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LAST WILL AND ARBITRATION IN SPAIN: A CRITICAL OVERVIEW ON SPANISH ARBITRATION ACT

The art. 10 of the Spanish Arbitration Act regulates expressly the testamentary arbitration. The paper is dedicated to interpreting specifically the phrase "herederos no forzosos o legatarios" (no-forced heirs or legatees) of that disposition and, at the same time, it wants to give some instructions to draft properly a testamentary arbitration disposition that does not suffer of pathologies at the time of its application.

Key words: *arbitration, last will, reserved shares, forced heirs, testamentary arbitration*

INTRODUCTION AND APPROACH

The art. 10 of the Spanish Law of Arbitration (LA)[1] states that "Arbitration established by testamentary disposition shall also be valid for resolving disputes

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[1] Ley No. 60/2003, of 23 December, *Boletín Oficial del Estado*, No. 309, of 26th December.

among non-forced heirs or legatees regarding matters related to the distribution or administration of the estate".[2] So, it states expressly the possibility for the testator to prevent an arbitration proceeding relating to his estate, to be based on a unilateral disposition of the testator.[3]

Although legal doctrine has been devoted to interpreting testamentary arbitration[4], there is not an excessive number of court rulings on testamentary arbitration. In fact, it is the judges themselves who acknowledge the "virtually nonexistent jurisprudential treatment[5]" regarding the scope of application of Article 10 of the Law on Arbitration, and they use this as justification for considering that the defendant may not be ordered to bear the costs of the trial[6].

The fact that there is no copious cases on the matter does not mean that it is not of considerable importance in the legal field of reference, especially given that it is used to find solutions in the extrajudicial phase, although it is necessary to

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[2] Art. 10 LA, op. cit. Literally: "también será válido el arbitraje instituido por disposición testamentaria para solucionar diferencias entre herederos no forzosos o legatarios por cuestiones relativas a la distribución o administración de la herencia."

[3] In this sense this disposition has some peculiarities see: Rafael Colina Garea, "El negocio jurídico constitutivo del arbitraje testamentario", *Los nuevos retos del arbitraje en una sociedad globalizada* (dir. por A.-J. Pérez-Cruz Martín: coord. por A. Neira Pena), Thomson Reuters-Civitas, Madrid, 2011, 194.

[4] For the state of art see Alfredo Ferrante, "El Arbitraje Testamentario del art. 10 de la Ley 60/2003: necesidad de nuevo enfoque legislativo", *Sucesión testada. Voluntad del causante e interpretación* (dir. por Marta Carballo Fidalgo, Marta Madriñán Vázquez), Thomson Reuters Aranzadi, Cizur Menor, 2025, in print.

[5] The nullity of the testamentary disposition had been requested, but the appeal was dismissed: STSJ Madrid No. 6/2021, de 2 marzo 2021, 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2021:23. In this case, the existence of a necessary passive joint litigation was upheld with the Notary who executed the will and the Institution to which the arbitration had been referred; another aspect was the inadequacy of the amount, both aspects of which were rejected. Reference is made more broadly to the doctrine that has commented on the judgment in: Rafael Hinojosa Segovia, "Estimación de la anulación de un laudo arbitral por haber resuelto el árbitro cuestiones no sometibles en un arbitraje testamentario. Sentencia del Tribunal Superior de Justicia de Extremadura de 1 de febrero de 2021", *La Ley: Mediación y Arbitraje*, No. 8, julio–septiembre 2021, 445 ff.; Ignacio Gomá Lazón, "Improcedencia de la invalidez de la cláusula de sumisión a arbitraje predispuesto en testamento. Sentencia del Tribunal Superior de Justicia de Madrid CP 1ª 2 de marzo de 2021", *La Ley: Mediación y Arbitraje*, No. 8, julio–septiembre 2021, 474 ff.

[6] Thus, it is established that "there is no reason to agree to the express award of costs, despite having dismissed the claim in its entirety, because it is understood that the case presents serious legal doubts (art. 394.1 Spanish Civil Procedural Act)": STSJ Madrid, No. 6/2021, op. cit. See also Rafael Hinojosa Segovia, "El arbitraje testamentario en las Leyes de Arbitraje de 22 de diciembre de 1953 y 36/1988, de 5 de diciembre", *El notario del siglo XXI: revista del Colegio Notarial de Madrid*, No. 100, 2021, 20 ff.

promote its application, an impulse which, however, is not encouraged by the cryptic wording of the current regulations.

For this reason, the aim of this paper is not to provide an overview or a study of all aspects of the institution, but rather to highlight some of those that are considered relevant or critical.

Thus, first of all, a better understanding of the clause "non-forced heirs or legatees" ("heredero no forzoso o legatarios") and specifically – and *a contrario* – of the role played in this context by the reserved share[7] and the forced heirs, is desirable. It is also appropriate to identify some useful parameters for the drafting of the arbitral testamentary disposition and to validate its independence and autonomy.

THE RESERVED SHARE: A POTENTIALLY RELATIVE CONCEPT. TESTAMENTARY ARBITRATION: A CLEAR CONCEPT THAT MUST BE ADEQUATELY REFLECTED IN AN APPROPRIATE DISPOSITION

There is no doubt that family law and inheritance law have a close relationship, the most obvious manifestation of which is the protection of the reserved share. However, in this context, personal law also comes into play, since the testator has the freedom to testate his estate. In this context, in the model that traditionally characterises continental law countries – albeit with some differences[8] – the reserved share acts, in part, as a brake on the freedom to testate, which is not the case in the common law model, which is based, rather than on a mechanism of the reserved share, on a system based on the trust.[9]

This last aspect can create problems in the case of successions where private international law is involved.[10] Thus, the reserved share – depending on the context

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[7] In this paper legitime and reserved share are used as synonyms.

[8] See schematically Marius J. De Waal, "Comparative Succession Law", *The Oxford Handbook of Comparative Law* (eds. Mathias Reimann, Reinhard Zimmermann), 2nd ed., Oxford University Press, Oxford, 2019, 1073 ff.

[9] With nuances, for example, between Italian, French and German law. See *v.gr.* Alessandro Semprini, "La successione necessaria nella prospettiva comparativa", *Comparazione e Diritto Civile*, No. 1, 2022, 89 ff.; Andrea Fusaro, "Linee evolutive del diritto successorio europeo", *Giustizia Civile*, 2014, 509–563; Paolo Gallo, "Successioni in diritto comparato", *Digesto delle Discipline Privatistiche Sezione Civile*, XIX, Utet, Torino, agg. 2011, 851 ff. Andrea Zoppini, *Le successioni in diritto comparato*, Utet, Torino, 2002; Anne-Marie Leroyer, "Réforme des successions et des libéralités", *Revue trimestrielle de droit civil*, No. 3, 2006, 617 ff.

[10] See *v.gr.* Daniele Muritano, "Trust and succession", *EU Cross-Border Succession* (eds. Stefania Bariatti, Ilaria Viarengo, Francesca Villata), Edward Elgar, Cheltenham, 2022, 33 ff.

in which it is applied – may be somewhat elastic and its scope considerably reduced, even if the national law of the person entitled to a reserved share provides for it as a matter of public order. In certain cases, therefore, it can give way to a trust mechanism, where the deceased has predisposed it and died in a country that recognizes this mechanism. In this respect, the European Court of Human Rights is clear in a couple of French cases,[11] concerning the application of California law. Thus, it is established that Art. 8 of the Convention on Human Rights does not impose the recognition of the right to receive a share of the parents' estate,[12] and that therefore children can be excluded from the estate – with the relative exclusion of the share of the legitime portion – by means of a trust. It is thus established that this does not violate the right to due process under Art. 6.1 of the Convention on Human Rights.[13] It is noted that the right to a reserved share is not an internationally recognised right, which is all the more relevant in view of the fact that this right is not unconditional.[14]

Therefore, the right to a legitimate right is not a human right, given that each state can assess the means that allow each person to lead a family life, and in this sense, there is no violation of public order.[15]

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[11] It should be remembered that, according to the current article 914 of the French Civil Code, the reserved share ("réserve héréditaire") is excluded for ascendants and is maintained for children and the surviving spouse who is not divorced (after the *Loi no 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités*) Cfr. arts. 912, 721, 734, 736, 738, French Civil Code.

[12] European Court of Human Rights, February 15, 2024, case *Colombier v. Francia* No. 14925/18, *https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7877083-10950823&filename=Judgments%20and%20decisions%20of%2015.02.2024.pdf.* The French photographer Colombier settled in California, establishing a trust for his third wife and two of his daughters, excluding three other sons. The three sons claimed the "right of abduction and detraction" ("droit d'aubaine et de détraction") under Article 2 of the Law of June 14, 1819 (*Dans le cas de partage d'une même succession entre des cohéritiers étrangers et français, ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens situés en pays étranger dont ils seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales*) which essentially aimed to grant French heirs treatment similar to what they would have received if French law had been applied. See Armelle Gosselin-Gorand, "La Convention européenne des droits de l'Homme face au droit de prélèvement compensatoire français", *L'essentiel. Droit de la famille et des personnes*, No. 4, 1st of April 2024, 4 ff.

