Hans Rainer Künzle *

Literatur und Rechtsprechung zur Schiedsgerichtsbarkeit in Erbsachen

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A. Literatur zur Schiedsgerichtsbarkeit in Erbsachen

Auf der homepage des SVSiE wird die Literatur zur Schiedsgerichtsbarkeit in Erbsachen laufend erfasst. Nachfolgend wird der Stand Anfang 2021 wiedergegeben:

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- *Krug Walter*, Die Besonderheiten des Erbprozesses im Schiedsverfahren und das Schiedsverfahren aus der Sicht des Nachlassgerichts, S. 33-74.
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- *Haas Ulrich*, Schiedsgerichte in Erbsachen und das New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, S. 160-194.
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B. Rechtsprechung zur Schiedsgerichtsbarkeit in Erbsachen

I. Schweiz

(1) Bundesgericht 4A_7/2019 vom 21.03.2019, Sachverhalt B.

Einbezug des Willensvollstreckers in ein von den Erben in einem Erbvertrag vereinbartes Schiedsgericht durch Übernahme seines Amtes (Abweisung der Beschwerde)

Sachverhalt B: «Après avoir décidé que le litige divisant les parties était un arbitrage international soumis au chapitre 12 de la loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP), l'arbitre a retenu en substance que la clause compromissoire figurant dans le pacte successoral était opposable à l'exécuteur testamentaire, qui en acceptant et en exécutant sa mission sans élever la moindre réserve, avait adopté un comportement permettant de considérer qu'il avait adhéré à la convention d'arbitrage. L'arbitre a en outre considéré que toutes les conclusions prises par la demanderesse étaient arbitrables».

Erwägung 2.3: « En l'occurrence, l'arbitre a cité deux arrêts (ATF 129 III 727; arrêt 4P.48/2005 du 20 septembre 2005) dans lesquels la cour de céans a retenu qu'une clause arbitrale est opposable à un tiers non partie lorsque celui-ci s'est immiscé dans l'exécution du contrat contenant la clause compromissoire et que cette immixtion peut être interprétée comme une volonté d'être partie à la clause arbitrale (sentence incidente, n. 90). Il a estimé que l'exécuteur testamentaire s'était immiscé dans l'exécution du pacte successoral et avait à fortiori adhéré à celui-ci, de sorte que la clause compromissoire insérée dans ledit pacte lui était opposable. Les recourants se contentent de contredire cette appréciation de l'arbitre, sans satisfaire aux exigences de motivation accrues applicables en matière d'arbitrage. A cet égard, force est de relever que les intéressés ne sauraient s'acquitter des strictes contraintes les obligeant à contredire précisément l'argumen-

tation de l'arbitre, en se bornant à renvoyer le Tribunal fédéral à accomplir ce travail».

Erwägung 2.4: «Si les recourants contestent certes que les conclusions prises à l'égard de l'exécuteur testamentaire puissent être soumises à un tribunal arbitral, leur critique, faute de motivation suffisante, ne respecte pas les exigences strictes de motivation découlant de l'art. 77 al. 3 LTF et, partant, est irrecevable».

(2) Bundesgericht 5A_61/2017 vom 07.03.2019

= successio 2020, 347 (Besprechung von Tarkan Göksu)

Ein privat eingeholtes Gutachten ist für die Erben nur dann verbindlich, wenn die sachverständige Person als Schiedsgutachter (Art. 189 ZPO) bestellt wurde.

Erwägung 6.4: «Es ist vorauszuschicken, dass privaten Gutachten, wie vorliegend namentlich der Schätzung J. vom 10. August 2002, kein Vertragscharakter zukommt. Privat eingeholte Bewertungsgutachten haben für die Erben nur dann verbindliche Wirkungen, wenn die sachverständige Person als Schiedsgutachter bestellt wurde, sich die Erben also vorgängig schriftlich verpflichtet haben, den Entscheid des Gutachters als verbindlich anzuerkennen (Thomas Weibel, in: Daniel Abt/Thomas Weibel, Praxiskommentar Erbrecht, 3. Aufl. 2015, N. 13 zu Art. 618 ZGB)».

(3) Bundesgericht 4A_218/2015 vom 28.10.2015

Abweisung einer Beschwerde (Art. 190 Abs. 2 IPRG) gegen ein Schiedsurteil in einer internationalen Erbsache, das gestützt auf eine Vereinbarung der Erben zustande kam

Sachverhalt A: «Le 8 mars 2011, les héritiers de feu Y. ont signé une transaction extrajudiciaire afin de régler la répartition des actifs du défunt ... Soumise au droit ..., cette convention prévoyait que les litiges s'y rapportant seraient tranchés par un tribunal arbitral de trois membres, le siège de l'arbitrage étant fixé à Genève et la procédure à conduire en français. Un avenant à ladite convention a été signé le 27 juin 2011».

Sachverhalt B: «Le 6 mars 2013, A., B., C. et D. (ci-après: les consorts A.) ont introduit une procédure arbitrale à l'encontre de X. devant la Chambre de commerce, d'industrie et des services de Genève (CCIG), laquelle a constitué un Tribunal arbitral composé de trois membres … Par sentence finale du 19 mars 2015,

le Tribunal arbitral a débouté les consorts A. de toutes leurs conclusions. Admettant partiellement la demande reconventionnelle, il a condamné solidairement les quatre consorts à payer ... euros à X. et a rejeté toutes autres conclusions de cette partie».

Sachverhalt C: «Le 23 avril 2015, les consorts A. (ci-après: les recourants) ont formé un recours en matière civile pour violation de l'art. 190 al. 2 let. c LDIP en vue d'obtenir l'annulation de la sentence du 19 mars 2015».

Erwägung 2.1: «Selon l'art. 190 al. 2 let. c, seconde hypothèse, LDIP, la sentence peut être attaquée lorsque le tribunal arbitral a omis de se prononcer sur un des chefs de la demande … Par de longs développements, les recourants tentent de démontrer que le Tribunal arbitral ne se serait pas prononcé sur leur conclusion subsidiaire tendant à faire constater la nullité partielle de la transaction extrajudiciaire du 8 mars 2011, plus précisément de ses art. 2, 3, 4 et 11. Semblable tentative est d'emblée vouée à l'échec car elle fait fi de la jurisprudence précitée».

Erwägung 3.1: « 190 al. 2 let. c, première hypothèse, LDIP permet d'attaquer une sentence lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi. Tombent sous le coup de cette disposition les sentences qui allouent plus ou autre chose que ce qui a été demandé (ultra ou extra petita)».

Erwägung 3.3: «Dans le dispositif de sa sentence, le Tribunal arbitral a condamné solidairement les recourants à payer ... euros à l'intimée (sentence, p. 66, ch. IV, n. 4). Ce faisant, il est resté bien en deçà de la conclusion ad hoc formulée dans le cadre de la demande reconventionnelle, dès lors que le montant alloué est inférieur au montant réclamé et qu'il n'est de surcroît pas assorti d'un quelconque intérêt».

(4) Kantonsgericht Freiburg 101 2015 185 vom 27.10.2015

= FZR 2015, 159

Zuständigkeit der staatlichen Gerichte für eine vorsorgliche Beweisaufnahme trotz Schiedsklausel in einem Erbvertrag, welchen die Ehegatten und Kinder unterzeichnet hatten

Sachverhalt*:* «Im Jahr 2001 haben A und seine Ehefrau B einerseits, und ihre fünf Kinder andererseits, einen Schenkungs- und Erbvertrag abgeschlossen … Der Vertrag enthielt zudem eine Schiedsklausel zu Gunsten eines Schiedsgerichts der Zürcher Handelskammer unter Ausschluss der ordentlichen Gerichte».

Erwägung 2b: «Art. 61 ZPO ist nicht anwendbar, wenn es um die Zuständigkeit des staatlichen Gerichts zum Erlass vorsorglicher Massnahmen geht. Das Gericht kann daher die notwendigen vorsorglichen Massnahmen auf Antrag der gesuchstellenden Partei treffen, auch wenn eine gültige Schiedsklausel besteht … Art. 374 Abs. 1 ZPO sieht nämlich diesbezüglich eine konkurrierende Zuständigkeit vor, wonach das staatliche Gericht oder, sofern die Parteien nichts anderes vereinbart haben, das Schiedsgericht auf Antrag einer Partei vorsorgliche Massnahmen einschliesslich solcher für die Sicherung von Beweismitteln, anordnen können. Da sich der Vorbehalt zugunsten einer abweichenden Abrede nur auf die Zuständigkeit des Schiedsgerichtes bezieht, ist die Zuständigkeit der staatlichen Gerichte im Bereich des einstweiligen Rechtsschutzes als zwingend zu erachten … Haben die Parteien die Zuständigkeit des Schiedsgerichts nicht wegbedungen, hat die gesuchstellende Partei somit die Möglichkeit, die ihr für den einstweiligen Rechtsschutz geeignet erscheinende Gerichtsbarkeit zu wählen».

(5) Bundesgericht 5A_304/2007 vom 07.08.2007

Abweisung der Beschwerde (Art. 36 lit. f KSG) gegen ein Urteil des Schiedsgerichts, welche von den Erben vereinbart wurde: Bestimmung des Anrechnungswerts von ausgleichspflichtigen Grundstücken.

Erwägung 1.1: «Mit Zirkular-Erledigungsbeschluss vom 10. Mai 2007 hat das Obergericht des Kantons Zürich eine Nichtigkeitsbeschwerde von X. (Beschwerdeführer) gegen ein Urteil des von den Parteien (als Erben des Nachlasses ihrer Mutter zwecks Ermittlung des Verkehrs- und Anrechnungswertes ausgleichspflichtiger Grundstücke) vereinbarten Schiedsgerichts abgewiesen».

Erwägung 1.2: «Im angefochtenen Entscheid erwog das Obergericht, dass der Beschwerdeführer keinen durch das Schiedsgericht gesetzten Kassationsgrund darlege, sondern dass er vielmehr sein Ermessen über dasjenige des Schiedsgerichts stellen wolle, indem er Beilagen dieses Gerichts sowie eigene Unterlagen erörtere, statt klar erkennbare Fehlüberlegungen des Gerichts aufzulisten: Im Zusammenhang mit den gerügten tatsachenwidrigen Annahmen des Schiedsgerichts zitiere er lediglich die Meinung der Gerichtsminderheit, und wo er Kenntnis des Gerichts behaupte, fehle jeder Beleg. Im Einzelnen erwog das Obergericht namentlich, das Schiedsgericht habe mit der Ermittlung des Verkehrswerts der (zum Teil bereits verkauften) Grundstücke auf Grund der Vergleichsmethode keinen Nichtigkeitsgrund im Sinne von Art. 36 lit. f des Konkordates über die **Schiedsgerichtsbarkeit** vom 27. März 1969 (KSG; Gesetzessammlung des Kantons Zü-

rich Nr. 274) gesetzt, denn der angenommene Quadratmeterpreis von Fr. 550.-- (anstelle des vom Beschwerdeführer tatsächlich erzielten Erlöses) sei keineswegs aktenwidrig oder willkürlich, sondern durchaus realistisch und entspreche den Schätzungsregeln».

Erwägung 3.2: «Nach Art. 36 lit. f KSG kann Nichtigkeitsbeschwerde erhoben werden, um geltend zu machen, der Schiedsspruch sei willkürlich, weil er auf offensichtlich aktenwidrigen tatsächlichen Feststellungen beruht oder weil er eine offenbare Verletzung des Rechts oder der Billigkeit enthält».

Erwägung 4: «Der Verkehrswert von Liegenschaften lässt sich am zuverlässigsten auf Grund der tatsächlich gehandelten Preise für vergleichbare Objekte ermitteln … Der Beschwerdeführer stellt diese vom Schiedsgericht angewendete Methode als solche nicht in Frage … Im Übrigen setzt sich der Beschwerdeführer mit seinen Ausführungen nicht - den erwähnten gesetzlichen Anforderungen entsprechend - mit den entscheidenden Erwägungen des Obergerichts auseinander, so dass insoweit auf die Beschwerde nicht einzutreten ist».

(6) Einzelschiedsrichter (Douglas Hornung, Genf) vom 19.07.2005

= ASA Bull. 2006, 471 ff.

Schiedsklausel in einem Erbvertrag mit Rechtswahl für das schweizerische Recht: Erbstreitigkeiten sind vermögensrechtliche Streitigkeiten und somit schiedsfähig (E. A). Streitig sind nicht erbrechtliche, sondern vertragliche Ansprüche (E. B). Pflicht zur fachmännischen Erstellung eines Inventars über Mobiliar in der Liegenschaft Alpha (E. C+D/Urteil).

Erwägung A: «En l'espèce, ni l'ordre public suisse ni un ordre public étranger, qu'il soit espagnol ou beige, imposerait que le présent litige soit soumis à une autorité étatique, étant rappelé que les litiges successoraux sont considérés comme des litiges patrimoniaux et que - à ce titre, ils peuvent faire l'objet d'une élection de for et/ou d'un arbitrage».

Erwägung B: «Le litige porte pour l'essentiel sur l'interprétation, la portée et l'exécution des articles 8 et 14 de la convention. Ces clauses ne concernent en rien la succession de H. 11 convient dès lors de reprendre une à une les prétentions de la demanderesse et de déterminer si les prétentions peuvent être valablement accordées».

Urteil: «l. Madame Y. doit fournir à Madame X. un inventaire précis des meubles, tableaux, œuvres d'art et objets importants (en taille et/ou en valeur) garnissant la Casa Alpha et leur évaluation.

2. L'inventaire et l'évaluation des biens devront être établis par un expert compétent, choisi d'entente entre les parties.

3. Les frais de l'expert devront être supportés par moitié par Madame Y. et Madame X., sauf pour ce qui concerne les frais et coûts liés à l'évaluation des biens inventoriés, lesquels seront à la charge exclusive de Madame X.

4. A défaut d'entente entre les parties sur la désignation d'un expert dans les 60 jours dès la notification de la présente sentence, le Tribunal arbitral nomme Monsieur G.».

(7) Verwaltungsgericht Basel-Stadt vom 19.05.2003

= BJM 2005, 81 E. 3 = ZBGR 87 (2006) 95 Nr. 1

Willensvollstrecker als Schiedsrichter

Erwägung 3: «Die Rolle eines ‚Richters' komme dem Willensvollstrecker nur zu, wenn er einstimmig von den Erben zum Schiedsrichter ernannt worden sei (Piotet, Erbrecht, in: Schweizerisches Privatrecht, Bd. IV/1, Basel 1978, S. 166 f.) …

Der Rekurrent räumt ein, dass der Nachlass der Gesamtheit der Erben gehört, und der Willensvollstrecker im Falle einer Uneinigkeit unter den Erben nicht berufen ist, Schiedsrichter zu spielen ….».

