Unilateral Arbitration Clauses

*Irene Welser/Gregor Klammer**)

I. George Washington's Last Will

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

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

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

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

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1) Especially in Germany; *see* Maximilian Burkowski, Letztwillige Schiedsklauseln 11 (2016) (unpublished doctoral thesis, Vienna University) (on file with the library of the Vienna University).

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in the will by George Washington himself; *see* Werner Vorhofer, Schiedsverfahren bei Erbstreitigkeiten 11 (2015) (unpublished doctoral thesis, Vienna University of Economics and Business) (on file with the library of the Vienna University of Economics and Business); a scan of George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

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

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

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

II. Definition And Legal Framework

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

The legal framework of unilateral arbitration clauses in Austrian law is set out in Sec 581 (2) Austrian Code of Civil Procedure (ACCP): "*The provisions of this Chapter*[8]) *shall apply accordingly to arbitral tribunals that are, in a legally valid manner, mandated by testamentary disposition or other legal transactions*

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

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

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

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

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

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

that are not based on agreements by the parties or through articles of association or incorporation."[9])

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

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

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

III. Legal Nature And Basis

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

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

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

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

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

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

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

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

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

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

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

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

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

B. "Direct-Basis-Approach"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23]) Schlumpf has published extensive elaborations on the relationship between private autonomy and testamentary unilateral arbitration clauses from a Swiss law perspective: Michael Schlumpf, Testamentarische Schiedsklauseln 45 (2011).

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

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

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

C. Alternative Approaches And Theories

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Conclusion

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

IV. Reach Of Arbitration Clauses

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

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

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

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

A. Testamentary Arbitration Clauses

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

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

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

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

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

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

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

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

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

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

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