[13] A judgment similar to the previous one is that of the musician Maurice Jarre, which also involves a trust and the legal system of California: European Court of Human Rights, 15 February 2024: case *Jarre v. France*, No. 14157/18, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-230875%22]}*.

[14] See point no. 51 case *Colombier y otros v. Francia*, op. cit., also point no. 64 case *Jarre v. France*.

[15] In fact, according to Article 35 of Regulation (EU) No. 650/2012, a regulation can be excluded only if, for the State, this regulation is not manifestly incompatible with the public policy of the Member State of the forum. See Regulation (EU) No 650/2012 of the European Parliament

Therefore, the testamentary freedom of the deceased prevails over that of the heirs, at least in the European Union, with the result that in some cases there is a tmesis between the conceptualisation of national and international public order. Indeed, in this case, the law of the last habitual residence of the deceased applies (unless the testator has not provided otherwise).[16] In this way, the testator can freely exclude (and/or perhaps cheat) the system of wanting to 'shield' the protection of the forced heirs and the reserved share by fixing his residence outside a country where the latter is not protected. This possible exclusion demonstrates a binding force of the reserved share, which is potentially weakened by the testator's possible future choices regarding his change of residence, especially in those cases where he would fix his residence in a common law system. If the reserved share is weakened by the mutation of the system, the arbitral testamentary disposition, on the other hand, is not, since there is no objection to the admission of these[17] in common law systems.[18] In fact, perhaps the best known example is the one,[19] in George Washington's holographic will.[20]

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and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ L* 201, 27. 7. 2012, 107–134.

[16] See arts. 20 ff Regulation (EU), No. 650/2012, op. cit.

[17] For example, in relation to the United States, reference is made to the interesting study by Jakob Gleim, *Letztwillige Schiedsverfügungen. Geltungsgrund und Geltungsgrenzen*, Mohr Siebeck, Tübingen, 2020, 59 ff.

[18] In this paper we will not analyze the common law model nor the German model, which also widely recognizes the model in its civil procedural code and specifically through the interpretation of the § 1066 ZPO. It is essential here to consult J. Gleim, op. cit.

[19] This is the disposition: "But having endeavored to be plain, and explicit in all Devise so even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

The text of the holographic will signed on June 6, 1799, by George Washington six months before his death can be found at: *https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/george-washingtons-last-will-and-testament-july-9-1799.*

[20] See John C. Fitzpatrick, *The Last Will and Testament of George Washington and Schedule of his Property, to which is appended the Last Will and Testament of Martha Washington*, The Mount Vernon Ladies' Association of the Union, Mount Vernon, 1939.

Although it is true that this paper does not intend to go into the problems of application of foreign law that interact under the rules of international law, it can be affirmed that what has just been analysed is useful to show that the freedom of the testator, when he is still alive, plays a key role in the aspects of inheritance law relating to his estate. Indeed, if he wanted to exclude the reserved share, he could even act in a more extreme way, deciding to 'spend it all', even going on a trip with his forced heirs. In this case, would he be spending his own money or that of his forced heirs? Evidently, the answer is clear and further validates the power of the testator's freedom in his choices.[21] Reserved share becomes a relative concept, as well as its protection a fortiori, in an international context, despite the fact that it is highly protected in the national legal system. This does not mean, however, that certain issues relating to the reserved share and the forced heirs remain open at the national level as well. If, for some, the legitimate share itself is in question, what is certain is that this relationship plays a fundamental role in testamentary arbitration and, therefore, requires an adequate and specific analysis.

In this context, therefore, once a testamentary arbitration has been stipulated, the role played by the reserved share and the reserved heirs must be analysed and given the appropriate validity for the sake of the due recognition of the freedom of testament.

The reserved share becomes a relative concept, as does its protection *a fortiori*, in an international context, even though it is highly protected in national legal systems. However, this does not mean that some issues relating to the reserved share and the forced heirs remain open at the national level as well. While for some the reserved share itself is in question,[22] what is certain is that this relationship

[21] However, the legal protection of the forced heir (as *heredero forzoso*) must also be considered, as he, as a forced heir (as *legitimario*), has a different position from the voluntary heir and therefore can challenge simulated transfers for the benefit of third parties and contextual impairment of his "potential" right, given that said right does not become effective until the death of the testator: see Antonio Jose Vela Sánchez, "La libertad del causante de disponer inter vivos de todos sus bienes", *Revista de Derecho Civil*, No. 2, 2022, 227 ff.

[22] The doctrine is widely debating the issue of the pros and cons of maintaining, excluding or modifying the legitime. See: Manuel Espejo Lerdo de Tejada, *Tendencias reformistas en el Derecho español de sucesiones: especial consideración al caso de las legítimas*, Bosch, Wolters Kluwer, Madrid, 2020, Victorio Magariños Blanco, *Libertad para ordenar la sucesión. Libertad de testar*, Dykinson, Madrid, 2022; Rafael Verdera Server, *Contra la legítima*, Marcial Pons, Madrid, 2022; M.ª Patricia Vives Velo de Antelo, *Razones para mantener la legítima y propuesta de regulación*, Fundación Notariado, Madrid, 2024. This phenomenon has also been reflected in a rethinking by the Spanish Ministry of Justice: see Ministerio de Justicia español: *Orden de 4 de febrero de 2019 por la que se encomienda a la Sección de Derecho Civil de la Comisión General de Codificación el estudio de los regímenes sucesorios de legítimas y de libertad de testar*, in *https://www.mjusticia.gob.es/es/AreaTematica/*

plays a fundamental role in the testamentary arbitration and, therefore, requires an adequate and specific analysis. In this context, therefore, once a testamentary arbitration disposition has been stipulated, the role played by the reserved share and the forced heirs must be analyzed, and it must be granted the appropriate validity for the sake of due recognition of the freedom of will-making.

In this sense, testamentary arbitration is an instrument in which the will to make a will is complete and independent, and there can be no interference by other parties who may have a legitimate interest or be forced or non-forced heirs. The limits that will apply will be only those established by public order and mandatory dispositions. Therefore, it is the unilateral will of the testator that establishes and decides the method of dispute resolution through arbitration, which will be subject to the free will of the successors to accept or reject the estate (and arbitration). When speaking of testamentary arbitration in the presence of a disposition established by the testator, it cannot be considered that, after the death of the testator, it is the heirs who, conventionally and tacitly, enter into an arbitration agreement by exchanging statements of claim and defense, justifying this based on the interpretation of Arts. 6 and 9.5 of the Spanish Arbitration Act,[23] therefore, the lack of opposition to arbitration should not be considered as a tacit expression of said will (art. 9.5 LA), given that the waiver of the right to challenge (*facultad de impugnación*: art. 6) will have its effects on the impossibility of the action of nullity of the award, but it cannot be interpreted as a will to stipulate even tacitly a new arbitration agreement between forced and non-forced heirs, but rather to grant full legitimacy and effects to the testamentary arbitration contemplated by the testator. In this sense, as has been observed, this could not be considered as a "new conventional arbitration, different from what was ordered"[24] by the testator.

Another clear example of what is stated is the nullity of an agreement between testator and heirs whereby it was decided to stipulate an arbitration disposition on future inheritance. Not only is this prohibited by Art. 1271 Spanish Civil Code,[25]

ActividadLegislativa/Documents/1292430803576-Orden_de_4_de_febrero_de_2019__por_la_que_se_encomienda_a_la_seccion_de_derecho_civil_de_la_comisio.PDF.

[23] This seems to be the reinterpretation of what happened where the arbitrators addressed some forced heirs (*legitimarios*) by burofax, sending them the testamentary arbitration provision and inviting them to adhere to the requested arbitration "by virtue of the arbitration agreement invoked", under penalty of receiving the minimum forced legitimate in case of opposition according to the Fifth Provision of the Testament; see STSJ Madrid, No. 6/2021, op. cit.

