

Testamentary Arbitration Clauses

Reasons and Limitations of their Validity

Summary

According to § 1066 of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO), the provisions on contractually agreed arbitral tribunals apply *mutatis mutandis* to arbitral tribunals “established, in a manner permissible under statute, by last wills [...]”¹. While such testamentary arbitration clauses were very rare in the 20th century, they are litigated before German courts more often these days. This increased practical relevance requires looking into the doctrinal foundations of testamentary arbitration clauses: Why is the testator allowed to make both substantive and procedural testamentary dispositions? How far does the jurisdiction of the arbitral tribunal established by testamentary disposition go?

§ 1066 ZPO proves not to be particularly helpful in this regard. The provision merely indicates that it is in principle possible to order arbitration proceedings by testamentary disposition. But the “manner permissible under statute” mentioned in the provision has no meaning of its own, since every legal act is subject to the condition that it must be “permissible”. If the words “in a manner permissible under statute” were deleted from § 1066 ZPO, an impermissible arbitration clause would remain impermissible, and a permissible arbitration clause would remain permissible.

In order to determine the reasons for the validity of testamentary arbitration provisions and their limits, the present thesis draws inspiration from US-American law. Unilateral arbitral clauses in wills and trusts are also a new phenomenon there and they are treated differently from state to state. Nonetheless, a common pattern emerges: The arbitration clause is linked to receiving a benefit under the will or trust. Therefore, claims that arise out of that benefit are generally subject to arbitration. In return, claims that do not arise from the benefit are not subject to arbitration.

The thesis then turns to German constitutional law. It is shown that a testamentary arbitration clause triggers a conflict of constitutionally protected rights between the beneficiaries’ right of access to justice and the testator’s freedom of disposition. These colliding interests are balanced in the appropriate manner if it is recognized that the reason for the validity of testamentary arbitration clauses lies in the fact that such a clause constitutes a restriction attached to the gratuitous transfer. By virtue of his freedom of disposition, the donor may distribute benefits at his discre-

¹ English translation provided by the German Federal Ministry of Justice and Consumer Protection, available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

tion. This goes hand in hand with the authority to put certain restrictions on the transfer. With regard to claims that do not follow from the benefit, however, the beneficiaries do not have to accept that their access to justice is restricted. Thus, the limitations of testamentary arbitration clauses can be defined both *ratione personae* and *ratione materiae*.

Ultimately, testamentary arbitration clauses can encounter a further limitation in cross-border cases. Looking at Austrian, Spanish, Swiss, Italian, French, and English law, it is shown that there is no consensus as to whether arbitration proceedings can be ordered by testamentary disposition. In a succession case that has connections to both Germany and France, it is therefore important whether German or French law governs the arbitration clause, because according to German law such a clause is generally effective, whereas according to French law it is not.

In order to determine which law is to be applied to the testamentary arbitration clause, it is necessary to identify the proper conflict of laws rule. If a testamentary arbitration clause is to have any effect at all, that effect hinges on the beneficiaries receiving a benefit which has been framed in a certain manner by the testator. The clause is therefore inextricably linked to the mechanisms of succession law, which means that the applicable law has to be specified according to the European Succession Regulation. The same law that is applicable to the succession as a whole thus governs whether and to what extent the testator can mandate arbitral proceedings by testamentary disposition. Finally, the arbitral tribunal itself has to apply the European Succession Regulation in order to specify the law applicable to the succession, because the Regulation enjoys precedence over national conflict of laws rules such as § 1051 ZPO.

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