(8) Obergericht Zürich vom 16.02.1987

= ZR 88 (1989) 239 Nr. 75

Testamentarische Schiedsklausel: Pflichtteile sind gemäss Bundesrecht vom Erblasser zu wahrende Minimalbeteiligungen der Berechtigten am Nachlass. Da eine Schiedsklausel den staatlichen Rechtsverfolgungsweg weitgehend ausschliesst, ein Schiedsgericht die Rechte der Parteien aber einschränken kann und zudem häufig teurer ist, wäre eine Schiedsklausel eine zusätzliche Belastung des Pflichtteils und kann deren einseitige Anordnung von Bundesrechts wegen nicht in Frage kommen. Aus dem Sinn des Pflichtteils als vom Willen des Erblassers unabhängiger Minimalanspruch auf einen Erbteil ergibt sich, dass der Pflichtteils-

schutz auch die Teilung betreffen muss. Im Rahmen des Pflichtteils kann die Erbteilung nicht verbindlich von einem Schiedsgericht beurteilt werden

Erwägung 3a: «Zur Gültigkeit einer Schiedsabrede ist einerseits die materielle Zulässigkeit erforderlich, d.h. es muss sich um einen Anspruch handeln, über welchen die Parteien frei verfügen dürfen. Die Frage der freien Verfügbarkeit entscheidet sich bei einer dem Bundesprivatrecht unterworfenen Sache nach Bundesprivatrecht (BGE 78 II 396)».

Erwägung 3b: «Pflichtteile sind gemäss Bundesrecht vom Erblasser zu wahrende Minimalbeteiligungen der Berechtigten am Nachlass. Sie bemessen sich unabhängig vom Willen des Erblassers … und müssen den Nachkommen frei und unbelastet zukommen (mit Ausnahme von Art. 473ZGB). Da eine Schiedsklausel den staatlichen Rechtsverfolgungsweg weitgehend ausschliesst, ein Schiedsgericht die Rechte der Parteien aber einschränken kann und zudem häufig teurer ist, wäre eine Schiedsklausel eine zusätzliche Belastung des Pflichtteils und kann deren einseitige Anordnung von Bundesrechts wegen nicht in Frage kommen. Dies gilt auch für sämtliche Vorfragen zur Ermittlung des Pflichtteils, insbesondere für die Berechnung des Nachlasses.
Da bei der Ermittlung des Nachlasses Zuwendungen unter Lebenden insoweit hinzuzurechnen sind, als sie der Herabsetzung unterliegen (Art. 475ZGB), hat der Erblasser im Bereich der Herabsetzungsklage keine Verfügungsfreiheit. Soweit die Rechtsbegehren des Klägers die Feststellung des Nachlasses resp. die Herabsetzung gewisser Zuwendungen des Erblassers an die Beklagte betreffen, kann somit andere Vereinbarung der Erben vorbehalten kein Schiedsgericht darüber entscheiden, sondern diese Fragen bleiben dem staatlichen Richter überlassen (a.M. Jolidon, Commentaire du Concordat Suisse sur l'arbitrage, S. 116 Ziff. 321».

(9) Obergericht Zürich vom 01.10.1980

= ZR 80 (1981) 26 Nr. 10 = SJZ 78 (1982) 145

Testamentarische Schiedsgerichtsklauseln: Durch den Erblasser aufgestellte testamentarische Schiedsgerichtsklauseln sind nach zürcherischem Prozessrecht nicht zulässig und für die Erben nicht verbindlich. Ohne klare gesetzliche Grundlage kann es einem Einzelnen nicht erlaubt sein, einen Dritten durch einseitige Erklärung dem allgemein zuständigen staatlichen Richter zu entziehen …

Erwägung 1: «Das Bezirksgericht hat in Anlehnung an den Wortlaut von § 238 ZPO und verschiedene Autoren die Einsetzung eines Schiedsgerichts durch einseitige Erklärung (Testament) insoweit als zulässig erklärt, als der Erblasser über seine Ansprüche frei verfügen könne. Dies treffe jedoch nur für die disponible Quote, nicht aber für den Pflichtteil zu, weshalb einseitige Schiedsklauseln in diesem Fall gänzlich abzulehnen seien».

Erwägung 2: «Soweit ersichtlich hat die Praxis zu dieser Frage bisher in publizierten Entscheidungen nicht Stellung genommen. In der Literatur wird die Zulässigkeit einseitiger (testamentarischer) Schiedsklauseln, zurückgehend einerseits auf Guldener, andererseits auf die deutsche Praxis, mehrheitlich bejaht, jedenfalls soweit testamentarisch frei verfügt werden kann …

Erwägung 3: «Bei den Schiedsabreden bzw. Schiedsverträgen und Schiedsklauseln handelt es sich um prozessrechtliche Rechtsgeschäfte sui generis, die keine privatrechtlichen Wirkungen entfalten, selbst dann nicht, wenn sie in einem privatrechtlichen Rechtsgeschäft enthalten sind …Es ist deshalb gestützt auf kantonales Prozessrecht zu prüfen, ob testamentarische, das heisst einseitig statuierte Schiedsklauseln zulässig sind. Auszugehen ist vom Wortlaut von § 238 ZPO. Darin ist wie die Rekursgegner zu Recht ausführen lediglich festgehalten, dass formell gesehen Schiedsklauseln einerseits vertraglich verabredet werden, andererseits in Statuten juristischer Personen enthalten sein können. Dazu meint Wiget, die Expertenkommission habe auf eine Regelung der Frage, ob testamentarische Schiedsgerichtsklauseln möglich sein sollen, verzichtet, doch sei deswegen nicht Unzulässigkeit anzunehmen. Vielmehr sollten derartige Klauseln insoweit zulässig sein, als testamentarisch frei verfügt werden könne (Sträuli/Messmer, N. 1 zu § 238 ZPO). Ein Blick in die Materialien zeigt jedoch, dass die testamentarischen Schiedsklauseln im Gesetzeswortlaut nicht zufällig unerwähnt geblieben sind, sondern wohl deshalb, weil das Problem in den Vorberatungen umstritten war und keine Einigung erzielt werden konnte …».

II. Deutschland

(1) OLG Hamm I-10 W 84/19 vom 23.07.2020

= juris

Schiedsgerichte können keine Erbscheine ausstellen

Rn. 45: «Soweit der Beteiligte zu 1) zunächst die Ansicht vertreten hat, zur Entscheidung über die vorliegende Erbstreitigkeit zwischen zwei Erbprätendenten sei nach dem Inhalt des Testaments vom 26.06.1943 vorrangig ein aus den Testamentsvollstreckern zu bildendes Schiedsgericht zuständig, und deshalb einen diesbezüglichen Aussetzungsantrag gestellt hat, hat er diesen mit Schriftsatz seines Verfahrensbevollmächtigten vom 24.04.2018 zurückgenommen».

(2) OLG Frankfurt 26 Sch 9/19 vom 30.07.2019

= juris

Vollstreckbarerklärung eines die Auseinandersetzung einer Erbengemeinschaft regelnden Schiedsspruchs: Der … am 24.06.2019 erlassene Schiedsspruch, der folgenden Inhalt hat: 'Die Erbengemeinschaft der Parteien wird wie folgt auseinandergesetzt: I. Die Schiedsbeklagte, Frau A, erhält folgenden Grundbesitz zu Alleineigentum: …' wird für vollstreckbar erklärt.

Rn. 7: «Das angerufene Oberlandesgericht Frankfurt am Main ist zur Entscheidung über den Antrag gem. § 1062 Abs. 1 Nr. 4 ZPO zuständig, nachdem der Ort des schiedsrichterlichen Verfahrens im Bezirk des hiesigen Oberlandesgerichts liegt».

Rn. 8: «Der Vollstreckbarerklärungsantrag ist auch begründet, denn in der Sache liegen keine Gründe für eine Versagung der beantragten Vollstreckbarerklärung vor. Weder sind Aufhebungsgründe gemäß § 1059 Abs. 2 Nr. 1 ZPO begründet geltend gemacht noch liegen von Amts wegen zu berücksichtigende Aufhebungsgründe nach § 1059 Abs. 2 Nr. 2 ZPO vor, so dass antragsgemäß zu entscheiden ist».

(3) BGH I ZB 21/18 vom 08.11.2018

= ErbR 2019, 306-308 = FamRZ 2019, 562-564 = MDR 2019, 369-370
= NJW 2019, 857-860 = WM 2019, 1031-1033 = ZEV 2019, 146-149

Testamentarische Schiedsanordnung des Erblassers: Zulässigkeit des Antrags auf Feststellung der Zulässigkeit oder Unzulässigkeit des schiedsrichterlichen Verfahrens nach Anrufung des Schiedsgerichts aber vor dessen Konstituierung; Einsetzung des Testamentsvollstreckers als Einzelschiedsrichter in Streitigkeiten zwischen ihm und den Erben

Rn. 18: «Es ist zulässig, wenn sich ein Kläger im Hinblick auf eine Schiedsvereinbarung zunächst an ein Schiedsgericht wendet, jedoch vor dessen Konstituierung wegen an der Zuständigkeit des Schiedsgerichts bestehender Zweifel das staatliche Gericht mit dem Antrag auf Feststellung der Zulässigkeit oder Unzulässigkeit des schiedsrichterlichen Verfahrens gemäß § 1032 Abs. 2 ZPO anruft».

Rn. 24: «Eine in einem Testament angeordnete Schiedsklausel ist unwirksam, soweit ein Testamentsvollstrecker als Einzelschiedsrichter auch über Streitigkeiten zwischen den Erben und dem Testamentsvollstrecker entscheiden soll».

(4) OLG Frankfurt 26 SchH 4/17 vom 21.03.2018

= juris

Schiedsklausel im Testament: Beendigung eines Schiedsrichteramtes und Bestellung eines Ersatzschiedsrichters

Rn. 24: «Schiedsgerichte können durch letztwillige Verfügung nur dann in gesetzlich statthafter Weise errichtet werden, wenn die materiell-rechtliche Verfügungsbefugnis des Erblassers dies zulässt. Diese findet ihre Grenze unter anderem in § 2220 BGB, wonach der Erblasser nicht das Recht hat, den Testamentsvollstrecker von seinen grundlegenden Verpflichtungen zur Erstellung eines Nachlassverzeichnisses, zur ordnungsgemäßen Verwaltung des Nachlasses, zur Auskunft und zur Rechnungslegung und von seiner Haftung zu befreien».

(5) OLG München 18 U 1202/17 vom 25.10.2017

= ErbR 2018, 99-100 = FamRZ 2018, 1035-136 = NotBZ 2018, 393-394
= ZEV 2018, 97-99

= ZEV 2018, 98-99 (Anmerkungen von Johann F. Burchard)

Nachlasssache: Wirksamkeit einer testamentarischen Schiedsgerichtsklausel; Anspruch auf Erstellung eines notariellen Nachlassverzeichnisses bei Vorliegen eines privaten Nachlassverzeichnisses

Rn. 3: «Eine einseitige letztwillige Anordnung, die dem Berechtigten den Rechtsweg zu den staatlichen Gerichten entzieht und ihm ein Schiedsgericht aufzwingt, überschreitet die Grenzen der Verfügungsfreiheit, die dem Erblasser durch das materielle Recht gezogen sind».

(6) BGH IV ZB 25/16 vom 17.05.2017

= BeckRS 2017, 111170 = ErbStB 2017, 275-276 = MDR 2017, 770-771
= NotBZ 2017, 257-259 = Rpfleger 2017, 457-460 = WM 2017, 1124-1127

Keine einseitige Zuweisung von Streitigkeiten über die Entlassung eines Testamentsvollstreckers an ein Schiedsgericht durch den Erblasser

Rn. 11: «Streitigkeiten über die Entlassung eines Testamentsvollstreckers können in einer letztwilligen Verfügung nicht einseitig durch den Erblasser unter Ausschluss der staatlichen Gerichtsbarkeit einem Schiedsgericht zugewiesen werden».

Rn. 12: «Die materiell-rechtliche Verfügungsbefugnis des Erblassers findet ihre Grenze unter anderem in § 2220 BGB, wonach der Erblasser nicht das Recht hat, den Testamentsvollstrecker von den ihm nach den §§ 2215, 2216, 2218 und 2219 BGB obliegenden Verpflichtungen zu befreien».

Rn. 13: «Zwar wird die Regelung über die Entlassung des Testamentsvollstreckers in § 2220 BGB nicht genannt. Im Streit um die Entlassung eines Testamentsvollstreckers erfordert aber der nur gering ausgeprägte Schutz der Nachlassbeteiligten ein Minimum an Schutz durch die staatlichen Gerichte».

(7) BGH I ZB 50/16 vom 16.03.2017

= jurisPR-FamR 16/2017 Anm. 7 = MDR 2017, 771-772

= SchiedsVZ 2018, 49-52 (Anmerkungen von Ulrich Haas)

Streit über Pflichtteilsanspruch kann nicht Schiedsgerichtsbarkeit überantwortet werden

Rn. 19: «Der Streit über einen Pflichtteilsanspruch kann durch letztwillige Verfügung nicht der Entscheidung durch ein Schiedsgericht unterworfen werden».

Rn. 33: «Ein Verstoß gegen Treu und Glauben wegen widersprüchlichen Verhaltens kann gegeben sein, wenn sich eine Partei im Verfahren auf Vollstreckbarerklärung des Schiedsspruchs auf das Fehlen der Schiedsfähigkeit des Streitgegenstands beruft, nachdem sie in einem Parallelprozess einer anderen Partei vor den ordentlichen Gerichten die Schiedseinrede erhoben und damit erreicht hat, dass die Klage zurückgenommen wurde».

(8) BGH I ZB 49/16 vom 16.03.2017

= jurisPR-FamR 18/2017 Anm. 8 = MDR 2017, 897-898 = notar 2018, 219-221 = WM 2017, 1111-1116

= MittBayNot 2018, 352-356 (Anmerkungen von Stefan Bandel)
= SchiedsVZ 2018, 49-52 (Anmerkungen von Ulrich Haas)
= ZEV 2017, 421 (Anmerkungen von Reinhold Geimer)

Treuwidrige Berufung auf fehlende Schiedsfähigkeit

Rn. 10: «Ein Verstoß gegen Treu und Glauben wegen widersprüchlichen Verhaltens kann gegeben sein, wenn sich eine Partei im Verfahren auf Vollstreckbarerklärung des Schiedsspruchs auf das Fehlen der Schiedsfähigkeit des Streitgegenstands beruft, nachdem sie in einem Parallelprozess einer anderen Partei vor den ordentlichen Gerichten die Schiedseinrede erhoben und damit erreicht hat, dass die Klage zurückgenommen wurde».