[24] I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[25] On the prohibition of future agreements and art. 1271 Spanish Civil Code *v.gr.* see schematically Carlos De Prada Guaita, "El arbitraje testamentario", *Anales de la Academia Matritense del Notariado*, Vol. LIV, 2014, 447–449.

but it has also been established that the Court can, even *ex officio*,[26] assess the nullity of the disposition, since the arbitrator cannot decide on questions no "sometibles",[27] the behaviour of the subscribers being completely irrelevant here, and in these cases, the nullity of the award can be sanctioned.[28]

In this way, a certain relativity can be observed in the concept of reserved share, in the sense that its protection is not absolute depending on the context. Likewise, it can be affirmed that arbitration of disputes under a will, in those cases where it is recognised by the legal system, is a clear concept whose genesis is linked to the exclusive freedom of testament, although it may subsequently be subject to the free will of the successor to accept or not the inheritance, who, consequently, will assume and validate that the eventual method of dispute resolution is arbitration, with the nuances that will be seen throughout the text. It is true, however, that testamentary arbitration must be embodied in an appropriate testamentary disposition, which must be drafted carefully to avoid potential pathologies.

RESERVED SHARE IS *DE FACTO* INVOLVED IN THE ARBITRATION, BUT IT MUST REMAIN PROTECTED

At the time of making a will, the testator is limited in the shares of the reserved share, but this does not mean that this cannot be submitted to arbitration. This is affirmed because Art. 2.1 LA states that "Disputes concerning matters that are freely disposable under the law are subject to arbitration".[29] This has led to the assertion that conflicts between reserved shares,[30] do not fall within the scope of

[26] Thus, it is established that the judge *ex officio* may declare the nullity of the arbitration where it is about future estate, prohibited by art. 1271 Spanish Civil Code: STSJ Extremadura, No. 1/2021, of 1st feb. 2021, *Sala de lo Civil y Penal*, ECLI:ES:TSJEXT:2021:231.

[27] Cfr. arts. 2.1 and 41 LA 2003. In the specific case, the Court considers that it should rather refer to Article 41(1)(e) than to Article 41(1)(a), as invoked by the plaintiff.

[28] Thus, it has been established that the Chamber must examine ex officio, regardless of whether the claimant signed said clause or failed to invoke the issue of "non-arbitrability" before the arbitrator': STSJ Extremadura No. 1/2021, op. cit. For a commentary see R. Hinojosa Segovia, "Estimación de la anulación…", op. cit., 445 ff.

[29] "Son susceptibles de arbitraje las controversias sobre materias de libre disposición conforme a derecho."

[30] This is affirmed by for a scholar that also supports a broad application of testamentary arbitration: Adolfo Calatayud Sierra, "El arbitraje testamentario desde el derecho aragonés", *Revista de derecho civil aragonés*, No. 18, 2012, 183.

arbitration of disputes under a will. In this sense, part of the doctrine, based on this rule, considers that the reserved share,[31] is not a matter of free disposition and, consequently, is not arbitrable.[32] However, it should be emphasised that Art. 2.1 LA has an important nuance in its final paragraph, since, although it is true that it identifies matters of free disposal as those subject to arbitration ("sometibles" a arbitraje), it also states that arbitration must be carried out "in accordance with the law" ("conforme a derecho"). This disposition must therefore be interpreted in accordance with the law expressed in Art. 10 LA, in the sense that the legislator has expressly provided that the estate can be arbitrated in relation to its division and administration.

However, if since the creation of the figure of testamentary arbitration in 1953, this aspect was more consistent with the full protection of the reserved share of the estate, given that Article 5 of the LA of that year expressly referred only to disputes between "non-forced heirs" – presumably identified and thus opposed to the definition of "forced heir" in Art. 806 CC[33] – there has been a radical change

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[31] As regards the areas of regional law ("derecho foral"), legal doctrine holds that the limitations of Art. 10 should not apply in Navarre, given that the forced heirship there is purely formal, nor in those other areas where the reserved share can be freely distributed among a specific category of heirs – if the disputes concern them – such as in the case of descendants in Aragon". I. Gomá Lazón, "Art. 10", *Comentarios a la Ley de Arbitraje* (coord por C. González-Bueno), Consejo General del Notariado, Madrid, 2014, 242 and 243.

Moreover, it is argued that in Aragon the limitation "does not apply when the only beneficiaries designated by the testator are descendants, because, since the reserved share is collective, no conflicts can arise among them": A. Calatayud Sierra, op. cit., 182.

[32] Fátima Yáñez Vivero, "Arbitraje y derecho de sucesiones: El arbitraje testamentario", *El arbitraje en las distintas áreas del derecho* (dir por Jorge L. Collantes González), Vol. II, Palestra, Estudio Mario Castillo Freyre, Lima, 2007, 91.

[33] Now then, as a forced heir, Art. 807 of the Spanish Civil Code expressly identifies, in addition to children and descendants, and in their absence, the ascendants, also the widower or widow.

There has been debate on whether the surviving spouse should be excluded from Art. 10 LA for being a non-forced heir. Doctrine is divided, and for some scholars, testamentary arbitration "does not include the forced share of the surviving spouse" ("legítima del cónyuge viudo") (Xavier O'Callaghan Muñoz, "El arbitraje en derecho sucesorio", *Ley del Notariado*, No. 47/48, 2007, 64), so thus, he/she is considered a forced heir of a fractional share in usufruct, and therefore the same doctrine applicable to forced heirs may be applied to him/her. (I. Gomá Lazón, "Art. 10", op. cit., 242). In this regard, "the surviving spouse is also a forced heir, but not an heir in the strict sense – just as a descendant or ascendant is not, unless they have been expressly granted that status": I. Gomá Lazón , "Art. 10", op. cit., 242. However, legal doctrine does not consider this person to be an heir in the strict sense: Manuel Albaladejo García, "El arbitraje testamentario", *Actualidad Civil*, No. 1, 1990, 82 and 88 ff.

since the amendment made by the 1988 reform, since it provides for the extension to legatees, who can be both forced and non-forced heirs.

I therefore consider that the correct interpretation of the clause "in accordance with the law", in the context analysed, must be interpreted by differentiating between what is the protection of the reserved share and what concerns the forced heirs within the arbitration process. Thus, the fact that disputes of the reserved share should remain safe from arbitration does not mean that the forced heirs should abstain from participating in the arbitration. The reserved share, as an unavailable share,[34] must always be safeguarded and should thus be considered as a 'non-arbitrable' matter ("no susceptible de arbitraje"): in all circumstances it will be the task of the arbitrator to safeguard it.

Consequently, it is necessary to clarify that the expression "susceptible" (according to Art. 2.1 LA) is not synonymous with "subject to" ("sometible a") arbitration, but marks the delimitation of the content in which the arbitrator cannot intervene. The arbitrator must ensure that the reserved share is safeguarded, insofar as it is not governed by the arbitrator's decision-making margin, which must be safeguarded in any case. On the other hand, it is a different matter if the forced heirs can participate in the arbitration (with their share being preserved, regardless of whether the arbitration is in law or in equity).[35] To state that "matters relating to the reserved share cannot be submitted to arbitration" does not mean that "the forced heirs share cannot be submitted to arbitration".[36] Their part of the reserved share must be taken into consideration in the arbitration proceedings in order to be protected at all times, because it cannot be infringed and because a violation of this aspect would lead to a possible nullity of the award.

On the will executed by an executor ("testamento por comisario") and Art. 831 of the Spanish Civil Code, which allows the testator to delegate certain testamentary powers to their surviving spouse, see R. Colina Garea, op. cit., 228 ff.

[34] On the traditional concept of availability in arbitration matters see Elías Campos Villegas, *Aspectos del convenio y del laudo arbitral vistos por un notario. Cuestiones en la nueva ley: discurs d'ingrés de l'acadèmic de número Sr. Elías Campo Villegas i contestació de l'acadèmic de número Sr. José Juan Pintó Ruiz, 3 de juny de 2004*, Acadèmia de Jurisprudència i Legislació de Catalunya, Barcelona, 2004, 32 ff.

[35] In this regard, although the arbitration is based on equity, the interpretation of the will "must comply with the mandatory provisions of Art. 675 of the Spanish Civil Code": Carmen García Pérez, *El arbitraje testamentario*, Tirant lo Blanch, Valencia, 1999, 458.

[36] Literally "no se pueden someter a arbitraje las cuestiones relativas a la legítima". See Francisco José León Sanz, "Art. 10", *Comentarios a la Ley de Arbitraje de 2003* (coord. David Arias Lozano), Pérez-Llorca Abogados-Thomson Aranzadi, Cizur Menor, 97.

THE FORCED HEIRS: THEY MAY BE EXCLUDED BY THE ARBITRATION DISPOSITION, BUT IN PRACTICE IT IS APPROPRIATE THAT THEY BE INVOLVED TO PROTECT THEIR RIGHTS

The reserved share *per se* is protected by Art. 806 and Art. 1056 of the Spanish Civil Code,[37] but it has not been proven that Art. 10 LA wants to exclude the forced heirs from arbitration, as the forced heirs can also be considered legatees or non-forced heirs, depending on the case. This, rather, stems from a terminological problem (which could become substantial) from which Art. 10 LA suffers. It must be borne in mind that the decision of the Spanish legislator is flawed, given that it decides to refer to two terms that have traditionally suffered from extreme relativity: "heredero" and "herencia" ("heir" and "estate/inheritance"). The interconnection of these with the will further complicates matters.

