[40])

The exact legal basis of this right of the testator may be relevant when answering the vividly discussed question whether unilaterally imposed arbitration clause also comprises claims in respect of the legal portion.[41]) Since the person entitled to the legal portion derives his right from the law, not the will of the testator, one may argue that the testator has no authority to unilaterally impose an arbitration clause: The position of the person entitled to the legal portion is the same position as of any other creditor of the estate. However, in short, substantive law sets out that the testator may fulfill the legal portion by assigning a specific part of the estate by testamentary provision (Sec 780 Austrian General Civil Code, AGCC).[42]) Thus, the testator is entitled

[37]) *E.g.* Hahnkamper, *supra* note 3, at 853.

[38]) Zöchling-Jud & Kogler, *supra* note 4, at 86.

[39]) However, the mother could include a condition (*Auflage*) in her last will stating that her estate, as far as legally permitted, would be *e.g.* donated to the local animal shelter, if her children do not enter into an arbitration agreement in respect of all their future matters; Zöchling-Jud & Kogler, *supra* note 4, at 80.

[40]) Hahnkamper, *supra* note 3, at 853.

[41]) Many authors discuss this issue under the pretext of the "objective arbitrability" of the legal portion (as reported by: Hahnkamper, *supra* note 3, at 854; Burkowski, *supra* note 1, at 60); in the view of the authors this is incorrect. The objective arbitrability of the legal portion cannot be questioned: A legal dispute in respect of the legal portion may be referred to arbitration at any time with the express consent of all parties. The interesting question is whether the testator may unilaterally require that a dispute regarding the legal portion shall be finally settled by arbitration.

[42]) Some legal scholars refer to Sec 774 AGCC providing that the legal portion may not be burdened (as reported by Zöchling-Jud & Kogler, *supra* note 4, at 85). Sec 774 AGCC, however, was recently repealed. Under the now corresponding Sec 762 AGCC the testator may burden the legal portion; any burden on the legal portion has to be taken into account when assessing the value of the legal portion.

to provide how the legal portion shall be fulfilled in its substantive aspects. The testator has no comparable right *vis-à-vis* the other creditors of the estate. Correspondingly, it may be assumed that the testator's right to decide on procedural matters extends to the legal portion as well: As a result, his right to decide on procedural matters is not limited by Austrian law in respect of the legal portion (testamentary-power-approach).[43]) Furthermore, under the small-consent-theory, the person entitled to the legal portion submits himself to the arbitration clause by "small consent": After all, Sec 780 AGCC serves as a clear reflection of the underlying legal principle that the recipient of the legal portion has to accept the legal portion "as is" (only subject to a review of value); alternatively, he may waive his right to the legal portion entirely and thereby escape from the legal effects of the arbitration clause.

Concluding, both the testamentary-power-approach and the small-consent-theory affirm that the testator may also impose a unilateral arbitration clause in respect of the legal portion.

B. Arbitration Clauses In Foundation Deeds

According to Austrian legal literature, the founder or co-founders of a foundation may unilaterally impose arbitration clauses on different groups through the foundation deed or a supplementary deed.[44]) The legal basis of this right of the founder or the co-founders differs from group to group, which is why each group has to be discussed separately in the following.[45])

First, an arbitration clause in a foundation deed or a supplementary deed is binding on

- the co-founders (first requirement)
- as far as matters of the co-founders are concerned (second requirement).

Technically, a foundation deed made by two or more co-founders is still a unilateral legal act.[46]) Since all co-founders have made the declaration jointly, the legal basis of the permissibility of such a clause is the consent of the co-founders.[47]) However, the parallels to a "real" bilateral or multilateral agreement cannot be denied: After all, the co-founders certainly have agreed on the content of the foundation deed and the arbitration clause after negotiations and discussions. Therefore, small consent alone may not be sufficient to confirm the validity of an arbitration clause in respect of matters between the co-founders; full consent may be required. Furthermore, it is appropriate to apply the laws

[43]) *Cf.* Hahnkamper, *supra* note 3, at 853.

[44]) Kodek, *supra* note 5, at 154.

[45]) Kodek, *supra* note 5, at 155.

[46]) Nikolaus Arnold *in* Privatstiftungsgesetz Kommentar Sec 7, 3 (Nikolaus Arnold ed., 3rd ed. 2013).