Rn. 26: «Da die Testierfreiheit des Erblassers durch die gesetzliche Anordnung der grundsätzlichen Unentziehbarkeit des Pflichtteils beschränkt ist, ist dem Erblasser jede Beschränkung des Pflichtteilsberechtigten bei der Verfolgung und Durchsetzung seines Pflichtteilsanspruchs verwehrt. Ein Erblasser, der dem Pflichtteilsberechtigten durch letztwillige Verfügung den Weg zu den staatlichen Gerichten versperrt und ihm ein Schiedsgericht aufzwingt, überschreitet die ihm durch das materielle Recht gezogenen Grenzen seiner Verfügungsfreiheit».

(9) LG München 13 O 5937/15 vom 24.02.2017

= ErbR 2017, 521-522 = ZErb 2017, 234-237 = ZEV 2017, 274-278

Keine Zuständigkeit privater Schiedsgerichte für Entscheidungen über Pflichtteils(ergänzungs)ansprüche

Rn. 26-35: Schiedsgerichte können nur insoweit einseitig angeordnet werden, als dies Ausfluss einer einseitigen Verfügungsmöglichkeit ist. Weil der Erblasser in den Gehalt von Pflichtteils(ergänzungs)ansprüchen nicht eingreifen kann, ist ihm auch die einseitige Anordnung der Schiedsgerichtsbarkeit nicht möglich. Die Zulässigkeit von Schiedsklauseln für Pflichtteils(ergänzungs)ansprüche folgt nicht aus der Testierfreiheit, denn die Pflichtteilsrechte begrenzen die Testierfreiheit kraft Gesetzes.

(10) OLG Stuttgart 8 W 166/16 vom 07.11.2016

= ErbR 2017, 492-496 = NJW Spezial 2017, 327 = ZEV 2017, 269-273

= ZEV 2017, 273-274 (Anmerkungen von Knut Werner Lange)

Keine Zuständigkeit privater Schiedsgerichte für die Entscheidung über die Entlassung eines Testamentsvollstreckers

Rn. 25: «Zwar kann gem. § 1066 ZPO die Zuständigkeit eines Schiedsgerichts grds. auch durch letztwillige Verfügung angeordnet werden. Dem Schiedsgericht kann dabei jedoch nicht die Kompetenz zur Entscheidung über einen Antrag auf Entlassung des Testamentsvollstreckers zugewiesen werden».

(11) OLG München 34 Sch 12/15 vom 25.04.2016

= MDR 2016, 717-718

= FamRZ 2016, 1313-1314 (Anmerkungen von Peter Schlosser)

Keine Zuständigkeit privater Schiedsgerichte für Entscheidungen über Pflichtteils(ergänzungs)ansprüche

Rn. 19-32: «Der gesetzliche Pflichtteilsanspruch, der die Testierfreiheit begrenzt, kann nicht durch einseitige Verfügung von Todes wegen dem Schiedsverfahren unterstellt werden. Darauf, ob sich dies im konkreten Fall zugunsten oder zulasten des Pflichtteilsberechtigten auswirkt, kommt es nicht an».

Rn. 33: «Zum Verstoß gegen den inländischen verfahrensrechtlichen ordre public, wenn das Schiedsgericht das Verfahren mit einer - nicht vereinbarten - Säumnisentscheidung abschliesst».

(12) KG Berlin 6 W 107/15 vom 19.01.2016

= ErbR 2016, 337-342

Testamentarische Schiedsklausel: die Erteilung eines Erbscheins ist dem Nachlassgericht vorbehalten

Rn. 16: «Eine Schiedsgerichtsklausel im Testament des Erblassers ist unerheblich, solange kein Rechtsstreit bzw. kein Schiedsverfahren um die Erbfolge selbst anhängig ist, da die Erteilung eines Erbscheins nicht übertragen werden kann; diese Aufgabe ist ausschließlich dem Nachlassgericht vorbehalten».

(13) OLG Celle 6 W 204/15 vom 11.12.2015

= ErbR 2016, 268-269 = FamRZ 2016, 847-848 = NJW-RR 2016, 331-332
= RNotZ 2016, 252-254 = ZEV 2016, 337

= ErbR 2016, 248-250 (Anmerkungen von Roland Wendt)
= MittBayNot 2017, 1-9 (Anmerkungen von Stefan Bandel)

Nachlassverfahren: Erbscheinsantrag bei testamentarischer Verfügung der schiedsrichterlichen Entscheidung eines Erbprätendentenstreits; Wirksamkeit der Verfügung; Benennung des Schiedsrichters durch einen Dritten; Berücksichtigung der Schiedsgerichtsklausel durch das staatliche Gericht

Rn. 2: «Bei letztwilliger Verfügung schiedsrichterlicher Entscheidung eines Erbprätendentenstreits ist ein Erbscheinsantrag unzulässig, solange das Schiedsgericht nicht entschieden hat».

Rn. 3: «Eine solche Verfügung ist nicht nach § 2065 Abs. 1 BGB unwirksam».

Rn. 5: «Eine solche Verfügung des überlebenden Ehegatten beeinträchtigt nicht die bindende Erbeinsetzung eines Erben durch ihn in dem gemeinschaftlichen Testament mit seinem vorverstorbenen Ehegatten».

Rn. 6: «Der Erblasser kann die Benennung der Schiedsrichter einem Dritten überlassen».

Rn. 7: «Es spricht vieles dafür, dass die Schiedsgerichtsklausel nicht nur auf Rüge eines Beteiligten vom staatlichen Gericht zu beachten ist».

(14) LG Heidelberg 2 0 128/13 vom 22.10.2013

= ErbR 2014, 400-401 = ZErb 2014, 292-293 = ZErb 2014, 292-293

= ErbR 2014, 401-402 (Anmerkungen von Roland Wendt)
= ZErb 2014, 293-295 (Anmerkungen von K. Jan Schiffer)

Schiedsfähigkeit von Pflichtteilsansprüchen

Rn. 1: «Die Entscheidung über das Bestehen oder Nichtbestehen eines Pflichtteilsanspruchs sowie der korrespondierenden Auskunftsansprüche kann nicht wirksam der Schiedsgerichtsbarkeit zugeordnet werden. Dem Erblasser ist sowohl in materiell-rechtlicher als auch verfahrensrechtlicher Hinsicht die Dispositionsmöglichkeit über den Pflichtteilsanspruch entzogen».

(15) OLG Frankfurt 8 U 62/11 vom 04.05.2012

= ErbR 2013, 252-257 = RNotZ 2013, 238-243 = ZErb 2013, 267-272
= ZEV 2012, 665-669

= ZErb 2013, 304-306 (Anmerkungen von Rüdiger Gockel)

Erbvertrag: Wirksamkeit der Schiedsanordnung für den Fall von Rechtsstreitigkeiten der Erben

Rn. 31: «Die in einem Ehe- und Erbvertrag enthaltene Regelung, dass im Fall der gerichtlichen Klage eines Erben gegen einen anderen Erben oder bei der Inanspruchnahme anwaltlicher Hilfe zur Durchsetzung von Ansprüchen die Testamentsvollstreckung angeordnet wird und die Testamentsvollstrecker zu Schiedsrichtern ernannt werden, ist auch dann wirksam, wenn bereits in einem früheren gemeinschaftlichen Testament eine Schiedsanordnung enthalten war. Schiedsanordnungen unterfallen nicht der Wechselbezüglichkeit nach § 2270 Abs. 1 BGB, da sie keine Erbeinsetzungen, Vermächtnisse oder Auflagen darstellen, auf die allein die Regelungen des § 2270 Abs. 1 BGB anwendbar sind (Anschluss RG, 27. September 1920, IV 2/20, RGZ 100, 76)».

(16) OLG Karlsruhe 11 Xs 94/07 vom 28.07.2009

= FamRZ 2010, 150-152 = MittBayNot 2010, 214-216 = NJW 2010, 688-689
= RNotZ 2009, 661-663 = ZEV 2009, 466-468

= RNotZ 2009, 663-666 (Anmerkungen von Stefan Heinze)

Testamentsvollstreckung: Testamentarische Zuweisung von Streitigkeiten über die Entlassung des Testamentsvollstreckers an ein Schiedsgericht

Rn. 13: «Eine Schiedsklausel in einem Testament, wonach sich die Erben und Vermächtnisnehmer sowie der Testamentsvollstrecker bei Streitigkeiten im Zusammenhang mit dem Erbfall einem Schiedsgericht zu unterwerfen haben, ist wirksam».

Rn. 17-23: «Streitigkeiten über die Entlassung des Testamentsvollstreckers, die auf einer letztwilligen Verfügung gemäß § 1066 ZPO, und nicht auf einer zwischen dem Testamentsvollstrecker und den Erben und sonstigen Beteiligten vereinbarten Schiedsklausel beruhen, können allerdings nicht dem Schiedsgericht zugewiesen werden (Anschluss RG, 23. Juni 1931, VII 237/30, RGZ 133, 128)».

(17) LG Mainz 1 O 405/06 vom 17.04.2008

= SchiedsVZ 2008, 263-264

Schiedsgerichtliche Zuständigkeit für die Entscheidung über Auseinandersetzungen zwischen Erben; Rechtsschutzbedürfnis für einen Antrag auf Feststellung der Unzuständigkeit des Schiedsverfahrens

Rn. 17: «Ist in einer letztwilligen Verfügung für die Entscheidung über Auseinandersetzungen zwischen den Erben über die Auslegung der testamentarischen Bestimmung ein Schiedsgericht eingesetzt worden, kommt es für die Zuständigkeit des Schiedsgerichts auf den Stand der Erbauseinandersetzung an oder auf Zahl der Streitenden nicht an».

Rn. 19: «Einen Antrag auf Feststellung der Unzulässigkeit des Schiedsverfahrens gem. § 1032 Abs. 2 ZPO fehlt das Rechtsschutzinteresse, wenn bereits in einem anhängigen Verfahren vor dem staatlichen Gericht Schiedseinrede erhoben wurde».

(18) OLG Karlsruhe 10 Sch 6/07 vom 26.11.2007

= beck-online

Streit über die Auseinandersetzung des Nachlasses fällt in den Kompetenzbereich des Schiedsgerichts

(19) BayObLG 1Z BR 116/99 vom 19.10.2000

= BayObLGZ 2000, 279-291 = FamRZ 2001, 873-876 = ZEV 2001, 31 und 190

Erbscheinsverfahren: Zulässigkeit der Schiedsgerichtsbarkeit

Rn. 31: «Zur Bedeutung einer die ordentlichen Gerichte soweit zulässig ausschließenden letztwilligen Schiedsgerichtsklausel im Erbscheinsverfahren: Ohne Rechtsfehler hat das Landgericht auch angenommen, dass die letztwillige Schiedsklausel (in Nr. XI Abs. 4 des Testaments vom 1.9.1988) der Durchführung des Erbscheins- und Beschwerdeverfahrens nicht entgegensteht».

(20) OLG Köln 26 U 21/91 vom 04.09.1991

= OLGR Köln 1992, 26-27

Rechtsweg zu den ordentlichen Gerichten: Ausserkrafttreten einer testamentarischen Schiedsgerichtsklausel wegen Uneinigkeit der Schiedsrichter über die ordnungsgemäße Besetzung des Schiedsgerichts

Rn. 96: «Eine testamentarisch verfügte, den ordentlichen Rechtsweg ausschließende Schiedsgerichtsklausel tritt in entsprechender Anwendung des ZPO § 1033 Nr. 2 ausser Kraft, wenn die von den Parteien benannten Schiedsrichter sich über die Frage der ordnungsgemäßen Besetzung des zu bildenden Schiedsgerichts (Zweierschiedsgericht oder Dreierschiedsgericht) endgültig nicht einigen können».

Rn. 113: «Erweist sich ein Schiedsgerichtsverfahren aus förmlichen Gründen als undurchführbar, ist der Rechtsweg zu den ordentlichen Gerichten zur Sachentscheidung eröffnet».

(21) OLG Hamm 8 U 38/90 vom 08.10.1990

= NJW-RR 1991, 455-456

Unwirksame Einsetzung eines Schiedsrichters im Testament

«Soll zwischen den am Erbvertrag beteiligten Parteien eine Schiedsabrede vereinbart werden, so kann dies nur in einer gesondert von den Parteien zu unterzeichnenden Vertragsurkunde geschehen.

In der nachträglichen Einsetzung eines Schiedsrichters durch Testament liegt eine beeinträchtigende Verfügung des im Erbvertrag bedachten Vermächtnisnehmers i.S. von BGB § 2289».

(22) LG Hamburg 72 O 329/84 vom 08.07.1985

= EWiR 1985, 815

= EWiR 1985, 815-816 (Anmerkungen von Jürgen Damrau)

Schiedsvertrag zwischen Miterben und Testamentsvollstrecker - Bindungswirkung für Pfändungspfandgläubiger

«**1.** Miterben können einen Schiedsvertrag für sämtliche künftigen Streitigkeiten aus der Verwaltung und Auseinandersetzung des Nachlasses abschliessen.

2. Ein solcher Schiedsvertrag ist selbst dann möglich, wenn Testamentsvollstreckung angeordnet ist; er erfasst aber keine Streitigkeiten zwischen dem Testamentsvollstrecker einerseits und einzelnen oder allen Miterben andererseits.

3. Auch die Miterben einerseits und der Testamentsvollstrecker andererseits haben die Möglichkeit, bezüglich ihrer künftigen Rechtsstreitigkeiten einen Schiedsvertrag zu schließen; dies gilt jedenfalls für die Streitigkeiten, die ohne Schiedsvertrag im Verfahren nach der ZPO auszutragen wären.

4. Ein Pfändungspfandgläubiger ist grundsätzlich an den Schiedsvertrag des Schuldners gebunden.

5. Eine Bindung des Pfändungspfandgläubigers (oder des Zessionars) entfällt aber, wenn dieser an der Ernennung des Schiedsrichters nicht mitwirken kann und der Schiedsrichter eine Vertrauensperson der ursprünglichen Parteien des Schiedsvertrages ist oder war».

(23) BGH VII ZR 191/57 vom 30.4.1959

= BB 1959, 714-715 = DNotZ 1959, 789 = MDR 1959, 834-835
= NJW 1959, 1493-1494

Erbauseinandersetzung - Schiedsspruch

«Durch einen Schiedsvertrag kann dem Schiedsrichter die Auseinandersetzung einer Miterbengemeinschaft übertragen werden».