Indeed, as has been said,[38] it should be remembered that the original justification of the freedom to testate was given in the absence of descendants, given that the will was not justified where there were descendants by proceeding to a forced mechanism of transmission, and it is only since Justinian that the co-presence in a will of both the "voluntary" ("heredero voluntario") and the "forced' heir" ("heredero forzoso")[39] began to be observed.

The reference to the "forced" ("forzoso") character and the use of the expression "non-forced heir" ("no forzoso") in Art. 10 LA distorts the correct understanding of these aspects, which would have been easily understood by using the reference, on the one hand, to "heredero voluntario" and, on the other hand, to "legitimario". Thus, it would have been possible to understand the three cases that may exist, i.e.: "1) voluntary heir who is not a forced heir; 2) forced heir who is not a voluntary heir and 3) voluntary heir who is a legitimate heir."[40]

The reference to "forzoso", on the other hand, denaturalised the classification, since if the terminology were to be replaced,[41] the new terminology would

[37] A part of scholars refer in this sense to a "sobreprotección para la legítima" (A. Calatayud Sierra, op. cit., 172).

[38] Francisco Virgili Sorribes, "Herederos forzoso y heredero voluntario: su condición jurídica (El llamado heredero forzosos no es heredero)", *Revista Crítica de Derecho Inmobiliario*, No. 185, 1943, 481.

[39] Thus, it is observed that the freedom to make a will originally served its purpose where there was no offspring, and when there was offspring, such freedom was not justified, thereby ensuring transmission through the mechanism of forced heirs: F. Virgili Sorribes, op. cit., 481.

[40] Literally "1) *Heredero voluntario que no es legitimario*; 2) *Legitimario que no es heredero voluntario* and 3) *Heredero voluntario que es legitimario*": Para esta clasificación: F. Virgili Sorribes, op. cit., 487.

[41] Replacing "heredero voluntario" with "heredero no forzoso".

cancel out the third case,[42] since it would have to be said that there is a "heredero no forzoso que es legitimario",[43] an aspect which, intuitively and semantically, is not very comprehensible, although this is what happens when the testator expressly names in the will the subjects identified by Art. 807 CC. The misunderstanding arises from the fact that "forced heirs" can be identified by both the expressions *legitimarios* and *herederos forzosos* which nonetheless do not have the same meaning. Thus, the references in Art. 10 LA to "forzoso" and "herencia" are misleading.[44]

Therefore, the limitation provided for by Art. 10 LA, by using the expression "herederos no forzosos" (non-forced heirs), must be understood as a synonym for the protection of the part of the reserved share as such, and not as a limitation to the subjective participation of the forced heirs.[45] There are several reasons for this.

The first is that the status of forced heir and legatee can overlap, since legacies can be a means for the payment of the reserved share,[46] and "the reserved share can be left by any lucrative title".[47] In this sense, although the reserved share must be guaranteed at all times, a forced heir may *de facto* participate in the arbitration.

The second reason is that the exclusion of a forced heir from the arbitration process would not give him greater protection than if he had not participated in the arbitration process; on the contrary, it might even offer him better protection.

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[42] The first two cases would indeed make sense: a) "Heredero no forzoso que no es legitimario"; b) "Legitimario que no es heredero no forzoso".

[43] Even more complicated if the term *legitimario* were replaced by *heredero forzoso*, resulting in this classification: a) *heredero no forzoso que no es heredero forzoso*); b) *heredero forzoso que no es heredero no forzoso*; c) *heredero no forzoso que es heredero forzoso*.

[44] There has been a debate in the mid 1940s in Spanish doctrine, which can be summarised in three publications in the *Revista crítica de Derecho inmobiliario*. Against a position that assumes an incompatibility between the statuses of de *heredero* and *legitimario* ("donde hay herencia, no hay legítima"), there is another that advocates the possible compatibility of these statuses, and a third that considers that the forced heir ("heredero forzoso") should not be considered as heir. See more broadly, respectively Julián Dávila García, "Herederos y legitimarios (Donde hay herencia no hay legítima)", *Revista Crítica de Derecho Inmobiliario*, No. 185, 1943, 661 ff.; Pedro Sols García, "El heredero: ideas para su estudio", *Revista Crítica de Derecho Inmobiliario*, No. 196, 1944, 568 ff.; F. Virgili Sorribes, op. cit., 479 ff.

[45] Art. 10 LA, by referring to "heredero no forzoso" ("non-forced heir"), intends to give protection to the "legittima" (reserved share) of art. 806 Spanish Civil Code by means of an indirect reference, *a contrario*, to the "herederos forzosos" ("forced heirs") expressed in art. 807 Spanish Civil Code.

[46] As observed by F. Yáñez Vivero, op. cit., 92.

[47] This in Aragon in relation to, for example, art. 487.1 *Código del derecho Foral de Aragón* and art. 490: A. Calatayud Sierra, op. cit., 173. Cfr. F. J. León Sanz, op. cit., 97 and 98.

It must be assumed that "submission to arbitration does not entail disposition or infringement of the legitimation"[48] also on the assumption that "the legitimated parties who believe that their rights have been infringed by the award could bring an action for annulment of the award"[49], by bringing an action for the annulment of the award, for example, by resorting to Art. 41 (f) LA, i.e. on the grounds that it is contrary to public order.[50] However, there is more: in order to ask for such annulment, one must have an interest to ask for it. In this sense, it is useful to rely on a pronouncement which – taking up an earlier position,[51] that referred to the annulment of arbitration (not under a will) – considers that according to Art. 41. 1 LA "the award can only be annulled when the party requesting the annulment alleges and proves", that is to say, it must refer to "those who were party to the arbitration proceedings, and [...] to those who, not being party to the arbitration proceedings, can nevertheless justify an interest in the exercise of the annulment action, because they should have been party, or who, being able to have been, have been unduly denied their intervention".[52]

Non-participation in the arbitration by the forced heir, or a passive attitude towards it, would considerably reduce the possibility of lodging an action for annulment on the grounds that there would be a tacit waiver to contest (cf. Art. 6 LA), where the forced heirs in title have been notified of the arbitration and do not activate themselves accordingly. This could implicitly validate the willingness to submit to arbitration through subsequent conclusive conduct (according to Art. 9 Paragraph 5 LA).[53]

Therefore, it is important to make the parties aware of the arbitration proceedings by notifying them of the arbitration disposition, even if it does not expressly refer to the forced heirs. In this sense, the notification of the arbitration procedure to the forced heirs will be a suitable occasion to validate or verify that throughout the arbitration procedure the legitimate rights are not undermined

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[48] A. Calatayud Sierra, op. cit., 182.

[49] A. Calatayud Sierra, op. cit., 182; C. De Prada Guaita, op. cit., 458.

[50] C. De Prada Guaita, op. cit., 459.

[51] STSJ Madrid, No. 73/2016, 28 November 2016, 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2016:13751; STSJ de Madrid, No. 21/2018, 24 April, Sala Civil y Penal, Sección Primera, ECLI:ES:TSJM:2018:3982; STSJ Madrid, No. 40/2019, 29 October 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2019:11974; STSJ Madrid, No. 65/2016, 13 October 1ª, Sala de lo Civil y Penal, ECLI:ES:TSJM:2016:11921. The position is also confirmed later *v.gr.* STSJ Madrid, No. 27/2024, 28 May 2024, 1ª, Sala de lo Civil y Penal, ECLI:ES: TSJM:2024:6579.

[52] STSJ Madrid, No. 6/2021, op. cit.

[53] See STSJ Madrid, No. 6/2021, op. cit.

and, if they are, they can and should[54] be activated. Therefore, once the notification has been received, the most effective thing to do is to participate in the arbitration process in order to actively verify that everything is proceeding in accordance with the appropriate protection of the reserved share. In particular, the forced heirs must be active in order to avoid the application of Art. 6 LA, so that their behavior can be interpreted as a tacit waiver of objection. It could be argued that the forced heirs should not participate in the arbitration and would have to assume a passive position waiting for an award in the hope that it would be in accordance with the protection of the reserved share. In that sense, even if there is a testamentary disposition that does not expressly refer to the forced heirs (for example, talking about disputes of 'non-forced heirs and legatees') and therefore does not impose *a priori* their participation, it will be in their interest to participate in the arbitration voluntarily. Otherwise, it could be concluded that they have no direct interest in the challenge. The same jurisprudence considers that, if the validity of the testamentary arbitration disposition is not challenged within the arbitration proceedings, Article 6 of the LA is activated, and the right to challenge the existence or the validity of the agreement shall be deemed tacitly waived.[55]

Therefore, the possible activation of Article 6 of the LA becomes a key element in understanding that there is a clear tmesis between the subjective and objective scope of the regulations (since the protection of the reserved share is one thing and the participation of the forced heirs in the arbitration process is another) and is configured as a "serious incentive for the parties to promptly and immediately report violations of the dispositive rules".[56] Therefore, the forced heir who does not participate in the arbitration process would be left in an inferior legal position compared to the one (heir) who activated his protection from the moment he learned of the existence of the arbitration procedure.