[47]) Kodek, *supra* note 5, at 156.

applicable to arbitration agreements in this respect as far as matters between the co-founders are concerned. In particular, the consumer protection provisions are applicable per analogy.

Second, an arbitration clause in a foundation deed or a supplementary deed is binding on

- the foundation (first requirement);
- as far as matters between the founder or co-founders and the foundation are concerned (second requirement).

The legal basis for the binding effect on the officials of the foundation is the creator-approach.[48]) The foundation has to accept its existence "as is" (*see* III.C above).

Third, an arbitration clause in a foundation deed or a supplementary deed is binding on

- the beneficiaries[49]) and potential beneficiaries[50]) of the foundation (first requirement)
- as far as matters that pertain to the foundation are concerned (second requirement).[51])

The legal basis for the binding effect on beneficiaries and potential beneficiaries is the small-consent-theory (*see* III.C above). Any right of the beneficiaries or the potential beneficiaries can only be accepted "as is", comparable to rights deriving from a contract for the benefit of third parties. The reach of an arbitration clause also extends to dispute matters between the beneficiaries and potential beneficiaries as far as the matters in connection to the foundation are concerned.[52])

Legal claims that do not fall within one of these three groups are generally not subject to unilateral arbitration clauses in a foundation deed. This includes, *e.g.*:

- Private matters of the officials of the foundation, such as their remunerations and damage claims, which cannot be unilaterally referred to arbitration by an arbitration clause in the foundation deed.[53])
- Damage claims of the beneficiary against officials or of third parties against the foundation likewise cannot be unilaterally referred to arbitration.[54])

Thus, if the above discussed first or second requirement of any group is not fulfilled, the founder or co-founders may not unilaterally impose an arbitration clause on these persons or in respect of such matters. The parties concerned may nonetheless agree on an arbitration agreement. For example, the right of a member of the managing board to receive his agreed remuneration does not fall within the reach of a unilateral arbitration clause. It is therefore not possible for the founder of a foundation to unilaterally impose an arbitration clause on a member of the managing board with regard to his salary. However, the foundation may conclude an arbitration agreement with a member of the managing board in respect of his remuneration.[55]) In any case, the fulfillment of the first or second requirement of any of the groups is not a matter of objective arbitrability.[56])

C. Arbitration Clauses In Prize Offers

Similarly, Austrian legal literature suggests that the offeror of a prize offer may unilaterally impose an arbitration clause on:

- applicants in response to the prize offer (first requirement);
- in respect of the conditions for receiving the prize and the prize itself (second requirement).[57])

The small-consent-theory may serve as the legal basis for the binding effect on the applicant: By applying for the prize under the terms and conditions of the prize offer, the applicant accepts any incorporated arbitration clause. However, given the fact that in many cases thorough preparation and a considerable effort to the advantage of the offeror are required in order to qualify as applicant of a prize offer,[58]) one may seriously question if the small-

[48]) Kodek seems to favor this approach as well: Kodek, *supra* note 5, in 154.

[49]) Arnold, *supra* note 46, at Sec 40, 4.

[50]) It is important to note that when drafting the arbitration clause a potential beneficiary is only bound by the arbitration clause if he is expressly referred to as "potential beneficiary"; he is not encompassed by the term "beneficiary"; *cf.* Supreme Court: OGH, Dec 17, 2010, docket no. 6 Ob 244/10s (Austria).

[51]) Even without any form of consent by the beneficiary: Arnold, *supra* note 46, at Sec 40, 4; Horvath stands firm on the position that full consent of the beneficiary is required in order to conclude that he is bound by the arbitration clause: Günther Horvath, *Streitschlichtungsmechanismen in der Stiftung – Überlegungen zur Schiedsgerichtsbarkeit, in* JAHRBUCH STIFTUNGSRECHT 131 (Eiselberg ed., 2008).

[52]) Kodek, *supra* note 5, at 156.

[53]) Arnold, *supra* note 46, at Sec 40, 4.

[54]) Kodek, *supra* note 5, at 159.

[55]) For further details and references on the conclusion of arbitration agreements with members of the managing board of a foundation, *see* Kodek, *supra* note 5, at 158.

[56]) Arnold seems not to differentiate between the matter of the reach of an arbitration clause and objective arbitrability: Arnold, *supra* note 46, at Sec 40, 4.

[57]) With further references: Koller, *supra* note 17, at 3/351.