(24) RG III 111/42 vom 08.02.1943

= RGZ 170, 380-384

Zulässigkeit der einseitigen Schiedsklausel im Testament

«… die in §§ 1937 flg. BGB enthaltenen Bestimmungen über den möglichen Inhalt letztwilliger Verfügungen nicht etwa dahin zu verstehen sind, dass ausschliesslich die dort angeführten Anordnungen zulässig wären … Aus diesem Grund ist in der Rechtsprechung beispielsweise die Anordnung eines Schiedsgerichts durch Testament für zulässig erachtet worden (RGZ Bd. 100 S. 76)».

(25) RG VII 237/30 vom 23.06.1931

= RGZ 133, 128-137

Zur Frage der Zulässigkeit und der Tragweite einer auf Feststellung der Unzulässigkeit eines schiedsrichterlichen Verfahrens gerichteten Klage.

Kann der Erblasser den Erben in der Befugnis beschränken, die Entlassung des Testamentsvollstreckers wegen eines wichtigen Grundes beim Nachlassgericht zu beantragen?

Rn. 5: «Durch Antrag des Klägers war ein Verfahren der freiwilligen Gerichtsbarkeit in Gesetz gesetzt worden … In diesem Verfahren ist kein Raum dafür, dass irgend eine andere Stelle mit bindender Wirkung für die Gerichtsbehörde Beschlüsse fassen könnte. Namentlich wäre – wie das Berufungsgericht zutreffend ausgeführt hat – einem Schiedsspruch oder einem Schiedsgutachten über die Frage, ob ein wichtiger Grund für die Entlassung eines Testamentsvollstreckers gegeben sei, jede Bedeutung für die von den Gerichten der freiwilligen Gerichtsbarkeit zu erlassenden Entscheidungen abzusprechen. Eine Wirksamkeit des von den verklagten Miterben angerufenen Schiedsgerichts in dieser Richtung ist also ausgeschlossen».

Rn. 6: «Für die Tragweite einer etwaigen Entscheidung dieses Schiedsgerichts verbliebe sonach nur der Gesichtspunkt, ob sie den Kläger zur Zurücknahme seines Antrags vom 16. August 1926 nötigen könnte, die an sich zweifellos zulässig wäre».

(26) RG Rep. IV. 2/20 vom 27.09.1920

= RGZ 100, 76

Ist die letztwillige Anordnung eines Schiedsgerichts zulässig? Kann der als Testamentsvollstrecker Berufene zugleich zum Schiedsrichter ernannt werden?

Testament: Über etwaige Streitigkeiten bei der Testamentsvollstreckung soll der Testamentsvollstrecker entscheiden.

S. 77 f.: «Gegen die Zulässigkeit einer solchen Anordnung ist kein Bedenken zu erheben. In § 1048 ZPO wird die Anordnung ohne weitere Erörterungen als zulässig vorausgesetzt; der Umstand, dass das BGB keine ausdrückliche Vorschrift darüber enthält, steht um so weniger entgegen, als sich die Sache bezügliche der vertragliche vereinbarten Schiedsgerichte ebenso verhält. Die Zulässigkeit folgt

vielmehr ohne weiteres aus der Erwägung, dass der Inhalt letztwilliger Anordnungen keinen anderen als den sich aus dem Gesetz ergebenden Einschränkungen unterliegt, wobei aber nicht etwa die in den §§ 1937 bis 1941 enthaltenen Bestimmungen über den möglichen Inhalt letztwilliger Verfügungen dahin zu verstehen sind, dass ausschliesslich die dort aufgeführten Anordnungen zulässig wären; denn das Gesetz erwähnt selbst mehrfach an anderen Stellen letztwillige Verfügungen sonstigen Inhalts (z.B. §§ 332, 1777 Abs. 3, 2197, 2336). Es bedarf daher zur Rechtfertigung der Schiedsgerichtsklausel nicht der in der Rechtslehre mehrfach vertretenen Unterstellung ihrer Anordnung unter den Gesichtspunkt der Auflage nach § 1940 BGB».

S. 78 f.: «Die Revision meint, jedenfalls könne nicht ein Testamentsvollstrecker zum Schiedsrichter bestellt werden; denn das BGB behandle den Testamentsvollstrecker als Vertreter der Erben und unterstelle ihn mehrfach den Regeln des Auftrags, er sei den Erben verantwortlich, habe ihnen Rechnung zu legen usw. und könne daher nicht Richter über die Erben sein. Das Bedenken schlägt nicht durch. Die Tätigkeit, die der Testamentsvollstrecker als Schiedsrichter auszuüben hat, hebt sich von seiner Tätigkeit als Testamentsvollstrecker schon äusserlich dadurch deutlich ab, dass für erstere ein besonderes, den Beteiligten gewisse Rechte einräumendes Verfahren vorgeschrieben ist (§ 1048 mit §§ 1028 flg. ZPO) …».

III. Österreich

(1) OGH 6 Ob 590/87 vom 21.05.1987

= www.ris.bka.gv.at

Offen gelassen, ob testamentarische Schiedsklausel zulässig sei

«Selbst bei Rechtswirksamkeit des Schiedsspruches wäre durch ihn noch nicht entschieden, ob die New Yorker Erbin durch einen Verzicht auf ihren ererbten Anteil am Einzelunternehmen auch auf ihre Berufung als Nacherbin ihrer beiden kinderlosen Wiener Geschwister Verzicht leistete. Dazu fehlt jede Erörterung und Feststellung, ohne die die Beteiligtenstellung nicht geklärt werden kann»

(2) OGH 6 Ob 16/84 vom 06.09.1984

= EvBl 1985/52 S. 242 = NZ 1985, 56 = RdW 1985, 13 = SZ 57/136

RIS-Justiz RS0045005: Das Vorliegen einer Schiedsvereinbarung wirkt vor den ordentlichen Gerichten als Verfahrenshindernis

RIS-Justiz RS0045187: Eigentliche Streitsachen der außerstreitigen Gerichtsbarkeit, in welchen einander die Parteien in gleicher Position gegenüberstehen wie im Prozess und die nur aus rechtspolitischen Erwägungen in das Verfahren außer Streitsachen überwiesen sind, sind schiedsfähig. Auf solche Schiedsvereinbarungen und die sich daran knüpfenden Schiedsverfahren sind die Bestimmungen der §§ 577 ff ZPO entsprechend anzuwenden

Seite 3: „Zur Frage, ob Ausserstreitsachen schiedsfähig seien, folge das Rekursgericht der differenzierenden Auffassung Faschings, dass hiebei vom § 577 Abs 1 ZPO auszugehen sei. Diese Bestimmung schränke die Schiedsgerichtsbarkeit keineswegs auf den Prozessbereich ein, sondern begrenze diesen Sachbereich durch die Vergleichsfähigkeit des Streitgegenstands, demnach durch die Parteiendisposition über den Verfahrensgegenstand. Daher müssten die Parteien in jenen außerstreitigen Rechtssachen, die sie durch Vereinbarung über den Anspruch in das streitige Verfahren verlagern könnten, sowie überhaupt in den Fällen der „streitigen Sachen der außerstreitigen Gerichtsbarkeit“ wirksame Schiedsvereinbarungen treffen können“.

(3) OGH 1 Ob 171/57 vom 20.03.1957

= JBl. 1957, 595

Testamentarische Schiedsklausel ist zulässig

RIS-Justiz RS0039738: Auch die testamentarisch angeordnete Schiedsgerichtsklausel ist auf Grund der Einrede zu berücksichtigen. Die Geltendmachung der (heilbaren) Unzuständigkeit erst in einer fortgesetzten Verhandlung (vor dem Bezirksgericht) ist verspätet.

(4) OGH 1 Ob 1203/27 vom 28.12.1927

= SZ 9/270

Testamentarische Schiedsklausel ist auch ohne ausdrückliche Bestimmung im Gesetz zulässig

RIS-Justiz RS0045225: Der Mangel der Bestätigung der Rechtskraft und Vollstreckbarkeit macht den Schiedsspruch nicht unwirksam.

IV. Liechtenstein

In Liechtenstein sind soweit ersichtlich noch keine Gerichtsentscheide zu diesem Thema publiziert worden.

V. USA

(1) Ali v. Smith

= 554 S.W.3d 755 (Tex.App. 2018)

"In this appeal, we assume that courts must enforce a testator's intent, as reflected in the will, that "all disputes" between executors and their successors be resolved through binding arbitration. But, because the Texas Arbitration Act requires the party seeking to compel arbitration to show the existence of an "agreement" to arbitrate, courts may not compel arbitration under the Act unless the will is "supported by the mutual assent required to render the [will] an agreement and the arbitration provision valid." See Rachal v. Reitz, 403 S.W.3d 840, 845 (Tex. 2013) (enforcing arbitration provision in a trust based on theory of direct-benefits estoppel)" (757).

(2) Daniels v. Sunrise Senior Living Inc.

= 212 Cal.App.4th 674 = 151 Cal.Rptr.3d 273 (Cal.Ct.App. 2013)

"Apparently, one of the two arbitration agreements under consideration in Fitzhugh was an agreement to arbitrate medical malpractice claims against the convalescent care facility pursuant to section 1295. (Fitzhugh, supra, 150 Cal.App. 4th at p. 472, 58 Cal.Rptr.3d 585.) But Fitzhugh was decided before Ruiz, and the Fitzhugh court was not called upon to consider the question addressed in Ruiz - whether an agreement to arbitrate medical malpractice claims against a health care provider pursuant to section 1295 is binding on nonsignatory heirs asserting wrongful death claims based on the arbitrable malpractice claims. Nonetheless, in our view Fitzhugh remains good law as applied to arbitration agreements not governed by or entered into pursuant to section 1295, including the

arbitration clause in Barcenas's residency agreement with Sunrise Senior Living, Inc. C. The Trial Court Did Not Abuse Its Discretion in Refusing to Compel Arbitration Based on the Possibility of Conflicting Rulings on Common Questions of Law and Fact in the Event the Survivor Claims, But Not the Wrongful Death Claim, Were Ordered to Arbitration (§ 1281.2(c))" (686).

(3) Laizure v. Avante at Leesburg Inc.

= 109 So.3d 752 (Fla. 2013)

"Laizure opposed arbitration, contending that the arbitration agreement was procedurally and substantively unconscionable and that the wrongful death claims were not arbitrable. The trial court found that the arbitration agreement was valid, that the claims brought by Laizure were arbitrable issues, and that the beneficiaries of the estate were intended third-party beneficiaries of the agreement. On appeal, the Fifth District affirmed the trial court's order. The Fifth District focused primarily on Laizure's argument that the arbitration agreement did not, and could not, encompass a wrongful death claim because the claim did not belong to Stewart, but rather was an independent claim belonging to the estate and the statutory heirs. Laizure, 44 So.3d at 1257. The Fifth District observed that no Florida decision appears to have directly addressed the issue of whether a nursing home arbitration agreement executed by a patient is binding on his estate and heirs in a wrongful death action. Id.

The Fifth District began its discussion by reviewing this Court's decision in Seifert v. U.S. Home Corp., 750 So.2d 633, 635 (Fla.1999), in which the Court held that a wrongful death claim was not arbitrable where the arbitration agreement contained in a homebuyer's purchase and sale contract did not require the arbitration of personal injury tort claims. Laizure, 44 So.3d at 1257–58. The Fifth District recognized, however, that this Court "did not hold that wrongful death claims are not arbitrable. Rather, it concluded that an arbitration provision in a homebuyer's contract, which did not refer to tort claims for personal injuries, did not require arbitration of such disputes." Id. at 1258" (756).

(4) Application of Kalikow

= 2010 N.Y. Slip Op. 33642 (N.Y.Misc. 2010)

"Pursuant to the arbitration clause in the partnership agreement, the petitioners demanded arbitration to determine the effect of the transfer restrictions on valuation and the validity of the bequest of the decedent's interest in Hewlett Associates to the Sunshine Foundation. The arbitrator, Dennis Konner, found that the "the attempted transfer of partnership interests in Hewlett Associates by the Will of Pearl Kalikow without the consent of Edward Kalikow and Laurie Platt is barred by the Certificate." Thereafter, this court confirmed the arbitrator's decision by decision dated September 26, 2008 (Dec. No. 429). By decision dated March 31, 2009 (Dec. No. 851), this court determined that Edward and Laurie's actions in pursuing arbitration did, in fact, trigger the in terrorem clause in the decedent's will" (2-3).

(5) In re Nestorovski Estate

= 283 Mich.App. 177 (Mich.Ct.App. 2009)

"In summary, we hold that to the limited extent that In re Meredith Estate barred arbitration of probate disputes, that holding lacks continued viability because it has been superseded by more recent legislative developments and intervening changes in the court rules. Further, the central holding of In re Meredith Estate lacks applicability here, because all interested parties had notice of the contemplated arbitration, agreed that the arbitration would supply a binding resolution regarding Vlado's testamentary capacity, and actively participated in the arbitration process. Therefore, In re Meredith Estate does not preclude the instant parties from conducting binding common-law arbitration of probate disputes, including the question of testamentary capacity" (196).

(6) Covenant Health Rehab of Picayune v. Brown

= 949 So.2d 732 (Miss. 2007)

Section D4 enforces the contract entered into by the decedent against her heirs beyond her death. The United States Supreme Court has held that "[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of

contracts in which personal skill or taste is required, on all contracts broken after his death." United States ex rel. Wilhelm v. Chain, 300 U.S. 31, 35, 57 S.Ct. 394, 396, 81 L.Ed. 487, 490 (1937). This Court has held that arbitration agreements, specifically, are not invalidated by the death of the signatory and may be binding on successors and heirs if provided in the agreement. Cleveland v. Mann, 942 So.2d 108, 118 (Miss. 2006). Therefore, all of the provisions in D4 that remain upon this Court's ruling are enforceable by and against both the decedent's administrators and the nursing home. We find that the trial court clearly erred in striking this provision.

Section D4 reads verbatim in bold print: Notwithstanding any other provision set forth herein, Sections C5, E5, E6, E7, E8, E9, E12, E13, E14, E15 and F as set forth in this Agreement shall survive the termination for any reason of this Agreement and shall survive and shall not be revoked by the death of any Party hereto including the Resident. Said provisions shall be binding on the estate of the Resident in the event the Resident is deceased" (738).

(7) In Matter of Kalikow

= 2006 N.Y. Slip Op. 51942 (N.Y.Surr.Ct. 2006)

"When faced with a broad arbitration clause a court merely determines whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract. (Matter of Board of Educ. Of Watertown City School Dist. [[Watertown Edu. Ass'n]] 93 NY2d 132). Here, the dispute concerns the construction and enforcement of the partnership agreement (see Rappaport v. 55 Perry Co., 50 AD2d 54) and therefore meets this test.