Instituting a testamentary disposition that provides for the participation of forced heirs does not mean that the reserved share would be violated. A legatee who believes it is their right to be excluded from testamentary arbitration (because of the article 10 LA refers to "non-forced heirs") would be grammatically and syntactically coherent, but would not be substantively so, as they would be making a dangerous mistake, given that it is only in their interest to be able to participate in said arbitration. Hence, it is essential to notify them, as is required in all cases:

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[54] Thus, it can be seen that, whoever does not oppose arbitration at the appropriate procedural moment, will be subject to arbitration: A. Calatayud Sierra, op. cit., 175.

[55] In this regard see STSJ Madrid, No. 6/2021, op. cit.

[56] R. Colina Garea, op. cit., 199.

whether they are expressly mentioned in the testamentary arbitration disposition or not. Ultimately, in those cases where the testamentary disposition does not refer to forced heirs, it will be in their interest to participate in the arbitration in order to be actors in the protection of their rights and interests.

Where the testamentary disposition makes express reference to the forced heirs, the doctrine has defended its validity based on the observation that the reserved share would be available after the death of the testator.[57] Therefore, the acceptance of the arbitration disposition by the forced heirs does not prejudice the reserved share,[58] and if it existed, the acceptance of the inheritance would lead to accepting the disposition, otherwise, the subject will always be free to renounce the inheritance.[59] Thus, the inheritance right will be configured as "the right to accept or reject the inheritance (...) or transfer the resolution of conflicts to the arbitrator",[60] since "from the moment of the death of the testator, the reserved share is renounceable and from the moment the inheritance is accepted, it is perfectly available, alienable, taxable and, therefore, susceptible to being submitted to arbitration".[61]

Furthermore, it should be remembered that the acceptance and rejection of an inheritance are entirely voluntary and free acts, pursuant to Article 988 of the Civil Code.[62] Therefore, in cases where the estate is linked to an arbitration of disputes under a will, the party may carry out the necessary considerations before accepting it; otherwise, they are free not to do so.

However, some legal doctrine has sought to consolidate the validity of testamentary arbitration associated with forced heirs through financial compensation and the *Socini* caution (*cautela socini*), as will be seen later.

THE IMPORTANCE AND DIFFICULTY OF ARBITRATION EMBODIED IN AN APPROPRIATE TESTAMENTARY DISPOSITION

One way to understand the potential role of the reserved share and the forced heirs within a testamentary arbitration disposition is based on the possibilities

[57] X. O'Callaghan Muñoz, op. cit., 64. The position is also validated by STSJ Madrid, No. 6/2021, op. cit.

[58] I. Gomá Lazón, "Art. 10", op. cit., 237.

[59] *Ibidem.*

[60] X. O'Callaghan Muñoz, op. cit., 60.

[61] I. Gomá Lazón, "Art. 10", op. cit., 241.

[62] This is also noted by R. Colina Garea, op. cit., 197.

of drafting the disposition itself and on the analysis of some of its hypothetical variants. Indeed, Article 10 of the Spanish Arbitration Law posits the institution, although it does not offer a "model" to serve as a basis for drafting the disposition. The interpretative complexity of the disposition makes it difficult to formulate a disposition that could be defined as "standard". An example of this problem can be found, for example, if one observes that some institutions – while suggesting generic mediation and arbitration dispositions on their websites – do not propose one relating to arbitration of disputes under a will,[63] an aspect that demonstrates that the drafting of such a disposition is neither simple nor obvious. In this regard, a proposed variant has even been removed from one website,[64] or the existing one has been modified.[65] It follows from this that it is not only important that the legal system recognises or regulates arbitration of disputes under a will, but that professionals also carefully prepare for a non-pathological arbitration disposition.

Art. 10 LA, for example, limits itself, from the subjective point of view, to identifying the "non-forced heirs" and the "legatees" without making direct and express reference either to the reserved share or to the forced heirs. As a consequence, this opens up the possibility for the free drafting of various types of dispositions, and, in this sense, some of them could be (in increasing order): 1) The parties agree to submit any inheritance disputes to arbitration "pursuant to Article 10 of the Spanish Arbitration Act" or similar expressions; 2) to draft a disposition that essentially takes up or transcribes the content of Art. 10 LA; 3) to draft a more extensive disposition interpreting the content of Art. 10 LA and, therefore, providing for other aspects.

In the following, some reflections will be made in relation to the typologies mentioned above.

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[63] This is the cases, for example, of the *Fundación Notarial Signum*'s website: See *https://fundacionsignum.org/el-arbitraje/#documentacionabitraje* (Consultation date: 25 November 2024).

[64] A reproduction of a variant proposed by the *Fundación Notarial Signum* can be found in María del Pilar De Prada Solaesa, "El arbitraje testamentario. Estudios de derecho privado", *Estudios de derecho privado en homenaje a Juan José Rivas Martínez* (dir. por Antonio Pérez-Coca Crespo, Leonardo B. Pérez Gallardo; Juan Antonio Pérez Bustamante de Monasterio; coord. por Ángel Fernández-Reyes (coord.), Vol. 1, Dykinson, Madrid, 2013, 533 ff. A different variant that has been present on the *Fundación Notarial Signum's* web site can be found in C. De Prada Guaita, op. cit., 454.

[65] Currently, the Valencia Court of Arbitration and Mediation in the current version eliminates the part relating to the caution *socini*, which was initially foreseen. A comparison of the current version available is at: *https://www.cortearbitrajeymediacionvalencia.com/reglamento/anexo-i-modelos-indicativos-de-clausulas-arbitrales/* (Consultation date: 25 November 2024) – with an earlier model of the Valencia Chamber of Commerce which can be consulted in F. Yáñez Vivero, op. cit., 101–102.

BRIEF REMISSION TO ART. 10 LA

Surely, a testamentary disposition that makes a mere and concise reference to the regulations that govern this institution should be integrated together with the dispositions present in the current arbitration regulations. For example, this can be done as a holographic testamentary disposition by which the testator states: "I provide that the disputes relating to my estate be resolved in accordance with article 10 of the Spanish Arbitration Law" or other similar expressions, with the general regulations to be applied, *mutatis mutandis*.[66] In this sense, the dispute will be judged by an arbitration in law[67] by a single[68] jurist[69] in the full exercise of his civil rights,[70] who may choose the place of arbitration,[71] and will be appointed by the competent Court at the request of any designated successor or one considered as such (although not expressly designated in the will).[72]

A disposition that referred exclusively to Article 10 of the LA would therefore be absolutely valid and operational, although it would raise all the interpretive issues generated by the current wording of Article 10 of the LA.

If, on the other hand, there were only one disposition that expressly prohibited judicial intervention, this should not be interpreted as referring to arbitration,[73] since the desire to resort to arbitration must be expressly stated and also because such a prohibition could refer only to a specific aspect, such as division.[74] In any case, what is certain is that, although recourse to the courts cannot be imposed, recourse to arbitration can be imposed.[75]

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[66] It is clear that the other provisions of the Spanish Arbitration Act (LA) will apply, specifically those relating to the acceptance of arbitrators (Art. 16), their abstention or challenge (Arts. 17 and 18), the absence or inability to perform their duties (Art. 19), and the appointment of their possible replacement (Art. 20).

[67] Arg. art. 34 LA.

[68] Arg. art. 12 LA.

[69] Arg. art. 15 LA.

[70] Arg. art. 13 LA.

[71] Arg. art. 26 LA.

[72] Arg. arts. 8.1 y 15.2 letra a) LA.

[73] Julio Gavidia Sánchez, Eduardo Corral García, "Art. 10", *Comentario a la Ley de Arbitraje* (coord. por Alberto De Martín Muñoz, Santiago Hierro Anibarro), Marcial Pons, Madrid, 2006, 1028 ff., also R. Colina Garea, op. cit., 222.

[74] For example, a prohibition on judicial intervention in the inheritance division process may be introduced *ex* art. 792.1. 2º Spanish Procedural Civil Law: R. Colina Garea, op. cit., 209.

[75] As highlighted by A. Calatayud Sierra, op. cit., 167.

DRAFTING AN *AD HOC* DISPOSITION

The other two cases raised (see above) fall within this context, and therefore, it is possible to draft a disposition that essentially recaptures or transcribes the content of Article 10 of the Spanish Arbitration Act, or to draft a broader disposition interpreting the content of Article 10 and, consequently, providing for other aspects.