[58]) *E.g.* if the offeror offers a reward for the presentation of a solution to a technical problem that he is facing.

consent-theory should be applicable. Prize offers and their acceptance by an applicant may in many aspects resemble a classic two-sided contract: The applicant may provide the offeror with a valuable contribution in order to have a chance to receive the prize. The authors of this article are, therefore, open to the idea to require full consent from the applicant with regard to the arbitration clause, if a prize offer in its function resembles a classic two-sided contract. In such cases, the requirement of full consent not only results in the necessity of a written, signed form, but also application of the consumer and employee protection provisions (*see* VI.B below).

V. Subjective Arbitrability

Subjective arbitrability in this context determines who has the legal capacity to set unilateral arbitration clauses in place.[59])

Sec 581 (2) ACCP stipulates that "*provisions of this Chapter shall apply accordingly*" to unilateral arbitration clauses. However, the Chapter IV of the ACCP does not make any reference to subjective arbitrability. Thus, the only useful approach is to follow the general rules on legal capacity in order to determine the subjective arbitrability of a unilateral arbitration clause. Anyone who has the legal capacity to establish the main legal act shall also have the legal capacity to include a unilateral arbitration clause in that main legal act.[60])

Correspondingly, in order to provide for a unilateral arbitration clause in a last will, only testamentary capacity according to Sec 566 AGCC is required.[61]) In any case, the testator must make any will personally – it is therefore (of course) not possible to have a proxy establish a testamentary arbitration clause.[62])

A person requires general legal capacity in order to draft the statutes of a foundation or to make a prize offer. Thus, general legal capacity is required to include unilateral arbitration clauses in statutes of a foundation or in prize offers.[63])

[59]) Zöchling-Jud & Kogler, *supra* note 4, at 81.

[60]) Zöchling-Jud & Kogler, *supra* note 4, at 81; Burkowski summarizes the legal relevance in a concise fashion: Burkowski, *supra* note 1, at 53.

[61]) With references to further legal sources: Burkowski, *supra* note 1, at 54; Zöchling-Jud & Kogler, *supra* note 4, at 81; Nueber, *Gedanken zur testamentarischen Schiedsklausel,* JEV 120 (2013); Hahnkamper, *supra* note 3, at 852.

[62]) Rudolf Welser & Brigitta Zöchling-Jud, Grundriss des bürgerlichen Rechts II 1988 (14th ed. 2015).

[63]) Koller, *supra* note 17, at 3/133.

VI. Formal Requirements

The ACCP sets out formal requirements for the conclusion of arbitration agreements: The general formal requirements are listed in Sec 583 ACCP and the special formal requirements for the protection of consumers and employees are included in Sec 617 and 618 ACCP. The question arises whether these formal requirements of the ACCP also apply to unilateral arbitration clauses.

A. General Formal Requirements

Sec 581 (2) ACCP stipulates that unilateral arbitration clauses are effective if mandated "*in a legally valid manner*". Austrian legal literature argues that this wording excludes the applicability of the formal requirements of Sec 583 ACCP, since unilateral arbitration clauses already have to be validly in place in order to fall within the scope of Sec 581 (2) ACCP. According to this view, rather, the formal requirements of the main legal act containing the unilateral arbitration clause apply.[64])

In case of testamentary unilateral arbitration clauses the testamentary form suffices.[65]) As a result, such provisions can also be made orally by means of an emergency will[66]) – although this is a fairly theoretical scenario: In case of an emergency, it is hard to imagine that someone may think of including an arbitration clause in his last will.

The legal basis of a foundation has to be set out either in the foundation deed or, if applicable, in the foundation supplementary deed, generally in form of a notary deed. Thus, unilateral arbitration clauses have to be provided for in either the foundation deed and/or in the foundation supplementary deed.[67]) The difference between the foundation deed and the foundation supplementary deed is that the first has to be deposited with the companies' register, while the latter does not have to be made publically accessible.[68]) *Arnold* explains that some courts managing the companies' register are still not familiar with arbitration clauses in foundation deeds and may in practice reject foundation deeds that contain such a provision. Therefore, it may be advisable to include the arbitration clause in a separate supplementary deed.[69])

[64]) Zöchling-Jud & Kogler, *supra* note 4, at 81; Burkowski, *supra* note 1, at 109; dissenting opinion: Nueber, *supra* note 61, at 123.