The preliminary executor contends that this dispute concerns the distribution of an estate and arbitration is therefore barred by the New York State Constitution, public policy and the Surrogate's Court Procedure Act, (citing Matter of Berger, 81 AD2d 584; Swislocki v. Spievak, 273 App Div 768). Historically, public policy precluded the arbitration of a dispute concerning the probate or construction of a will but this prohibition does not extend to all disputes which impact upon the distribution of a decedent's estate (Matter of Spanos, NYLJ, Sept. 23, 1992, at p. 27 at col. 1).

Where the decedent is a party to an agreement, issues concerning termination of the agreement (Matter of Cassone, 63 NY2d 756) or its enforcement (Matter of

Salaway, NYLJ, April 12, 2004, at p. 31 col. 1) are subject to arbitration. Accordingly, the court finds that the dispute between the parties is subject to arbitration, pursuant to the terms of the agreement" (2).

(8) Matter of Jacobovitz

= 58 Misc.2d 330 = 295 N.Y.S.2d 527 (N.Y.Surr.Ct. 1968)

The distribution of the decedent's estate is not an arbitrable controversy

«The issue presented, as the court views it, is whether the validity of a will and the disposition of an estate can be the subject of an arbitration proceeding under the laws of this State ... It can thus be seen that even where all of the proper parties are before the court, the Legislature has imposed such requirements as to who may make a will and its proper execution that, even without objections to probate, the court has the duty to exercise its judicial conscience before admitting the instrument to probate. That the distribution of a decedent's estate would not constitute an arbitrable controversy was held in Matter of Swislocki (Spiewak), 273 App. Div. 768, mot. for lv. to app. den. 273 App. Div. 808), and, where the intestate share of an infant and the rights of creditors in an estate of the deceased were involved, it could not be the 334 subject of arbitration (Matter of Kabinoff, 19 Misc.2d 15)» (333-334).

(9) Matter of Kabinoff

= 19 Misc. 2d 15 = 163 N.Y.S.2d 798 (N.Y.Sup.Ct. 1957)

Intestate shares of an infant and rights of creditors may not be subject to arbitration

Agreement of the heirs: «The parties hereto, their attorneys and accountants shall negotiate and attempt to reach by mutual consent a figure which shall fairly represent the amount due Rose Kabinoff as referred to in paragraph second hereof. In the event that agreement cannot be had within thirty days from the date of this contract any party may refer the unresolved matter for determination by the American Arbitration Association of the City of New York, whose decision shall be absolute, final and binding upon all of the parties hereto» (16).

Case: «From a study of the agreement it becomes clear that the surviving partners intended to prevent their stepmother as administratrix of their father's estate from acquiring the entire interest of their father in the partnership, but intended to carve

out from their father's interest their own interest and permit the administratrix to receive only 1 the interest of herself, her son by the decedent and a sum to be fixed as a result of the arbitration which would defer the costs of the administration proceeding. Such computation necessarily involves the intestate share of an infant and the rights of creditors in the estate of the deceased and may not be the subject of arbitration (Matter of Swislocki [Spiewak], 273 App. Div. 768).
In the demand for arbitration the surviving partners seek to avoid this construction of the arbitration agreement by providing that the arbitration shall determine the amount due Rose Kabinoff as administratrix of the estate of Isidore Kabinoff, deceased, etc., said amount constituting the value of the partnership interest of Isidore Kabinoff, deceased, in and to the net worth of the New Way Transport Company. This is not in conformity with the original arbitration agreement which, if it had been expressed in these terms, would have been arbitrable. The desire of the surviving partners to prevent their share of the assets of their father's estates from coming into the hands of the lawfully appointed administratrix renders the agreement insofar as the arbitration provisions are concerned invalid» (16-17).

(10) Matter of Dobbins

= 206 Misc. 64 (N.Y.Surr.Ct. 1953)

Facts: «I select John Dobbins as executor and his decision or interpretation on any questions of my will must be final» (65).

Case: «The discretion granted to the executor, so far as valid, relates to dealings with the testator's sister, Florence, and with the specific legatees, and it is held that the executor has no authority to divert the residue from the purpose for which the testator bequeathed it, nor to pay it to anyone but the Society for the Propagation of the Faith» (67).

(11) Swislocki v. Spiewak

= 273 A.D. 768 = 75 N.Y.S.2d 147 (N.Y.App.Div. 1947)

«The power of attorney to plaintiff and the submission to arbitration do not make clear the subject matter of the arbitration, but if, as is otherwise indicated, the subject matter is the distribution of a decedent’s estate, it would not constitute an arbitrable controversy. That does not mean that plaintiff’s wife might not have a

good and collectible claim through estate administration, or otherwise against defendant for funds originating in an estate but presently in a status beyond any stage of estate administration, which claim might be arbitrable, but on the present submission that does not appear to be the case. Order appealed from unanimously affirmed, with $20 costs and disbursements» (768).

(12) In re Estate of O'Brien

= 13 Wn.2d 581 = 126 P.2d 47 (Sup.Ct. 1942)

«The executors named in a will and an additional executor named in a codicil, it has been held, cannot submit to arbitration the question whether the testator had sufficient mental capacity to execute the codicil, as the codicil may be declared invalid only in a will contest action waged by a person or persons having some pecuniary interest in the property of the estate. In re Meredith's Estate (1936), 275 Mich. 278, 266 N.W. 351, 104 A.L.R. 348» (585).

(13) In re Estate of Reynolds, 221 N.C. 449

= 20 S.E.2d 348 (N.C. 1942)

In Lassiter v. Upchurch, 107 N.C. 411, 12 S.E. 63, the Court used this language: "However that may be in ordinary submission by parties to arbitration, we think that section 1426 of The Code (now C. S., 99) was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators, or collectors and claimants against the estates of testators and intestates may be settled and determined, and, fairly interpreted, the award of the referees, unless impeached for fraud and collusion, should have the effect, at least, to determine and put an end to the controversy, if not of a judgment in an action between the parties. Its effect, if unimpeached for fraud and collusion, is to determine and settle the validity or invalidity of the debt in a mode prescribed and authorized by law, and if not intended to put an end to the controversy involved, the statute is useless, but if it has this effect, then the award, when filed, whether for or against the administrator, is equivalent to a judgment, and can only be attacked for collusion and fraud" (451-452).

(14) In re Barbey's Will

= 177 Misc. 898, 32 N.Y.S.2d 191 (N.Y.Surr.Ct. 1941)

Last will: «I authorize my executors to determine in their absolute discretion which employees will qualify to receive a share under this paragraph and to interpret and apply in their discretion the formula above stated» (899-900).

Case: «Under the provisions of article 'Tenth' of his will, the testator specifically authorizes his executors ‘to determine in their absolute discretion which employees will qualify to receive a share under this paragraph and to interpret and apply in their discretion the formula above stated.’ If effect is to be given to the expressed intent of the testator, it is the executors rather than the court who are granted the authority to determine which of the employees of said company are entitled to share under the provisions of said article. In the absence of an abuse of discretion by the executors, the court has no power to interfere (Matter of Cowen, 148 Misc. 35.) The executors, pursuant to such express authority conferred in the will, have determined that these two claimants were not continuously employed during the two-year period in question. Under the circumstances, there was no abuse of discretion herein. It is not contended and it cannot be found that the executors acted arbitrarily or capriciously. It is quite evident that the granting of such absolute discretion to the executors was for the specific purpose of conferring upon the executors rather than upon the court the power to determine those employees qualified to share under said article ‘Tenth.’ That the facts herein present a fairly debatable issue as to whether these two claimants were so continuously employed demonstrates the foresight of the testator in conferring upon the executors the discretion of determining the employees qualified to share as legatees thereunder, rather than imposing upon the court the burden, and upon the estate the expense, of unnecessary litigation» (900-901).

(15) Howe v. Sands

= 194 So. 798 = 141 Fla. 813 (Fla. 1940)

«To the Executors hereof I give the exclusive right to determine who are my servants at the time of my death, also the number of years' service they have respectively served and the amount of the bequests to which they are severally entitled» (798).

«Paragraph Five of the Will gave to the Executor the exclusive right to determine who were the servants at the time of his death, the number of years of service,

and the amount of the bequests to which each was entitled. The intention of the testator was clear, free from ambiguity, and expressed in language free from doubt. The authorities hold that the power to make such a provision is valid ... » (819).

(16) Mulligan v. McDonagh, 307 Mass. 464

= 30 N.E.2d 385 (Mass. 1940)

G.L. (Ter. Ed.) c. 204, § 15, provides as follows: "The supreme judicial court or the probate court may authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the petitioners for administration with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisers or legatees under such will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the petitioners for administration with the will annexed, as the case may be, those claiming as devisers or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties" (466).

(17) Taylor v. McClave

= 15 A.2d 213 (N.J.Ch. 1940)

«This court cannot be deprived of its jurisdiction by any direction of the testator to the effect that his executor, or any other person, other than the court, shall construe or define the provisions of a will.

(18) Nations v. Ulmer

= 139 S.W.2d 352 (Tex.Civ.App. 1940)

«*If by the terms of the will defendants were made the arbiters of the amount of their compensation, we think a reasonable construction made in good faith would be binding on all concerned*.

A provision in a will making the decision of the executor binding on disputed questions as to the construction thereof is a valid provision. If such a decision is

fairly and honestly made and the will is reasonably susceptible of such construction same is final.' Couts v. Holland et al., 48 Tex.Civ.App. 476, 107 S.W. 913; Grant et al. v. Stephens, Tex.Civ.App., 200 S.W. 893; 69 C.J. p. 124, § 1166. The provision relied on to confer arbitral powers on the trustees is to be found in the codicil. There it provides the trustees may retain as compensation in addition to fees and commissions allowed by law in administration of estates ten per cent of 'gross income without judicial ascertainment.' In our opinion this will does not confer arbitral power on the trustees. In the cases above cite the provisions conferring such power of construction were clear and distinct. The word "ascertainment" in the clause in question means, we think, determination. The whole phrase construed with the context means that they may retain their compensation without first having, same judicially determined. It may, perhaps, be contended with some logic that, the provision as we have construed it renders same meaningless. However, the construction given harmonizes with the will, in that an administration is contemplated with the minimum of judicial control. In order to confer the function of arbiter on a fiduciary in a matter in which his personal interest necessarily conflicts with the interest of the beneficiaries, the intent to do so should clearly and unequivocally appear from the context of the will» (356).

(19) In re Estate of Meredith

= 275 Mich. 278 = 266 N.W. 351 = 104 A.L.R. 348 = 1936 Mich. LEXIS 551 (Sup.Ct. 1936)

«*The Michigan statute relating to arbitration provides only for the arbitration of cases that might be subject to an action at law or suit in chancery. Mich. Comp. Laws § 15394 et seq. (1929). It applies only to controversies between parties, not to proceedings for determining the status of estates which are proceedings in rem*. Arbitration proceedings recognized in this State are either statutory or common-law proceedings. The statute relating to arbitration provides only for the arbitration of cases which might be subject to an action at law or suit in chancery. It applies only to controversies between parties, not to proceedings for determining the status of estates which are proceedings in rem. Here there was no execution of an agreement to arbitrate, no hearing held before the arbitrator, no oath administered to the arbitrator or the witnesses before him, no agreement as to the binding force and effect of the award. There was no sum of money or damages awarded upon which a judgment could be entered, no judgment of the court could

be entered for the recovery of any debt or damages, and, as a common-law arbitration, the court could not decree specific performance of the award because the award was one which could not under the law be submitted to arbitration. Probate proceedings are not suits or actions. They may affect persons not named in the record. The rights of all concerned or interested in the estate in question are involved. The issue upon the admission to probate of a will is marked out by statute and may not be contracted to the detriment of those concerned or interested by the act of others who happen to be proponents. A transaction between two contending parties cannot bind the interests of a third. An agreement between the parties has no application to those cases where the object of the litigation is to ascertain and settle the state or condition of the subject matter, as distinguished from the pecuniary rights or liabilities of confronting and contending litigants» (294-295).

«The jurisdiction of arbitration is well stated in 2 R.C.L. p. 358: 'The general rule is that all disputed matters not involving questions of a criminal nature are proper subjects for settlement by arbitration. It is not requisite that a legal right of action be involved. Disputes of a criminal nature are not arbitrable, for the reason that they are matters of public concern. Disputes concerning an illegal matter or transaction are not proper subjects for arbitration, and an award in such a case stands upon no higher ground than the original claim and is consequently unenforceable'» (300-301).

«The general rule which may be adduced from these cases is that courts favor arbitration and will recognize this type of agreement when not contrary to public policy, not void or contradictory upon its face and agreed to by all parties in interest. In the case at bar the agreement was not contrary to public policy, nor were its terms contradictory or void, and we think it was entered into by all of the interested parties. The agreement did not affect the will which had been admitted to probate; it merely related to the codicil and the principal parties interested in the codicil were the three executors named therein. The agreement was not a substitution for the judgment of the probate court, but was, in the final analysis, merely an agreement to prevent a will contest» (303-304).

(20) Stevens v. Felman

= 338 Ill. 391 = 170 N.E. 243 (Ill. 1930)

"Paragraph 9 provided that in the event of dissatisfaction by the testaor's son with the daughter's management of the estate, if there were just cause for complaint,

there should be no court proceedings but all questions in dispute should be referred to arbitration, one arbitrator to be selected by each child, and in the event of disagreement by the two they to select a third, the decision of two of the three to be binding. Paragraph 10 provided that in the event either child refused to be bound by the provision of paragraph 9, before commencing court proceedings such child should put up a bond to indemnify the other against all costs, including attorney fees … Paragraph 12 nominated Blanche M. executrix of the will and requested that she act without bond" (395).

(21) Talladega College v. Callanan

= 197 Iowa 556 = 197 N.W. 635 (Sup.Ct. 1924)

«*Testamentary Power — Authorizing Executors to Construe Will. A testator may validly constitute his executors the final arbiters to determine the meaning of his will and the amount due a legatee, and such decision will be final if it is rendered in regard to a matter in fair dispute, is not arbitrary, but on the contrary is in good faith, and based on reasonably plausible arguments arising out of the terms of the will and out of the facts and circumstances attending the settlement of the estate.*

'It will be noted that by the forty-ninth paragraph the testator constituted his executors final arbiters of any question of construction or meaning which should arise under his will, or any question of right or of dispute as to how much anyone is entitled to'» (560).

«This necessarily means that the question raised must present a fair dispute. The decision may not be arbitrary. It may not contradict the clear provision of the will. In other words, the power may not be abused. In this case, one of the executors is a residuary legatee. He has, therefore, personal interest in the dispute. If that were sufficient to disqualify him, it would avail nothing to the plaintiff, because he is only a minority, in any event. The decision made was concurred in by all the executors. There have been several successive executors, because of vacancies resulting by death and resignation. All these successive executors have concurred in the same decision.