Next, some reflections will be made regarding: a) the express reference to the legal disposition that institutionalizes arbitration of disputes under a will; b) the regulation of preparatory aspects to avoid a pathological arbitration disposition; c) the regulation of the objective scope of application; d) the regulation regarding the reserved share and/or forced heirs and e) the caution *Socini*.

THE EXPRESS REFERENCE TO THE LEGAL DISPOSITION THAT INSTITUTIONALIZES ARBITRATION OF DISPUTES UNDER A WILL

A different aspect from the one analyzed a few lines above is the inclusion of an express reference to the disposition that legitimizes the arbitration of disputes under a will, for example, if one chooses to write "availing itself of the power granted by arts. 10 and 14 of the current Spanish Arbitration Act".[76] This reference could lead to difficulties in some interpretative aspects in cases where the drafted disposition reproduces, in part, the literal meaning of art. 10 (think of the reference to non-forced heirs) and, at the same time, introduces references to aspects that could be considered antithetical (such as the reference to forced heirs). In this context, it is evident that art. 10 LA, when regulating arbitration of disputes under a will, grants the testator a clear discretionary right to choose arbitration as a method of resolving disputes relating to their estate.[77] Therefore, where the legal system regulates the institution, as is the case in Spain, debates that consider testamentary arbitration as a modal disposition,[78] as a negative resolutive condition,[79] or as

[76] This was the incipit of the provision suggested by the Valencia Chamber of Commerce that chose an institutional arbitration.: see F. Yáñez Vivero, op. cit., 101–102.

[77] In this sense, it would not be appropriate to state that it is a type of mandate. This is stated because some testamentary arbitration provisions have used the expression "it is the mandate of the testator that..." as in some of the models proposed by Fundación notarial Signum. You can find it in M. del P. De Prada Solaesa, op. cit., 533 ff. Another different variant that has been present on the Fundación notarial Signum's web page at C. De Prada Guaita, op. cit., 454.

[78] C. García Pérez, op. cit., 132 ff.

[79] J. V. Gavidia Sánchez, E. Corral García, op. cit., 1023.

a positive potestative condition with resolutive effects,[80] are considered superfluous. Therefore, in relation to testamentary arbitration provided for in art. 10, it must be shared the view according to which its nature should not be framed within a modal disposition or a condition, because the art. 10 institutionalizes the testamentary arbitration and grants a clear potestative right to the testator, without imposing on the subjects who are directly bound any obligation to do or not to do.[81] In this sense, there would be no "obligation of voluntary successors consisting of refraining from going to the courts of Justice to settle their disputes"[82] or "submitting to arbitration to resolve those same disputes".[83]

Through the arbitration of disputes under a will, the testator does not impose the obligation to formalize an arbitration agreement between them, but rather gives full effect to their right, which expressly arises from the legal disposition of Article 10 LA.[84] The foregoing is, at least, valid with respect to subjects who fall under the concept of "non-forced heirs or legatees". However, the debate could perhaps be opened in relation to forced heirs, where financial compensation is introduced. In this case, another complementary disposition would be introduced (relating to the caution *Socini*). What is certain is that arbitration must be carried out.

However, aside from a reference or an incipit regarding the express reference to Article 10 LA, it must be noted that a technical draft of the testamentary arbitration disposition would undoubtedly be advisable and would also be justified by the principle *permissum videtur id omne quod non prohibitur*, that is, that "everything that is not prohibited is considered permitted".[85]

However, how far could this scope of action be extended?

THE REGULATION OF PREPARATORY ASPECTS TO AVOID A PATHOLOGICAL ARBITRATION DISPOSITION

Certainly, it would be desirable to appoint arbitrators, determine the type and venue of arbitration, determine the method to be followed for allocating

[80] R. Colina Garea, op. cit., 231.

[81] See the attentive and acute considerations of C. De Prada Guaita, op. cit., 437.

[82] J. V. Gavidia Sánchez, E. Corral García, op. cit., 1023 interpreted by R. Colina Garea, op. cit., 231.

[83] R. Colina Garea, op. cit., 231.

[84] We fully share what was stated by I. Gomá Lazón, "Art. 10", op. cit., 244.

[85] Fernando Reinoso-Barbero, "*Permissum videtur id omne quod non prohibitur*", *Diccionario del Español Jurídico*, Real Academia Española, Madrid, 2016, 1199.

administrative costs and arbitration fees, and clearly define the applicable rules. In this regard, referral to institutional arbitration,[86] and above all, appropriate advice when drafting the arbitration disposition would greatly facilitate the future conduct of arbitration.

THE REGULATION OF THE OBJECTIVE SCOPE OF APPLICATION

A testamentary disposition that expressly expands the scope of arbitration would certainly be possible. In this sense, while it is true that legal doctrine broadly embraces the reference to the distribution and administration of the estate,[87] a disposition that broadly externalizes the objective scope would be welcome and appropriate, given that Article 10 LA does not prohibit anything in this regard. Thus, in addition to the references to distribution and administration, it could be expressly added that arbitration will refer to disputes relating to the interpretation, validity, or effectiveness of the will and to the actions of the executors or the partitioner. Although these aforementioned aspects should be considered to fall within a broad concept of the assessment of disputes relating to the distribution and administration of the estate (even if they are not indicated in the disposition), their inclusion would clear up any doubt.

THE REGULATION REGARDING THE RESERVED SHARE AND/OR FORCED HEIRS

The real and possible limit of the principle *permissum videtur id omne quod non prohibitur* could be raised in relation to the reserved share and the forced heirs.

This criticality stems from the fact that, on the one hand, the reference to "non-forced heirs and legatees" is not necessarily antithetical to "forced heirs", and, on the other hand, at the same time, it must be kept in mind that "disputes regarding matters of free disposition in accordance with the law are subject to arbitration"[88] "and that the testator cannot dispose of the reserved share except in favor of the forced heirs".[89] It follows from this that the drafting of the testamentary arbitration disposition must take care to ensure that it does not conflict with the dispositions of Article 10 LA.

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[86] The doctrine that suggests entrusting arbitration to an institution and determining that arbitration is by law is shared: C. De Prada Guaita, op. cit., 459.

[87] It refers to the reconstruction carried out in A. Ferrante, op. cit.

[88] Art. 2.1 LA.

[89] Cfr. arts. 806 and 807 Spanish Civil Code.

To understand the possible limitation arising from the clause "non-forced heirs or legatees", two possibilities arise: that is, this limitation excludes other subjects – and, therefore, exists within the subjective scope (and, therefore, within the forced heirs: that is, the legitimate heirs) – or it refers, rather, and indirectly, to the objective scope of application of the rule. In this sense, it would mean that the law seeks to protect the reserved share and, therefore, exclude it from arbitration. As has been duly noted,[90] adhering to one position or the other would mean including or excluding the *tercio de mejora* in the limitation provided for in the law.

Faced with this theoretical scenario, in practice it is clear that, despite the literal wording of Article 10 LA, there is a desire to expand the scope of arbitration action and, consequently, several possibilities arise, some of which will be examined in this article. In this sense, when drafting the testamentary disposition, one can operate from two perspectives. From a first perspective, reference will be made to the subjects, with some variations. Therefore, on some occasions, reference has been made to "the heirs or legatees, whether non-forced or forced, in the portion exceeding the strict reserved share",[91] or using the expression "even involving forced heirs".[92]

From a second perspective, the procedure will be applied from the perspective of the scope of application, making no reference to forced heirs or legitimate heirs (*herederos forzosos* or *legitimarios*), but rather through a testamentary disposition that establishes arbitration, thereby "protecting the reserved share". [93]This possibility – apart from the plaintiff's argument regarding its nonexistence in that specific case[94] – has been deemed valid by the court,[95] despite the fact that the disputes resolved by the arbitrator affected forced heirs, when determining the assets and liabilities of the estate.[96] To validate the effectiveness of the testamentary

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[90] I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[91] This, specifically, was the model provided by the Chamber of Commerce of Valencia, which can be consulted at F. Yáñez Vivero, op. cit., 101–102.

[92] See I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[93] Literally "a salvo las legítimas". This model for example can be found in STSJ Madrid, No. 6/2021, op. cit.

[94] The nullity was based on letter d) of article 41.1 LA, stating that failure to specify the subject matter of the arbitration would have prevented the issuance of its defenses. However, as has been emphasized by legal doctrine, the Court should not have resorted to letter d) but rather to letter b) of article 41.1 LA, which refers to aspects relating to the notification of the appointment of the arbitrator: R. Hinojosa Segovia, "Estimación de la anulación…", op. cit., 445 ff.

[95] The appeal for annulment of the award is rejected: STSJ Madrid, No. 6/2021, op. cit.