[65]) Brigitta Zöchling-Jud & Gabriel Kogler, *supra* note4, at 81; Burkowski, *supra* note 1, at 109; dissenting opinion: Nueber, *supra* note 61, at 123.

[66]) Sec 597 ACGG; Zöchling-Jud & Kogler, *supra* note 4, at 80; dissenting opinion: Nueber, *supra* note 61, at 123.

[67]) Horvath suggests that the arbitration clause must be provided for in the foundation deed in order to be valid: Horvath, *supra* note 51, at 133; Arnold, *supra* note 46, at Sec 7, 4.

[68]) Arnold, *supra* note 46, at Sec 40, 4.

[69]) Arnold, *supra* note 46, at Sec 40, 4; confidential provisions which the founder

Absent any other provision on formal requirements, prize offers can be made impliedly according to Sec 863 AGCC. Thus, unilateral arbitration clauses (if they are permissible; *see* IV.C) could also be made implicitly in the context of a prize offer. In practice, such implied unilateral arbitration clause may be relevant if the offeror has issued general terms and conditions containing such a unilateral arbitration clause. If the given circumstances clearly imply that a prize offer has been made subject to general terms and conditions, the unilateral arbitration clause may be part of the prize offer, even absent any written reference to them by the offeror, but simply on the basis of the offeror's implied declaration.[70])

B. Consumer Protection Provisions

Sec 617 and 618 ACCP set out several protection provisions for consumers and employees. Some of these provisions set out special formal requirements for arbitration agreements with consumers and employees. As *Hahnkamper* correctly elaborates in respect of testamentary arbitration clauses, such are unilateral legal acts, not agreements.[71]) Thus, absent any agreement, unilateral arbitration clauses leave no room for the application of Sec 617 or 618 ACCP. The same applies to foundation deeds and prize offers, as far as no full consent of the other party is required.

According to the opinion of the authors, this result is correct: The consumer and employee protection provisions serve the obvious purpose to avoid that the weaker party is unknowingly restricted from his right to seek relief from state courts entering into an arbitration clause either unknowingly or without being aware of the disadvantages. Especially consumers are often not familiar with arbitration as a form of alternative dispute resolution and are not informed about the advantages and disadvantages of arbitration. These considerations, however, cannot be of any concern in respect of *e.g.* heirs, legatees or the beneficiaries of a foundation: Since the recipient is typically in an exclusively advantageous position, there is no need to apply special protection provisions on him.[72]) Thus, an extension of these provisions for the protection of consumers and employees per analogy to unilateral arbitration clauses is not warranted.

does not want to reveal in court when presenting the unilateral arbitration clause may be included in a second supplementary deed.

[70]) However, as noted above under IV.C, arbitration clauses in prize offers may require full consent of the applicant in order to have a binding effect on him.

[71]) Hahnkamper, *supra* note 3, at 855.

[72]) *Cf.* Hahnkamper, *supra* note 3, at 855.

VII. Objective Arbitrability

Objective arbitrability determines the subject matters which can be referred to arbitration (Sec 582 ACCP).[73]) Objective arbitrability is not contingent upon the manner of how an arbitration clause is set in place; it is not relevant if the respective arbitration clause has been set in place uni-, bi- or multilaterally.[74]) It would therefore be possible to simply refer to the standard legal literature on the issue of objective arbitrability at this point. However, certain scenarios mostly occur in the context of unilateral arbitration clauses, thus, a brief overview on the issue of objective arbitrability shall be discussed in the following.

As a general rule, Sec 382 ACCP provides that all pecuniary claims are arbitrable.[75]) Only if certain public interests are concerned, the arbitrability of a pecuniary claim is excluded.[76]) It is clear that claims in the context of a prize offer are pecuniary and therefore arbitrable. In respect of claims under inheritance law and foundations, public interests may sometimes be affected; thus, the objective arbitrability of claims under inheritance law and in the connection with foundations shall be discussed in greater detail in the following.

A. Claims Under Inheritance Law

Since claims under inheritance law are generally pecuniary claims, they are arbitrable.[77]) Nevertheless, certain questions, which may be important for the distribution of a heritage, are never arbitrable under Sec 582 (2) ACCP: This includes questions on the relationship of the testator to possible heirs, *e.g.* if the partner of the testator and the testator were married or whether the testator was really the father of the heir.[78]) Furthermore, where certain public interests are concerned, the arbitrability of a claim is also excluded.[79])

Due to the public interest surrounding the death of the testator, the heritage is distributed among the heirs in a special probate proceeding (*Verlassenschaftsverfahren*) according to the Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz;* in particular Secs 143-185). In short, the local county court initiates the probate proceedings as soon as it receives news of the

[73]) *See e.g.* Zöchling-Jud & Kogler, *supra* note 4, at 81; Hahnkamper, *supra* note 3, at 852.