There is also respectable authority to the effect that the residuary legatee is not thereby disqualified from exercising this function. American Bd. of Com. v. Ferry, 15 Fed. 696, 700. The reason for this holding is that the testator had a right

to do as he would with his own, and that he had equally the right to name the same person as a residuary legatee, as executor, and as arbiter.

We have no occasion to go into the ultimate legal merits of the decision rendered by the executors. We have only to decide whether the objection raised by the defendants to the plaintiff's claim is artificial or fanciful, and whether their decision is an abuse of their power, in that it is arbitrary and contradictory to the clear terms of the will; or whether it is honest and in good faith, in that it is sustained by theory and argument reasonably plausible. We have no hesitancy in saying, upon the briefs before us, that the controversy is one which opens the door to very persuasive argument on either side» (561-562).

(22) In re Will of Meadows

= 185 N.C. 106 = 116 S.E. 257 (N.C. 1923)

"In the present case the clerk, after fully considering the petition and the affidavits offered in its support, has rejected the application, finding that the allegations are not supported by the evidence. On appeal, the court, without considering the evidence on the principal questions, has dismissed the petition, being of opinion that the petitioner is estopped by having entered into an arbitration agreement touching certain disputed matters in volved [involved] in the inquiry, but we do not concur in this view. This alleged arbitration entered into on 25 January, the day after the will was admitted to probate, seems to concern chiefly certain personal property, the title to which was in dispute between the petitioner and Mrs. Stratton, a granddaughter of the testator, and as to which both are claiming, not under the will, but against it, and its does not sufficiently appear that either the agreement or the award should necessarily and as a conclusion of law operate as an estoppel in the matter. Apart from this, a persual of the record will disclose that the intestate died (102) on 21 January. The will was admitted to probate on 24 January, and the arbitration agreement was entered into on 25 January, the next day, and both the allegations and the evidence offered by the petitioner are broad enough to include and apply to both the probate of the will, the qualification, and the agreement to arbitrate, and we are of opinion that this must be heard and considered by the appellate court" (106-107).

(23) Patterson v. McDonald

= 284 F. 277 = 1922 U.S. Dist. Lexis 1205 (Dist.Ct. W.D. Wash. 1922)

«Under the law of Washington, common-law arbitration does not exist in the state of Washington … The arbitration tribunal under the statute of Washington had relation to the courts of the state … and the trustee in bankruptcy was powerless to submit to arbitration an issue in the state court, within the jurisdiction of this court, except as directed by this court …Can the arbitration be sustained under the provisions of the Bankruptcy Act, § 26?

The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

B. Three arbitrators shall be chosen by mutual consent or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree within five days after appointment the court shall appoint the third arbitrator …

It appears in view of the stipulations in the contract and the selection of arbitrators by the respective parties that section 26, supra, and General Order 33 have been substantially complied with, and that the objection to the award is not well founded. The award is final, except for fraud or apparent arbitrary conduct (2 R.C.L. 386), and no fraud or arbitrary conduct is shown. …» (280-281).

(24) Grant v. Stephens

= 200 S.W. 893 (Tex.Civ.App. 1918)

«By the terms of the will, item 8, the executors and trustees named, in whose judgment, discretion, and honesty the testator evidently reposed great confidence, were made umpires to decide 'all doubtful questions of construction in the interpretation of said will according to their best judgment without resort to the courts.' In Couts v. Holland et al., 48 Tex. Civ. App. 476, 107 S.W. 913, writ denied, 110 S.W. xiii, it is held that this provision authorized the trustees to determine what property the will applies to, and what it does not, and does not limit them to a determination of what disposition was intended to be made of property to which it clearly applies. In Thompson on Wills, § 432, where the last-mentioned case is cited with approval, it is said: 'It is not unusual for the testator to provide in his will that all questions relative to the construction thereof are to be submitted to a certain designated person or persons, such as his executors, who

shall act as umpire or arbitrator, and whose decision, if fairly and honestly made, will be final and binding on all parties interested.'

In the instant case the chosen umpires have construed the will so as to include within the estate devised and bequeathed to them in trust the income as well as the corpus of the estate. Since we do not feel justified in holding that the conclusion reached by the executors and trustees upon this point was not fairly and honestly made, and reasonably to be predicated upon the terms of the will taken as a whole, it follows that we are not authorized, under the authorities, to overrule their decision. Of course, if the decision made by the trustees evidenced a gross departure from the manifest intent of the testator as disclosed in the will, then it could not be said that such decision was the result of an honest endeavor to find that intent, as held in Pray et al. v. Belt et al., 1 Pet. (U.S.) 670, 7 L.Ed. 309. But we do not find such a condition to exist here, and are of the opinion that said conclusion reached by the trustees, upon a question involving the proper construction of the terms used by the testator, is one reasonably reached and deduced from the language used» (895-896).

(25) Couts v. Holland

= 48 Tex.Civ.App. 476 = 107 S.W. 913 (Tex.Civ.App. 1908)

«*When an arbiter honestly and in good faith exercises his power and passes upon a doubtful question, either of law or fact, his decision will not be revised by a court, notwithstanding the court, whose interposition is invoked, may think his interpretation is erroneous. Rule applied to the interpretation of a will by executors, in whom the power to interpret the same was vested by the terms of the will.*
By appellant's first assignment of error and the propositions thereunder the contention is made that, though the executors are made the arbiters to determine conclusively 'all doubtful questions of construction in the interpretation of the will,' still the question of the scope of the will — of what property it applied to and what property it did not apply to — is a matter not submitted to these arbiters by the testator, and is, therefore, a matter upon which their decision is not binding. At least a majority of us are unable to agree with this contention. We think the intent of the testator is clear that, wherever there was doubt as to the meaning of the instrument, that doubt was to be settled by the executors and by no one else. The power to determine what the will means, in its every part and provision, involves as well the power to decide what property it operates upon as it does the power to decide just what disposition is intended to be made of property clearly

within its operation. A doubtful question of construction may as easily arise in the one case as in the other» (481-482).

(26) Sullivan v. Nicoulin

= 113 Iowa 76 = 84 N.W. 978 (Kossuth Dist.Ct. 1901)

Special Administrators: lack power to submit to arbitration.

«*Under Code 1873, sections 2357-2360, providing that special administrators may do all needful acts to collect the property of the deceased, under direction of the court, but shall take no steps as to allowing claims against the estate, a special administrator has no power to submit such claims to arbitration.*

After Plumley's death, pending the probate of his will, E. H. Clarke was appointed special administrator, and while acting in that capacity, and without the order or approval of court, entered into an agreement with the defendant to submit to arbitration, among other things, whether anything should he allowed the estate for the plastering, and, if so, what amount, and also what amount of damages defendant had suffered by reason of the work not being properly done. The arbitrators found that the estate should recover nothing, and defendant be allowed $75 as damages. The court, in sustaining a demurrer to a division of the answer setting up these facts, held that the special administrator was without authority to enter into such an agreement. No doubt executors and administrators at common law had the power to submit controversies affecting estates to arbitration. Wood v. Tunnicliff, 74 N. Y. 38; Hutchinson v. Johnson, 12 Conn. 376 (30 Am. Dec. 622) and note; 2 Woerner, Administration section 327. As the award was of no judicial force, an action thereon being necessary to give it effect, and as the executor or administrator, though acting in good faith, was still liable for any difference between the award and the amount recoverable at law, there was little inducement to arbitration, and it was not looked upon with favor. In view of the specific provisions of our Code, and especially section 3344, authorizing the reference of 'claims against an estate and counterclaims hereto,' in the discretion of the court, to one or more referees, whose decision shall be final, it may well be doubted whether, in this state, an administrator or executor, without the court's approval, lies any power to so submit such, controversies. See Reitzell v. Miller, 25 Ill. 53; Yarborough v. Leggett, 14 Tex. 679. Even more limited are the powers of a special administrator. Tie is simply 'to collect and preserve the property of the deceased,' and for this purpose 'may do all needful acts, under the direction of the

court, but shall take no steps in relation to the allowance of claims against the estate.' Sections 2357, 2360, Code 1873. So that any action of the special administrator relating to the-- allowance of the claim of defendant for damages, save as a: mere set off, was utterly void. But nothing is claimed for this, as the arbitration of the administrator's cause of action only is pleaded in bar. That a special administrator may maintain actions appears from Masterson v. Brown, 51 and, Iowa, 446. This is incident 'to the duty of collecting preserving the property.' Otherwise, indebtedness to the estate might be lost, through the running of the statute of' limitations and other causes. Such was the rule with respect to the powers of an administrator pendente lite at the common law. Kaminer v. Hope, 9 S. O. 258. See 2 Libby v. Cobb, 76 Me. 471. From this, however, it does not follow that he may enter into a contract for arbitration. In the first place, such an agreement is not essential to the performance of his duties; and, in the next, he has no such interest in the estate as will permit of his so doing. The right of general administrators to arbitrate is founded upon their legal title or interest in the assets of deceased, their power of disposition, and their authority to adjust and settle claims. But the special administrator, though an officer of the court, is not vested with any of these powers. His authority is no more than that of an agent. Long v. Burnett, 13 Iowa, 33. And even a general agent, without express authority, may not submit to arbitration. v. Emmons, 29 v. 12; Trout Ill.433; Scarborough Reynolds, Ala. 252» (78-79).

(27) In re Reilly's Estate

= 200 Pa. 288 = 49 A. 939 (Sup.Ct. 1901)

«The twenty-first clause is: 'My executors are to define the provisions of this, my will, and their decision shall be final and conclusive upon all matters in it ...' ... It follows, therefore, that since by the twelfth clause it clearly appears that testator intended to sever the product from its source, disposing of the income annually, and after the death of the first taker, providing for the ultimate distribution of the principal a trust was sufficiently created to warrant the executor in retaining the fund for the purposes named».

(28) Estate of Carpenter

= 127 Cal. 582 = 60 P. 162 (Sup.Ct. 1900)

Contest of Will — Arbitration — Estoppel of Proponents.— The matter of the contest of a will cannot be submitted to arbitration, and the proponents of the will cannot he estopped by an award thereunder to insist upon the probate of the will, especially where the' principal beneficiary under the will is a minor, and the arbitrator is to make his award without evidence, and to determine from his own judgment what is a reasonable, just, and equitable amount to be set over to the contestants by the beneficiaries under the will

«The reference to the documents is not sufficient to warrant our considering them, but, if it were, it is quite plain that the matter of the contest cannot be submitted to arbitration. Tire matter of the probate of a will is a proceeding in rem 'binding on the whole world. A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy. There are many other reasons why this submission cannot be sustained. The principal beneficiary under the will, being a minor, was not bound by it. The terms of the agreement itself are contradictory and absurd. Frank T. Baldwin is to arbitrate the matter, and to get his information as he pleases, neither party having a right to submit any evidence to him. He is to determine 'what, under all the circumstances of the case, is a reasonable, just, and equitable amount or portion of said estate, to be set over to said contestants in full for all claims of each and every of them.' He must fix the amount in money they are to receive, and ascertain the value of the land so the proponents can pay in money or land, and the proponents have five days after the award to determine whether they will pay in money or land» (585-586).

(29) Johnson's Appeal

= 71 Conn. 590 = 42 A. 662 = 1899 Conn. LEXIS 30 (Sup.Ct. 1899)

An executor or administrator, without any special authorization, may settle and discharge any claims the estate may have against others, and consequently he may compromise and settle doubtful or disputed claims of that kind, or may submit them to arbitration, but he does this subject always to the approval of the court of probate in passing upon his final account, and, so to speak, at his peril to a certain extent, while under 1895 Conn. Pub. Acts 83 he, in effect, gets this approval in advance of the act of settlement and compromise

«An executor or administrator, without any special authorization, may settle and discharge any claims the estate may have against others, and consequently he may compromise and settle doubtful or disputed claims of that kind, or may submit them to arbitration; Alling v. Munson, 2 Conn. 691; 3 Redfield on Wills, p. 236; Boyd v. Oglesby, 64 Va. 674, 23 Gratt. 674; but he does this subject always to the approval of the Court of Probate in passing upon his final account, and, so to speak, at his peril to a certain extent; while under the statute he, in effect, gets this approval in advance of the act of settlement and compromise, and this measure of protection the Superior Court has the power to give him in the present case» (595).

«Indeed, speaking generally, it may be said that the power of the representatives of others to submit claims to arbitration wherever such power exists at all, flows from the prior right to adjust and settle claims and institute and defend suits, as appears from the reasoning of the court in the cases of Hutchins v. Johnson, supra; Griswold v. North Stonington, 5 Conn. 367; Union v. Crawford, 19 id. 331; Mallory v. Huntington, 64 id. 88. If such representatives are held to have the lesser power to submit to arbitration, it is generally because they have the larger power to adjust, settle, and litigate» (596-597).

(30) District of Columbia v. Bailey

= 171 U.S. 161 = 18 S.Ct. 868 = 43 L.Ed. 118 (1898)

«It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. Wheatley v. Martin, 6 Leigh, 62; Wamsley v. Wamsley, 26 W. Va. 46; Wood v. Tunnicliff, 74 N. Y. 43. While, however, the agreement of the executor to a common-law submission was binding upon him, such a consent on his part did not protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was the voluntary act of the executor, and was not the equivalent of a judicial finding. 3 Williams, Ex'rs, p. 326, and authorities cited. So, also, the power of a municipal corporation to arbitrate ariss from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (Mun. Corp. [4th Ed.] § 478) » (172).

(31) Fairbanks v. Man

= 19 R.I. 499 = 34 A. 1112 (R.I. 1896)

“We do not wish to be understood as deciding that the point taken by the defendant's counsel, viz., that the payment was made in the exercise of the administrator's statutory power to compromise, (Pub. Stat. R.I. cap. 184, § 32,) is sustainable. The statute only authorizes an executor or administrator to compromise claims, "in the same manner and with the same effect as the testator or intestate might have done." This evidently limits the power to claims existing at the time of the decease of the testator or intestate.

As follows: SEC. 32. Executors and administrators may submit to arbitration or may adjust by compromise any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done” (503).

(32) Cogswell v. Railroad

= 68 N.H. 192 = 44 A. 293 (N.H. 1894)

“So the right of an administrator to submit to arbitration does not appear to ever have been denied. Bean v. Farnam, 6 Pick. 269, 272. In that case it was said: 'The general principle is, that every one having the capacity to contract, or to release his right, may make a submission to an award. If a less sum should be awarded in favor of the executor or administrator than he be entitled to recover at law, he might be held to account for the deficiency to the heirs, or other persons interested in the effects of the testator or intestate, but the award would be binding.' In Chadbourn v. Chadbourn, 9 Allen 173, it was held that this authority was not repealed or impaired by the statute empowering of probate to authorize executors and administrators to adjust by arbitration demands in favor of or against the estates by them represented; that 'the legislature intended only to give security and protection to these officers in the exercise of that authority with which they are clothed by the common law, and to relieve them from liability to have their acts . . . revised or set aside to their injury by those who were interested in the effects of the testator or intestate.'