[96] As keenly observes R. Verdera Server, "Interpretando testamentos", op. cit., 89 and 90.

disposition, where it refers to forced heirs or reserved share, a compensation mechanism is simultaneously introduced that, *mutatis mutandis*, operates according to the caution Socini (see below).

THE CAUTION *SOCINI*

Doctrine, together with the significant and appreciable driving force of notaries,[97] has strived to strengthen the potential participation of forced heirs in the arbitration process, advising the possibility of including a compensatory option. In this regard, whenever the will provides a share higher than the minimum reserved share (*Legitima estricta*)[98] – that is, for example, in those cases where the subject has been allocated a portion of the *tercio de mejora* – a caution *Socini* would be applied, *mutatis mutandis*. So this means that the forced heirs could oppose the arbitration instituted by the testator only if they saw their share reduced to the minimum reserved share (*Legitima estricta*).[99]

In this way, it is considered appropriate to notify the forced heir (*legitimario*), by means of an *interrogatio in iure*, within the corresponding deadlines according to arts. 1004 and 1005 Spanish Civil Code,[100] so that he can decide whether "he accepts the inheritance under the arbitration proceeding or prefers to be reduced to his minimum reserved share (*Legitima estricta*)".[101] This possibility is based on the consideration that the reserved share is available once the testator has died,[102] and, in this sense, no doubts would arise regarding the validity of the caution Socini.[103] Silence is considered as tacit acceptance of the arbitration procedure that may eventually arise.[104]

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[97] See *v.gr.* M.ª del P De Prada Solaesa., op. cit., 533 ff.; Thus, it is stated that "we, the notaries, must be who are the ones who, studying this figure and (...) should begin to propose to the testators (...) a testamentary arbitration, based on a caution Socini": C. De Prada Guaita, op. cit., 453 ff.

[98] In this regard, it is suggested that "it may be added to the testamentary arbitration clause that the forced heir who does not accept the established testamentary arbitration loses all attribution in his inheritance in favor of the others forced heirs who do accept it; and, if any forced heir accepts it, they will be reduced to the minimum reserved share, with the remainder of what was initially attributed to them". A. Calatayud Sierra, op. cit., 175.

[99] A. Calatayud Sierra, op. cit., 182.

[100] I. Gomá Lazón, "Art. 10", op. cit., 241.

[101] *Ibidem*.

[102] Thus, it is stated that "from the moment of the death of the testator, the reserved share is renounceable and when the inheritance is accepted, it is perfectly available, alienable and susceptible to being encumbered with usufruct". I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[103] C. De Prada Guaita, op. cit., 454.

[104] I. Gomá Lazón, "Art. 10", op. cit., 241.

Although testamentary arbitration disposition models do not always include the caution *Socini*[105] caution in their wording, this instrument is considered "the appropriate instrument to guarantee the effectiveness of an arbitration of disputes under a will"[106] and the current trend is to incorporate that type of disposition that introduces a compensatory option in favor of the forced heirs. However, when incorporating it, due care should be paid, since if the clause "protecting the reserved share"[107] also appears in the testamentary disposition, it would make little sense to subsequently introduce a disposition that foresees the caution Socini, since, as has been argued, it would not be a full compensatory option, since, in that case, the reference to the legitime should be interpreted broadly by the arbitral tribunal.[108]

The proposed solution, which combines the testamentary arbitration with a compensatory option, is valid for those forced heirs who have received more than the minimum reserved share,[109] and it is observed that this mechanism is promoted in some regional legal systems (*ordenamientos forales*).[110] However, the propelling effect of the caution Socini would not work with the same effectiveness in the case of those forced heirs who have received only the minimum legitimate portion, since the impetus would be to give them the *quid* that the testator granted them and not deprive them of the minimum share that is due to them by law.

However, here, although the forced heirs who receive a minimum reserved share would not have an incentive to refer to the caution Socini, they will nevertheless have an interest in participating in arbitration to verify that their interests are

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[105] Like the model of the Valencia Court of Arbitration and Mediation: see *https://www.cortearbitrajeymediacionvalencia.com/reglamento/anexo-i-modelos-indicativos-de-clausulas-arbitrales/* (accessed November 25, 2024). Some legal doctrine, even if it favors the caution *Socini* in these cases, considers that arbitration between forced heirs who receive more than their reserved share would be possible without resorting to the compensatory option.: see I. Gomá Lazón, "Art. 10", op. cit., 238.

[106] C. De Prada Guaita, op. cit., 454.

[107] Literally "a salvo las legítimas".

[108] This is based on the observation that "ultimately, the clause has not put a risk on and does not offer any compensatory option because the heirs do not actually have to accept any encumbrance on their reserved shares, given that the arbitrator must respect the clause's wording": I. Gomá Lazón, "Improcedencia de la invalidez…", op. cit., 474 ff.

[109] "If the 'forced heir' in question did not accept it, his share in the inheritance would be reduced to his minimum reserved share without receiving any other benefit from it". R. Colina Garea, op. cit., 231.

[110] This is the case of Aragon, based on Article 500 of the *Código del Derecho Foral de Aragón*: A. Calatayud Sierra, op. cit., 175.

adequately protected, or to take action to avoid the application of Art. 6 LA, with the understanding that the right to challenge has been tacitly waived.[111]

CONCERNING THE INDEPENDENCE OF THE TESTAMENTARY DISPOSITION ON ARBITRATION FROM THE POTENTIAL INVALIDITY OF THE WILL

The independence of the arbitration agreement from the main contract is indisputable and undisputed as it is regulated.[112] On the other hand, the problem arises, given that the testator's will is expressed by means of a unilateral act associated with the will, and it could be concluded that the former cannot be independent of the latter, since the above regulations do not refer to non-negotiable acts. However, it will be seen that this is not the case, at least this is the thesis that is maintained in this paper.

Some authors – noting that "the legal transaction constituting testamentary arbitration can only be implemented in a testamentary disposition"[113] – defend the position that there is a "lack of autonomy and independence of the arbitration transaction with respect to the testamentary disposition that implements it".[114] This leads to the assertion,[115] that art. 9.1 LA would not be applicable to arbitration of disputes under a will, given that if this disposition allows the arbitration agreement to take the form of a clause incorporated into a contract (and therefore allows it to be configured as an independent agreement), this would not be valid for the arbitration of disputes under a will, since – it is maintained – "the juridical act giving rise to testamentary arbitration shall comply with the formal requirements

[111] See STSJ Madrid, No. 6/2021, op. cit.

[112] Art. 9.1 LA.

[113] R. Colina Garea, op. cit., 200.

[114] For more details see R. Colina Garea, op. cit., 201–203.

[115] Now, in this sense, this doctrine seems to mix two aspects that can be handled differently (the fact that arbitration is necessarily included in a testamentary disposition and that art. 9.1 LA does not apply to it), given that, subsequently, it is in favor of the provision being able to be made through another different will in which only the business of submission to arbitration is included and validates the possibility of several wills existing simultaneously with the existence of a single clause: cfr. R. Colina Garea, op. cit., 200 ff. and 217 ff.

However, there is another that flatly denies the separability between the arbitration clause and the will and, therefore, the application, *mutatis mutandis*, of art. 22 LA to the testamentary provision that institutes testamentary arbitration: José Ángel Martínez Sanchiz, "Función notarial y arbitraje. Convenio y laudo arbitral", *Cuadernos de Derecho y Comercio*, No. 60, 2014, 40.

prescribed by law for the testamentary disposition that contains it".[116] However, there are arguments to defend the autonomy and independence of the arbitration disposition with respect to the will, just as the arbitration agreement is with respect to the main contract.

Indeed, it should be remembered that Spanish law allows a testator to make more than one will and may dispose of only part of his or her assets in these wills, not all of them.[117] Thus, Article 739 of the Spanish Civil Code allows, *a contrario*, the existence of several valid wills, provided that this is duly recorded. In this sense, it is understood that the testamentary disposition establishing a testamentary arbitration is completely independent, just as in an arbitration instituted by an arbitration agreement. The rationale for arbitration should not be confused with the disposition or agreement that institutes it. While it is true that the disposition establishing a testamentary arbitration has a *mortis causa* nature, it may be drafted independently. This independence is justified *a fortiori* by the fact that Spanish law allows for holographic wills (with minimal formal requirements). Consider, for example, the subsequent drafting of a holographic testamentary disposition instituting testamentary arbitration by referring to a previously drafted will (which does not contain it).[118] Therefore, the validity of the testamentary arbitration disposition does not depend on the validity of the will (or one of the wills) drafted; instead, it depends on its own validity requirements. Therefore, there may be a valid testamentary arbitration disposition and a void will contain it. Furthermore, in the case of the existence of more than one will, as can actually be verified, this is even more intuitive, given that, in some of them, this disposition will not be present. The nullity or invalidity of one of these does not prevent the disposition from being applied to the others, and systematic and interpretive work must be carried out.