[74]) In detail: Vorhofer, *supra* note 2, at 24.

[75]) *E.g.* Vorhofer, *supra* note 2, at 28.

[76]) Arnold, *supra* note 46, at Sec 40, 4.

[77]) As confirmed by the Supreme Court: OGH, May 22, 1994, docket no. 5 Ob 506/94 (Austria); *cf.* Vorhofer, *supra* note 2, at 29.

[78]) Zöchling-Jud & Kogler, *supra* note 4, at 81; Hahnkamper, *supra* note 3, at 852.

[79]) Hahnkamper, *supra* note 3, at 852.

death of the testator. A notary is then entrusted with the handling of the proceedings. The notary notifies all possible heirs, leads the investigations in order to locate the heirs and receives the declarations of acceptance from the heirs in respect of the heritage. In case of conflicting declarations, the notary refers the case to the county court. The county court then decides on the matter; the county court's decision may be challenged, whereby the Supreme Court is the third and final instance. After the settlement of all conflicts or in absence of any conflict, the county court formally pronounces the heirs. Hereafter, if a person alleges to have a right to the heritage, he can only bring an action directly against the heirs or a particular heir in order to enforce his right (Sec 823 AGCC).

In Austrian legal theory there are three opinions as to the question whether any part or if so, which parts of a probate proceeding could be handled by an arbitration tribunal:

In a commentary to the introduction to the new Austrian arbitration law in 2006, *Oberhammer* suggests that the whole probate proceedings could be handled by an arbitration tribunal.[80]) This opinion was not confirmed by other Austrian legal scholars, although it is an intriguing thought to have an arbitration tribunal to handle these proceedings.

The prevailing opinion is that the main issues of a probate proceeding within the competence of the county court and the notary are not arbitrable and must remain within the competence of the bodies designated by law. Only decisions regarding the conflicting declarations of heirs and/or any lawsuit on the basis of Sec 823 AGCC would be arbitrable.[81]) *Voit* also suggests that only a claim on the basis of Sec 823 AGCC would be arbitrable.[82])

In the opinion of the authors, the prevailing opinion on this matter is convincing: While the main issues of a probate proceeding concern matters of public interest and are therefore not arbitrable, the decision on conflicting declarations as well as any lawsuit on the basis of Sec 823 AGCC are pecuniary claims between two parties, without any noteworthy public interest being involved.

[80]) Paul Oberhammer, *Rechtspolitische Schwerpunkte der Schiedsrechtsreform, in* Das neue Schiedsrecht, ecolex spezial 119 (Kloiber & Oberhammer & Rechberger & Haller eds., 2016).

[81]) Nueber, *supra* note 61, at 121; Brigitta Zöchling-Jud & Gabriel Kogler, *supra* note 4, at 82.

[82]) Ulrich Voit, Die objektive Schiedsfähigkeit nach österreichischem Recht 93 (2009) (unpublished doctoral thesis, Vienna University) (on file with the library of the Vienna University).

B. Claims In Connection With A Foundation

Objective arbitrability concerns the question which matters in regard to a foundation are arbitrable. As elaborated above, Sec 382 ACCP provides that all pecuniary claims are arbitrable. However, where certain public interests are concerned, the arbitrability of a claim is excluded.

Due to the public interest involved, the following matters are generally seen as not arbitrable:[83])

- Matters of the companies' register (in its narrow sense);[84])
- The appointment and revocation of the foundation's officials (Sec 27 Austrian Private Foundation Act; APFA);[85])
- The right to initiate a special audit of the foundation (Sec 31 APFA);[86])
- The decision to dissolve the foundation (Sec 35 (3) APFA);[87])
- The right of the beneficiary to receive information (Sec 30 APFA).[88])

Claims in the context of a foundation that do not concern particular public interests are arbitrable. Claims of a beneficiary or claims of employees against the foundation are the classic example of an arbitrable claim.[89])

As far as the foundation deed creates rights exceeding the legal minimum, these rights are generally arbitrable. For example, as *Arnold* points out, the foundation deed may designate a special role to an arbitral tribunal giving it the right to revoke the foundation's officials for additional reasons.[90])

In Austrian company law, the arbitrability of a claim to confirm the validity or invalidity of a resolution of the company has finally been confirmed by the Supreme Court; the question whether the same reasons and logic may also be applied to a foundation has been the subject of intense legal discussions.[91])

[83]) Kodek sets out a detailed list of further non-arbitrable matters: Kodek, *supra* note 5, at 161.