The power of an administrator to submit to arbitration is said to be based upon the fact that he his power to prosecute or defend suits. Kendall v. Bates, 35 Me. 357; Eaton v. Cole, 1 Fairf. 137: Weston v. Stuart, 2 Fairf. 326. The award is binding against him in his fiduciary capacity (Wheatley v. Martin's Adm'r, 6

Leigh 62), and against the legatees or distributees and creditors of the estate. Strodes v. Patton, 1 Brock. 228" (193-194).

(33) Parker v. Prov. Stonington

= S.Co, 17 R.I. 376 = 22 A. 484 (R.I. 1891)

"The only question raised by the demurrer is, whether an executrix has the power to compromise and settle such a cause of action as is set out in the plaintiff's declaration, without the assent of the next of kin. Pub. Stat. R.I. cap. 184, § 32, provides as follows: 'Executors and administrators may submit to arbitration, or may adjust by compromise, any claims in favor of or against the estates by them represented, in the same manner and with the same effect as the testator or intestate might have done'" (379).

The power of an executor or administrator at common law to compromise, or submit to arbitration, disputed claims in favor of or against the estate which he represents, is undoubted. Chadbourn v. Chadbourn, 9 Allen, 173; Bean v. Farman, 6 Pick. 269; Chase v. Bradley, 26 Me. 531; Chouteau v. Suydam, 21 N.Y. 179, 184; Wood v. Tunnicliff, 74 N.Y. 38; Murray v. Blatchford, 1 Wend. 583, 616; Rogers v. Hand, 39 N.J. Eq. 270, 271, and note.

It is also well settled that a statute like the one under consideration does not change the power of the executor or administrator existing at common law, but simply reinforces and affirms the same. If, in the exercise of this power, the executor or administrator, by reason of negligence, or any serious error in judgment, obtains a less sum than he would clearly be entitled to recover at law, he may be held to be guilty of a devastavit, and be required to make up the loss out of his own estate, but still the compromise, if made in good faith, would be binding upon the parties thereto" (380-381).

(34) Lassiter v. Upchurch

= 107 N.C. 411 = 12 S.E. 63 (N.C. 1890)

"2. An agreement to arbitrate, and the award, under section 1426 of The Code, between the claimant and the administrator, where there is fraud or collusion, is binding upon the heirs at law, even though they were not parties to the proceedings.

3. In a proceeding by an administrator to make assets to pay the debts of the estate, heard upon issue raised an appeal from the clerk of the Superior Court, the defendant's heirs at law offered to show that a claim adjudged to be a debt against the estate by the arbitrators to whom the matter had been referred under section 1426 of The Code, was not, in fact, a valid debt: Held, (1) that the finding of the arbitrators was binding upon the heirs, though they were not parties to the proceedings; (2) it is equivalent to a judgment; (3) such proceedings could only be impeached for fraud or collusion" (411)

(35) Stahl v. Brown

= 72 Iowa 720, 32 N.W. 105 (Sup.Ct. 1887)

«*Estates of Decedents: power op heirs to bind administrator. The heirs of an estate have no power, before the appointment of the administrator, to create by agreement a charge on the personal estate, which will be binding upon the administrator when appointed. And so, where the heirs agreed with one having a claim against the estate for supporting the decedent to submit the claim to arbitrators, held that the award of the arbitrators could not be enforced against the administrator subsequently appointed, because the personal estate descended to the administrator, and not to the heirs; (Haynes v. Hams 38 Iowa 516, and Phinney v. Warren, 52 Id., 333).*

There is no stipulation in the agreement for the submission of the claim to the arbitrators as to the fund out of which the award should be paid; but the understanding undoubtedly was that it should be paid out of the assets of the estate. There is no claim that the heirs became individually liable for the amount; nor is there any stipulation in the contract that they should pay the amount; and plaintiff does not ask for any relief of that character against them. Her claim, if she has any, is against the estate; and the only assets of the estate, as we understand, is certain personal property. By the arbitration, then, the parties sought to have determined the amount which was due to plaintiff from the estate, and to appropriate an amount of its assets sufficient for the payment of the amount which should be awarded to that object. But the heirs had no power to do that. The estate had not yet been administered upon. But the time within which, under the statute, administration might be granted, had not yet expired. It will be observed, also, that it was not stipulated in the agreement that the estate should not be administered upon, nor that it was entered into for the purpose of avoiding the cost of administration; and we do not determine the question whether the heirs could have pre-

cluded administration by an agreement to that effect, for no such question arises in the case. When the agreement was signed, the estate was subject to be administered upon; and while it was in that condition the heirs had no power to make any disposition of the assets. Neither had they the power to bind it by any contract with reference to the establishment or allowance of claims against it. The heirs take no title to or ownership of the personal property of the estate while it is subject to administration; but it descends to the administrator upon bis appointment. Haynes v. Harris, 33 Iowa 516; Phinney v. Warren, 52 Id., 333. … If the heirs could, in advance of administration, bind the administrator by submitting claims against the estate to arbitration, it would be an easy matter in any case to secure the allowance of doubtful or even fraudulent claims, and the rights and interests of other claimants might by that means be greatly prejudiced. And it can make no difference that in this case the estate is sufficient to pay all claims against it, including the one in question, so that no interests, except those of the heirs, are affected by the proceeding. The question is whether the administrator can be bound by the action of the heirs with reference to the claim prior to his appointment, and we think it entirely clear that he cannot be so bound» (722-723).

(36) Moore v. Harper

= 27 W.Va. 362 (W.Va.Sup.Ct. 1886)

A testator provides in his will that a certain person therein named shall decide all questions, which may arise among his devisees and legatees in relation to the construction of his will, and that the written opinion of such person shall be final ... That the written opinion of such person, if made without fraud and corruption, will be treated by the courts as final and conclusive of the matters decided as between the devisees and legatees affected thereby

Arbitration Clause in the last will: «And should any difficulty occur in the construction of this will or among the legatees or devisees ... it is my will that said question be submitted to William Skeen, whose written opinion shall be final between them, of if ... Skeen's opinion can not be had, I authorize the circuit judge to appoint three persons as arbitrators, whose opinion shall be final of any or all such questions ... » (363).

Case: «The power of the testator to provide in his will the mode and manner of its interpretation and the force and effect of such interpretation, does not seem to have been questioned in this suit—it has certainly not been controverted by the proceedings or argued in this Court. No authorities have been referred to, nor

have I deemed it necessary to look for precedents, as the question seems to me to be so entirely analogous to contracts and other writings in which provision is made for their interpretation. In such cases, the right to prescribe the mode of interpretation and the effect to be given to it has, 1 believe, never been questioned. The effect of such a provision is to make the person appointed to interpret the writing, or settle controversies growing out of it, an arbitrator chosen by the parties, and his determination may be made final or otherwise as the parties shall provide in the writing. I can see no reason why the same rule should not apply to a will. Of course a will is not an agreement between two or more contracting parties, but it is certainly no less binding upon the parties who take a benefit under it than if they had contracted with the testator for that benefit. The testator has full dominion over his property with the absolute right, subject only to the limitations fixed by law, to do with and dispose of it in any manner or to whomever his will or caprice may suggest. Within the rules of law, he may subject it to any limitation, restriction or condition he chooses, and the devisee or legatee, if he elects to take under the will, will be bound to respect and observe the same. It, therefore, seems to me entirely clear that a testator has the power not only to appoint a person or arbitrator to interpret and settle difficulties among the devisees and legatees growing out of the dispositions made by the will, but that he has the right to make the decision of such arbiter, if made without fraud or corruption, final and conclusive upon the beneficiaries under the will» (373-374).

(37) Wamsley v. Wamsley

= 26 W.Va. 45 (Sup.Ct. 1885)

An administrator, or other fiduciary, has authority to submit to arbitration any suit or matter of controversy touching the estate or property of his intestate or beneficiary without having first obtained the permission of the circuit court to do so in the manner prescribed by section five of chapter sixty-three, Acts 1882 ; and an award made pursuant to such submission will not be set aside merely because the submission was made by the fiduciary without a compliance with the directions of said statute.

«By an agreement in writing entered into between Jacob W. Wamsley and Samuel B. Wamsley, dated September 13, 1883, they agreed to submit to the determination of two arbitrators and their umpire a controversy then existing between the former as administrator of Andrew M. Wamsley, deceased, and the said Samuel B. Wamsley and providing therein, that the award when made should be returned

to and entered as the judgment of the circuit court of Bandolph- county. The arbitrators and umpire met and made their award, by which they awarded, that the said Jacob W. Wamsley as administrator of Andrew W. Wamsley, deceased, should recover from the said Samuel B. Wamsley $841.50 with interest, &c.» (45).

«The said statute, in substance, provides, that 'a personal representative or other fiduciary may file his petition in the circuit court asking permission of the court to submit to arbitration any suit or matter of controversy touching the estate or property controlled by him as such representative or fiduciary, that he shall state the facts in his petition, upon which he seeks such permission, and the court may grant or refuse the prayer of the petitioner. If the petition is filed in good faith and the prayer granted, an order shall be made showing the granting of such permission- and be entered on the chancery order-book of the court, and the award made in any such case shall be binding upon all the parties in interest and maybe entered as the judgment of the court, as awards in other cases; and if the petition is filed in good faith, and there was no fault or neglect on the part of the fiduciary, he shall not be responsible for any loss sustained by an award-adverse to the interests of the estate which he represents. Section 5, chapter 63, Acts 1882, p. 124. The court of appeals of Virginia in Wheatley v. Martin, 6 Leigh 62, decided that it is competent for an executor or-administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor or a creditor;, that this results necessarily from the lull dominion which the law gives him over the assets and the full discretion which if vests in him for the settlement and liquidation of all claims due to and from the estate. And so far as relates to debtors and creditors, parties to the award, it is binding upon the legatees and distributees in the same manner, as if the adjustment had been made by the executor or administrator without an award, in virtue of the general powers belonging to his fiduciary character. This is simply the announcement of the common law rule, that a fiduciary as such might submit to arbitration matters affecting the estate or trust represented by him; and that an award made in pursuance of such submission would be binding upon the parties to the same extent that it would be if made between parties acting in their individual rights. 3 Leonard 53; 1 Lomax on Ex'rs. (1st Ed.) 356.

The same rule is announced in Nelson v. Cornwell, 11 Grat. 724, decided in 1854, but upon a controversy, which arose prior to the enactment' of section five, chapter one hundred and fifty-three of the Code of 1849, and therefore said statute had no effect upon said decision.

In both of these Virginia cases the court held, that notwithstanding the administrator had the right to submit to arbitration any claim for or against his intestate's estate, 'and an award made thereon was binding, still, if injustice was thereby done to, or loss' sustained by such estate, the administrator may be chargeable therefor as for a devastavit.

To relieve the apparent harshness of this rule in its operation upon the responsibility of the fiduciary, the statute-law was amended by the Code of 1849, by declaring that: "No such fiduciary shall be responsible for any loss sustained by an award adverse to the interests of his ward, insane person or beneficiary under any such trust, unless it was caused by his fault or neglect." Code of Va., sec. 5, chap. 153.

This statute was seemingly too liberal, in the opinion of the legislature, in relieving the fiduciary from responsibility, and it therefore amended it by adopting the statute of 1882, before mentioned which requires the fiduciary to act not only without fault or neglect in order to excuse himself .from responsibility for an adverse award, but it requires him,-in good faith, to file a petition, stating the facts to the circuit court and then obtaining the permission of that court to submit any fiduciary claim to arbitration, before he can claim exemption from liability for an adverse award even though it was not 'caused by his fault or neglect.' This statute, neither expressly nor by fair implication, manifests any purpose to alter the common law rule as to the validity or binding effect of an award made without complying with the directions of the statute; and, therefore, the reasonable conclusion is, that the statute of 1849 was enacted to relieve the responsibility of the fiduciary in cases of an adverse award, and that the statute of 1882, was intended to qualify and add certain prerequisites as conditions, upon which such release from responsibility should be granted; and that neither of them was intended to affect the validity of the award, or to take away the authority of the fiduciary to submit any matter to arbitration without doing so in the manner prescribed by the said statute of 1882. Tennant v. Divine, 24 W. Va. 887, 891» (46-48).

(38) Tennant v. Divine

= 24 W.Va. 387 (Sup.Ct. 1884)

«Emrod Tennant, as administrator of John Divine, deceased, and Joseph E. Divine entered into a written agreement, dated May 25, 1882, in which after reciting

that Tenant as such administrator ‘claims an account against the said Joseph E. Divine’ which is unsettled and contested by said Divine, and the parties desiring to have the same amicably adjusted and settled, states that, they, for that purpose, ‘agree to refer the said account and matters in controversy touching the same, including any accounts the said Divine may have against the estate of said John Divine, to the arbitrament and award of Andrew. J. Morris and John E. Price, and a third person to be selected by them, whose award, or an award of a majority of them, shall be final and conclusive on the parties, and they further agree that said award shall be entered up in the circuit court of Monongalia county, West Virginia, as the judgment of said court’» (388).

«By the common law a fiduciary as such might submit to arbitration and the trust represented by him was bound thereby - 3 Leonard 53. But it injustice should be done the trust-estate by such submission, the fiduciary was held responsible as for a devastavit—Wheatley v. Martin, 6 Leigh 62; Nelson v. Cornwell, 11 Gratt. 724» (391).

(39) American Bd. of Com'rs of Foreign Missions v. Ferry

= 15 F. 696 (C.C.W.D.Mich. 1883)

Wills - testator may designate an umpire to construe his will - when such umpire's decision final

«A testator may in his will designate his executor an umpire, and invest him with power to construe his will and determine every doubtful question that may arise touching the testator's intentions; and if such umpire exercises the power honestly and in good faith, his decisions will not be revised by a court, notwithstanding the court may think the same are erroneous» (696).

(40) Wood v. Tunnicliff

= 74 N.Y. 38 (N.Y.Ct.App. 1878)

«Passing these preliminary questions, we come to the consideration of the principal question in the case, and that is as to the power of executors or administrators to enter into an arbitration in right of their testators or intestates. It is claimed by the defendants' counsel that no such power exists, and that it was a condition precedent to any liability of the defendants upon their promise that there should be a valid award.