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[116] This is the position of R. Colina Garea, op. cit., 201. He also supports it through the arguments of Raquel Bonachera Villegas, *Los arbitrajes especiales*, Marcial Pons, Barcelona, 2010, 217.

[117] See *v.gr.* Resolución de 28 de julio de 2016, of the Dirección General de los Registros y del Notariado (*Boletin Oficial del Estado*, No. 228, of 21st September).

[118] 514 / 5.000.

If, in addition, the person concerned were over 16, in the case in which the previous will was validly drafted (not in holographic form), the testamentary disposition would not be valid pursuant to art. 688 Spanish Civil Code, while the original will would remain valid. On the contrary, the validity of the arbitrary testamentary disposition and the validity of the will are seen to be independent. Thus, if it is true that the nullity of a testamentary disposition also implies the nullity of the arbitrary testamentary that incorporates it (José Fernando Merino Merchán, José María Chillón Medina, *Tratado de Derecho Arbitral*, Thomson Civitas, Madrid-Cizur menor, 2006, 424), This nullity is independent of the nullity of the will to which it refers or to one of these wills if there are more.

Otherwise, we would end up in a paradoxical situation where the arbitrators would not be competent to assess the invalidity of the will (and the consequences this would entail) under the mistaken premise,[119] that the invalidity of the will would also imply the invalidity of the testamentary arbitration. Instead, the arbitrator may decide on the invalidity of the will,[120] this being legitimized by the principle *Kompetenz-Kompetenz.*[121] The opposing position, which denies this latter possibility on the grounds that challenging the will is not within the testator's discretionary powers, should therefore not prosper.[122] This aspect would affect arbitration and the arbitrator's competence only when the invalidity of the will has been previously declared.[123]

The independence of the testamentary disposition establishing the will to resolve disputes through arbitration therefore opens the possibility of its being instituted separately.[124] Indeed, while it is true that the purpose of the rule is to resolve disputes relating to estate where a will exists. This does not mean that Art. 10 LA requires that the will to solve disputes by arbitration already exist at the same time of the will. In this case, it will be a disposition that will be fulfilled, provided the will is drawn up. It would be a somewhat bizarre hypothesis, but it is not legally invalid.

CONCLUSIONS

Art. 10 LA grants the testator a discretionary right, within the scope of his or her will-making rights, to submit disputes relating to his or her estate to arbitration whenever there are incompatibilities between the successors. The latter have the right to accept or reject the inheritance, and if they do so, they will automatically

[119] See R. Verdera Server, "Art. 10", op. cit., 546.

[120] A systematic reconstruction can also be seen in Brian Buchhalter-Montero, "Arbitraje instituido por disposición mortis causa", *Revista Boliviana de Derecho*, No. 34, 2022, 524.

[121] We agree here with I. Gomá Lazón, "Art. 10", op. cit., 219.

[122] *Arg. ex* art. 675.2. See Francisco Capilla Roncero, "Art. 7", *Comentarios a la Ley de Arbitraje. Ley n. 36/1988, de 5 de diciembre* (coord. por Rodrigo Bercovitz Rodríguez-Cano), Tecnos, Madrid, 90.

[123] Declared pursuant to art. 675.2 CC cfr. F. Yáñez Vivero, op. cit., 97 and 98. For another doctrine, Art. 675.2 CC limits itself to 'prohibiting the prohibition': Elías Campos Villegas, "La partición hereditaria arbitral", *La partición de la herencia* (dir. por Xavier O'Callaghan Muñoz), Fundación Ramón Areces, Madrid, 2006, 257.

[124] The independence of the testamentary disposition by which arbitration may be instituted is also facilitated and justified by the possibility of issuing this will through an oral will that, for example, seeks to supplement a previous will devoid of such a disposition. In favor of the possibility of a testamentary disposition instituting testamentary arbitration in an act that does not provide for disposition of assets: C. García Pérez, op. cit., 192.

defer to this eventuality if a dispute arises. In this sense, inheritance possesses an inseparable element whenever the testator has acted in accordance with Art. 10 LA.

"Forced heirs" can be identified by both the expressions *legitimarios* and *herederos forzosos* which nonetheless do not have the same meaning.

Art. 10 use the reference at "herederos no forzosos o legatarios" (no-forced heirs, non-forced heirs or legatees) that is ambiguous and does not help to clarify the legal content of that article. Anyway, although art. 10 LA does not refer to forced heirs, this does not prevent the development of the arbitration proceeding (among the other subjects), the arbitration process will continue with or without their consent.

Therefore, and regardless of the literal meaning of Art. 10 LA and the dispositions of the testamentary arbitration disposition, it is in the forced heir's best interest to be able to participate in arbitration, not only to ensure and verify that their reserved shares are respected by the arbitrators, but also to avoid, in the event of a challengeable award, the inability to file a claim for annulment due to lack of interest pursuant to Art. 41 LA. However, they must be notified appropriately. In any case, it is true that any challenge to any disposition must be made at the appropriate time and not *a posteriori*, otherwise it may be understood that the right to challenge pursuant to art. 6 LA has been tacitly waived. In this sense, the reference to art. 6 LA is not a pretext for the inadmissibility of the arbitration. Art. 10 LA makes non-forced heirs must be interpreted, not in opposition to forced heirs (*legitimarios* or *herederos forzosos*), but to the figure of reserved share itself (*legitima*), since it is this that must be respected for reasons of public order.

However, based on the availability of the latter (the *legittima*) from the death of the testator, mechanisms such as the caution *socini* can also be introduced to encourage the participation of forced heirs in the arbitration process, where the subject has been awarded more than the minimum reserved share.

Despite the possibility of a holographic will, it is advisable to properly draft the testamentary arbitration disposition under the supervision of an expert. This can avoid future pathological aspects in the arbitration process, avoiding possible substantial inconsistencies when drafting the disposition, even more so where there is more than one will. Finally, it should be remembered that the conceptualization of the reserved share is not only a relative concept in the international sphere, but its disbursement methods, its redefinition, or reconceptualization are arguments that will need to be debated in the future, including in the Spanish context, especially when there may currently be grounds for disinheritance for emotional reasons, as is the case with Art. 451-17 of the Civil Code of Catalonia, which provides in its letter e) the possibility of depriving forced heirs of their right to a reserved

share in the event of "a manifest and continued absence of a family relationship between the deceased and the forced heir, if it is for a cause exclusively attributable to the forced heir".[125] This conceptual flexibility of the reserved share clearly affects and will affect a new understanding of the testamentary disposition which fixes an arbitration proceedings related to estate.

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TESTAMENT I ARBITRAŽA U ŠPANIJI: KRITIČKI OSVRT NA ŠPANSKI ZAKON O ARBITRAŽI

Rezime

Član 10 španskog Zakona o arbitraži izričito reguliše testamentarnu arbitražu. Rad je posvećen tumačenju formulacije „herederos no forzosos o legatarios" (bez prinudnih naslednika ili legatara) sadržane u pomenutoj zakonskoj odredbi. Istovremeno, autor nastoji da pruži sugestije za pravilno formulisanje odredbe o arbitraži u testamentu.

Ključne reči: arbitraža, testament, rezervisani deo, prinudni naslednici, testamentarna arbitraža

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Bonachera Villegas R., *Los arbitrajes especiales*, Marcial Pons, Barcelona, 2010.

[125] Literally: "ausencia manifiesta y continuada de relación familiar entre el causante y el legitimario, si es por una causa exclusivamente imputable al legitimario". Without being exhaustive, see on this subject see Rut González Hernández, "La ausencia de relación familiar como causa de desheredación de los descendientes", *Revista Crítica de Derecho Inmobiliario*, 2019, No. 775, 2603 ff. More broadly, in connection with the cessation of maintenance obligations: Begoña Ribera Blanes, "La falta de relación afectiva entre padres e hijos mayores de edad como causa de extinción de la pensión de alimentos", *Actualidad jurídica Iberoamericana*, 2020, No. 13, 482 ff; Pablo Chardí Torajada, "Extinción de la obligación de alimentos en particular por desafección de los hijos" *Actualidad Jurídica Iberoamericana*, No. 17-bis, 2022, 306 ff. Regarding the Spanish Supreme Court 's evolving approach to matters involving abuse *v.gr.* see Javier Barceló Doménech, "Abandono de personas mayores y reciente doctrina del Tribunal Supremo español sobre la desheredación por causa de maltrato psicológico", *Actualidad Jurídica Iberoamericana*, No. 4, 2014, 289 ff; Clara Gago Simarro, Pablo Antuña García, "La ausencia de relación familiar ¿justa causa de desheredación de hijos o descendientes?", *Revista Crítica de Derecho Inmobiliario*, 2021, No. 785, 1208 ff.

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