[84]) Kodek, *supra* note 5, at 160 and 161, with references to dissenting views.

[85]) Arnold, *supra* note 46, at Sec 40, 4; as confirmed by the Supreme Court of Liechtenstein: *see* Gasser & Nueber, *supra* note 17, with references to case law in Liechtenstein.

[86]) Arnold, *supra* note 46, at Sec 40, 4; Kodek, *supra* note 5, at 163.

[87]) Arnold, *supra* note 46, at Sec 40, 4.

[88]) Arnold, *supra* note 46, at Sec 40, 4; dissenting opinions: Kodek, *supra* note 5, at 163; *see* Gasser & Nueber, *supra* note 17, with references to case law in Liechtenstein.

[89]) Kodek, *supra* note 5, at 160.

[90]) Arnold, *supra* note 46, at Sec 40, 4.

[91]) „*Questionable*": Horvath, *supra* note 51, at 131; opposing opinion: Arnold, *supra* note 46, at Sec 40, 4; *see also:* Kodek, *supra* note 5, at 160; according to the Liechtenstein Supreme Court, the declaration of the invalidity of a resolution by the foundation council is not arbitrable: *see* Gasser & Nueber, *supra* note 17, with references to case law in Liechtenstein.

VIII. International Inheritance Law

The EU Succession Regulation No. 650/2012 is applicable to testamentary provisions. This is relevant for questions regarding choice of law and choice of forum.

Articles 20 to 23 EU Succession Regulation restrict a testator's choice of law rules. Sec 581 (2) ACCP, on the other hand, sets out that the provisions of the ACCP apply to unilateral arbitration clauses "*accordingly*". This would lead to the application of Sec 603 ACCP to choice of law, which is a rather liberal provision, allowing the parties to choose any particular law they deem fit. Since the EU Succession Regulation is a legal act of the EU, it prevails in this conflict.[92]) Thus, if at the time of his death the testator does not agree with the application of the law of his country of residence (default rule; Art 21 EU Succession Regulation), he may choose between the law of the country of his current citizenship or of the country where he was a citizen at the time of his death (Art 22 EU Succession Regulation).[93])

Art 4 EU Succession Regulation provides for the general competence of the state courts of a particular EU Member State. Art 5 EU Succession Regulation sets out general requirements for agreements regarding the competence of a state court. These provisions, however, only apply to state courts; they do not apply to arbitral tribunals.[94]) Thus, Art 4 and 5 EU Succession Regulation do not supersede Sec 581 (2) ACCP: The application of the EU Succession Regulation does not in any way invalidate a unilateral arbitration clause. Nonetheless, in order to avoid unnecessary conflicts, it may be advisable to choose a seat of arbitration in the same country in which the state courts will have the competence to handle the probate proceedings.

IX. Conclusion

We do not know of any specifics on how George Washington's family perceived the arbitration clause in his will and whether an arbitration tribunal was called upon on the basis of this arbitration clause. Nonetheless, two centuries later, George Washington's clause inspires the search for an alternative dispute resolution mechanism in probate proceedings.

Although to this day fundamental questions on the legal basis and reach of unilateral arbitration clauses remain disputed due to the scarce Austrian case law, the most important matters seem to be settled: Arbitration clauses may be unilaterally set in place by a testator in respect of his estate or by a founder in respect of certain matters of his foundation. However, while George Washington's concept certainly serves as an example when it comes to thinking

[92]) *See* Burkowski, *supra* note 1, at 180.
[93]) Burkowski, *supra* note 1, at 180.
[94]) Burkowski, *supra* note 1, at 178, with further references to legal literature.

outside the box regarding the settlement of disputes, his decision not to consult a "*professional character*" when drawing up his arbitration clause should not be imitated. In order to avoid unpleasant surprises, legal practitioners certainly have to take the different approaches and opinions in legal literature into account.