Without considering whether, if the award was invalid for the reason stated, it would constitute a defense to this action, we think the assumption that executors or administrators cannot be parties to a submission to arbitration in right of their testators or intestates is not well founded, and that they have the power to submit to arbitration disputed claims or demands in favor of or against the estate they represent. That this power exists at common law is well settled (Bac. Ab., art. C; Wilkins v. Mitchel, 1 Lord Ray., 348; Barry v. Rush, 1 T.R., 691; Schoonmaker v. Roosa, 17 J.R., 301; Bean v. Farnam, 6 Pick., 269; Wheatley v. Martin, 6 Leigh., 62; Alling v. Munson, 2 Conn., 691; 2 Williams on Executors, 1800; Russell on Arb., 36; Watson on Arb., 74; Caldwell on Arb., 33.).

The right of executors or administrators to arbitrate is founded upon their legal title to the assets of the deceased, their power of disposition, and their authority to adjust and settle claims in which the estate they represent is interested. They will be bound by an award made pursuant to the submission, the same as other persons, although if the award is to the prejudice of the estate, as, for example, if the arbitrators award to an executor less than is due, he will it is said, be answerable to the heirs or other persons interested in the estate, as for a devastavit. (Bac. Abr., art. C.; Watson on Arb., 74; 6 Leigh., supra.) It is claimed, however, that the common law power of executors or administrators to submit claims against the estate to arbitration is taken away by the provisions of the Revised Statutes, relating to the reference of disputed claims against the estate of decedents. (2 R.S., 89, § 36-39.) It is to be observed in the first place that the common law power of executors or administrators to arbitrate is not taken away by any express provision of law; and if it is abrogated it must be for the reason that the statute relating to the reference of disputed claims against estates of deceased persons, and the system established thereby, is repugnant to and inconsistent with the continuance of the common law right. It is a familiar rule that a statute will not be construed as changing the common law unless the intention, appears from express words or by implication. There is not only an absence of any expression of legislative intention to take away the right of executors or administrators to enter into an arbitration in the statute relating to the powers and duties of executors or administrators, but the system regulating the settlement of disputed claims by reference under the statute is entirely consistent with the existence of this power. The statute was designed to provide an easy, prompt and inexpensive method of securing an adjudication, having the force of a judgment, upon the validity of claims made against the estates of decedents. But neither party is bound to refer a controversy under the statute. The executor or administrator may refuse to refer, and so may the claimant. The courts are not ousted of their jurisdiction,

and the claimant may bring his action to have his claim established in the ordinary way. The only consequence of his refusal to refer is to put the short statute of limitation in operation, and to prevent his recovering costs in an action against the executor or administrator, brought to recover the demand.

The settlement of disputes by arbitration is encouraged. It is generally a safe and convenient method of composing disputes and controversies. The general statute of arbitrations (2 R.S., 540) enacts that "all persons, except infants and married women and persons of unsound mind," may submit to arbitration any controversy which might be the subject of an action at law or suit in equity, with certain exceptions of claims to real estate. The personal representative of a deceased person, and a claimant, having a demand against the estate of a decedent which is disputed, are, in respect to such claim, within this general statute, and the right of executors or administrators to arbitrate is not excepted, but is included in its language. The exception claimed, if it exists, would naturally have been introduced into this statute, and the omission to insert it is of some moment in determining the question before us. But it is to be further observed that the sections of the statute, providing for the reference of disputed claims, only embrace one class of claims arising in the course of administration of the estates of decedents, viz., claims against the estate. Claims in favor of the estate are not embraced, and as to these the statute provisions for a reference have no application. It can admit of no doubt that, in respect to claims in favor of the estate, the common law power of arbitration still exists. If it was the intention of the Legislature to deprive executors or administrators of the power to arbitrate claims against the estate, no reason is apparent why the power in respect to claims in favor of the estate should not also have been abrogated. The statute has not, we think, in either case, changed the common law. It provides a special mode of adjudicating a certain class of claims, without the formal proceedings of an action, and leaves it to the option of the parties whether they will avail themselves of its provisions, and was not, we think, intended to restrict or exclude the common law right of arbitration. This question has never been decided in this State. In Merritt v. Thompson (27 N.Y., 225), the power of an executor or administrator to enter into an arbitration was assumed both by counsel and by the court, although the question was not considered. In Tucker v. Tucker (4 Keyes, 136), the point was not involved. The court say that the proceeding in question there, was not intended to be and could not be considered an arbitration. In Chouteau v. Suydam (21 N.Y., 179) it was held that the statute of 1847, which authorized executors to compromise claims with the approval of the surrogate, did not take away their common law right to compromise without such approval; and in Chadbourn v. Chadbourn

(9 Allen, 173) it was held that the common law right of an administrator to submit to arbitration was not affected by a Massachusetts statute, which empowered courts of probate to authorize executors or administrators to adjust by arbitration demands in favor of or against the estates of decedents.

An award made against the estate under a submission by executors or administrators will ascertain and liquidate the claim submitted, but it will confer no right upon the party in whose favor it is made, as against other creditors, to priority of payment out of the assets. The statute regulates the rights of creditors to distribution, and an award of payment absolutely, while it may bind the executors or administrators, personally, cannot prejudice the right of other creditors, having debts of equal degree, to share in the distribution of the decedent's estate. The authorities tend to establish that executors are personally bound by a covenant to abide by and perform an award contained in a submission entered into by them although in form they covenanted as executors, unless from the other parts of the submission it appears that the intention was to bind themselves only to pay out of the assets in due course of administration. (Barry v. Rush, 1 Term, 691; Worthington v. Barlow, 7 id., 453; Love v. Honeybourne, 4 Dowling Ryland, 814; Ferrin v. Myrick, 41 N.Y., 315; Summer v. Williams, 8 Mass., 162; Childs v. Monins, 2 B. Bing., 460; Ring v. Thorn, 1 Term, 489.)» (42-46).

(41) Wait v. Huntington

= 40 Conn. 9, 1873 WL 1382 (Conn.Sup.Ct. 1873)

«The court upheld testator's power to condition devises with following provision: 'Should any questions arise as to the meaning of this instrument, I direct that the distribution of my estate shall be made to such persons and associations as my executors shall determine to be my intended legatees and devisees, and their construction of my will shall be binding on all parties interested'» (9).

(42) Manice v. Manice

= 43 N.Y. 303 = 1871 N.Y. Lexis 8, 26 (N.Y.Ct.App. 1871)

Last will: «I herby nominate ... executors and trustees of this my last will and testament; authorizing and empowering them ... to submit to arbitration any and all disputes or controversies which shall or may arise in the settlement of my estate».

(43) Nelson's Adm'r v. Cornwell

= 52 Va. 724 = 11 Grat. 748 (1854)

Executors and Administrators - Submission of Matter to Arbitration - Devastavit: An executor though he has authority to submit a matter to arbitration, yet is responsible as for a devastavit, if by the award his testator's estate is injured

«Executors and Administrators—Submission of Matter to Arbitration – Devastavit - in Wamsley v. Wamsley, 26 W. Va. 46, it is said : 'The court of appeal of Virginia in Wheatley v. Martin, 6 Leigh 62, decided that it is competent for an executor or administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor or a creditor; that this results necessarily from the full dominion which the gives law him over the assets and the full discretion which it vests in him for the settlement and liquidation of all claims due to and from the estate. And so far as relates to debtors and creditors, parties to the award, it is binding upon the legatees and distributees in the same manner as if the adjustment had been made by the executor or administrator without an award, in virtue of the general powers belonging to his fiduciary character. This is simply the announcement of the common-law rule, that a fiduciary as such might submit to arbitration matters affecting the estate or trust represented by him; and that an award made in pursuance of such submission would he binding upon parties to same extent that it would be if made between in their individual 3 Leonard 53; 1 Lomax on Ex'rs (1st Ed.) 356.

The same rule is announced in Nelson v. Cornwell, 11 Gratt. 724, decided in 1854, but upon a controversy, which arose prior to the enactment of section five, chapter one hundred and fifty-three of the Code of 1849, and therefore said statute had no effect upon said decision.

In both of these Virginia cases the court held, that notwithstanding the administrator had the right to submit to arbitration any claim for or against his intestate's estate, and an award made thereon was binding, still, if injustice was thereby done to, or loss sustained by such estate, the administrator may be chargeable therefor as for a devastavit.

To relieve the apparent harshness of this rule in its operation upon the responsibility of the fiduciary, the statute-law was amended by the Code of 1849, by declaring that: 'No such fiduciary shall be responsible for any loss sustained by an award adverse to the interest of his ward, insane person or beneficiary under any such trust, unless it was caused by his fault or neglect. Code of Va., sec. 5, chap. 153.

This statute was seemingly too liberal, in the opinion of the legislature, in relieving the fiduciary from responsibility, and it therefore amended it by adopting the statute of 1882 (sec. 5, ch. 63, Acts 1882), before mentioned, which requires the fiduciary to act not only without fault or neglect in order to excuse himself from responsibility for an adverse award, but it requires him, in good faith, to file a petition, stating the facts to the circuit court and then obtaining the permission of that court to submit any fiduciary claim to arbitration, before he can claim exemption from liability for an adverse award even though it was not 'caused by his fault or neglect.' See also, Tennant v. Divine, 24 W. Va. 391; Brewer v. Hutton. 45 W. Va. 116, 30 S. E. Rep. 85, both cases citing and approving the principal case, See monographic note on 'Executors and Administrators'; also, monographic note on 'Arbitration and Award'».

(44) Hutchins v. Johnson

= 12 Conn. 376 (Sup.Ct. 1837)

A conservator may submit to arbitration the claims of his ward.

«That a conservator has power to submit to arbitration. An executor or administrator has this power. Ailing, admr. v. Munson, 2 Conn. Rep. 691. Cofin v. Cottle, 4 Pick. 454. Bean v. Farnam & al. 6 Pick. 269. Dickey v. Sleeper, 13 Mass. Rep. 244. A conservator has unlimited controul over all the estate, except the power of selling the real estate. The executor or administrator has no greater controul. That it was the design of the legislature to give the conservator this controul, is obvious from the provision requiring him to return a true and perfect inventory and to give bond. Why return an inventory, if the property be not entrusted to him, and if he have not a right to the possession and controul of it? Why give bond, if he have no power, by reason of his controul over it, to waste and destroy it?» (380).

(45) Wheatley v. Martin's Adm'r

= 33 Va. 62 = 6 Leigh 62 (Va.Sup.Ct. 1835)

«Executors and Administrators – Authority- Submission to Arbitration. - Although an executor has a right to submit a matter to arbitration, yet if injustice should be done the trust estate by such submission, the executor is responsible as for a devastavit. The principal case is cited, in support of this proposition, in Nelson v. Cornwell, 11 Gratt. 748; Tennant v. Divine, 24 W. Va. 391; Wamsley

v. Wamsley, 26 W. Va. 46, 47. The principal case is cited with approvalin Brewer v. Hutton, 45 W. Va. 116, 30 S. E. Rep. 85. See footnote to Nelson v. Cornwell, 11 Gratt. 724; and monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

In District of Columbia v. Bailey, 18 Sup. Ct. Rep. 872, the court said: "It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. Wheatley v. Martin, 6 Leigh 62; Wamsley v. Wamsley, 26 W. Va. 46; Wood v. Tunnicliff, 74 N. Y. 43.

It is competent to an executor or administrator to submit to arbitration, any controversy concerning the estate, whether the estate claims to be a debtor or' creditor. This results, necessarily, from the full dominion which the law gives him over the assets, and the full discretion which it vests in him for the settlement and liquidation of all claims due to or from the estate. And although a mere submission to arbitration will not bind the executor or administrator, personally, to pay the sum awarded out of his own estate, yet the award is binding on him in his fiduciary character, and consequently on the assets of the estate which he represents: Pearson v. Henry, 5 T. R. 6; Lyle v. Rodgers, 5 Wheat. 394. And, so far as relates to debtors and creditors, parties to the award, it is binding on legatees and distributees, in the same manner, as if the adjustment and liquidation had been made by the executor or administrator, without an award, in virtue of the general powers belonging to his fiduciary character. If, indeed, injury has been done to legatees and distributees, by an award giving too much against the estate, or too little in its favour, that injury may be redressed; but it can be done only by charging it as a devastavit by the executor or administrator, on the settlement of his accounts. I allude to cases free from fraud; for we know that fraud will vitiate every transaction. In this case, no fraud is alleged or proved: there is no misbehaviour or partiality proved in the arbitrators; and the award, on its face, is free from objection. The decree must be affirmed» (71).

(46) Pray v. Belt

= 26 U.S. 670 = 7 L. Ed. 309, 1 Pet. 670 = 1828 U.S. LEXIS 437 (1828)

«The executors ... contend, that their testator has submitted the construction of his will, absolutely, to their judgment, and that their decision against the claim of the legatees, is final ... » (676).

«The acting executors, and executrix, are empowered, in all cases of dispute or contention, to determine what is the intention of the testator; and their decision is declared to be final.

This power is given, in the apprehension that he may have committed error. It is to be exercised in order to ascertain his intent in such cases. It certainly does not include the power of altering the will. It cannot be contended, that this clause would protect the executors in refusing to pay legacies altogether, or in paying to A, a legacy bequeathed to B, or in any other plain deviation from the will. In such case, what would be the remedy of the injured party? Is he concluded by the decision of the executors, or may he resort to a Court of Justice? But one answer can be given to these questions. So gross a departure from the manifest intent of the testator, cannot be the result of an honest endeavour to find that intent; and must be considered as a fraudulent exercise of a power, given for the purpose of preserving peace, and preventing expensive and frivolous litigation.

But who is to determine what is a gross misconstruction of the will, if the party who conceives himself injured may not submit his case to a Court of Justice? And if his case may be brought before a Court, must not that Court construe the will rightly?» (680).

(47) Alling v. Munson

= 2 Conn. 691 (Sup.Ct. 1818)

An administrator may submit a claim of his intestate to arbitration; and may, in that capacity, maintain a suit on the award

«I am of opinion, that the authorities clearly establish the position, that an administrator can submit a claim of the deceased, whom he represents, to arbitration and that he, can, in that capacity, maintain ⅞ suit on the award» (694).

(48) Rogers v. Cruger

= 7 Johns. 557 = 1808 N.Y. Lexis 184 (N.Y. 1808)

Last will: I hereby nominate, constitute and appoint my beloved wife, Ann Cruger, executrix, and my respected friends, Robert Watts, John Watts and Cornelius Stevenson, all of the city of New York, Esqrs., executors of this my last will and testament" (4).

«I do hereby give them full power ... to submit to arbitration, compromise, and settle all and every or any differences and disputes that may arise in and about the execution of this my last will and testament» (6).

C. Literatur / Rechtsprechung zu Stiftungen und Trusts

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