

## INTERNATIONAL IMPLICATIONS OF THE WILL AS AN IMPLIED UNILATERAL ARBITRATION CONTRACT

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In his article, *The Will As An Implied Unilateral Arbitration Contract*, Professor Gary Spitko offers an intriguing and innovative argument about how arbitration provisions in wills can be enforced even over the objection of a beneficiary and even in cases where the beneficiary seeks to set aside the will in its entirety.<sup>1</sup> While I do not agree with all of the assertions in that Article (for example, the conclusion that “a consensus is developing that a testator may not compel arbitration of contests to her will”<sup>2</sup> appears somewhat premature, given a number of probate cases not discussed by Professor Spitko<sup>3</sup> and recent developments in the arbitration of internal trust disputes<sup>4</sup>), the basic premise of the discussion—that arbitration provisions in wills can and should be considered to be contractual in nature and thus enforceable—is sound as a matter of U.S. probate and arbitration law.<sup>5</sup>

One item that Professor Spitko does not address in detail is whether and to what extent his theory would apply to wills that are international in nature. This is an important issue to consider, given the increasing number of people who live outside their countries of origin as a result of globalization.<sup>6</sup> The situation has been further exacerbated by the recent

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1. See E. Gary Spitko, *The Will As An Implied Unilateral Arbitration Agreement*, 68 FLA. L. REV. 49 (2016).

2. *Id.* at 53.

3. See, e.g., *In re Meredith's Estate*, 266 N.W. 351, 354, 356 (Mich. 1936), *superseded by implication by In re Nestorovski Estate*, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009); *In re Blumenkrantz*, 824 N.Y.S.2d 884, 887 (Sur. Ct. Nassau Co. 2006), *superseding In re Jacobovitz' Will*, 295 N.Y.S.2d 527, 529 (Sur. Ct. Nassau Co. 1968); see also Spitko, *supra* note 1, at 58 n.33 (citing the initial negative decisions but not referring to the more recent decisions).

4. Arbitration of trust disputes has been embraced in a variety of U.S. and foreign jurisdictions. See, e.g., ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW (S.I. Strong ed., 2016) [hereinafter ARBITRATION OF TRUST DISPUTES] (examining developments in arbitration of trust disputes both domestically and internationally); S.I. Strong, *Arbitration of Trust Law Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157 (2012) [hereinafter Strong, *Two Bodies*] (discussing trust law and arbitration law in the context of international commercial arbitration).

5. See Spitko, *supra* note 1, at 98.

6. A significant number of Americans live abroad, although precise numbers are difficult to estimate. See Joe Costanzo & Amanda Klekowski von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POL'Y INST. (May 17, 2013), <http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans> (placing the number between 2.2

economic downturn, which has led many elderly individuals to move to “retirement havens,” where health care and cost of living is more affordable for those on fixed incomes.<sup>7</sup> As a result, it is necessary to consider the international implications of Professor Spitko’s theory.

As Professor Spitko’s article illustrates, this issue needs to be considered from the perspective of both arbitration law and succession law, which includes principles relating to donative transfers and intestate succession.<sup>8</sup> In many ways, the arbitration analysis appears relatively straightforward, since the notion of an implied unilateral contract to arbitrate is already well-accepted in international circles, at least in investment cases. Indeed, investment arbitration (also known as investor-state arbitration) is often referred to as “arbitration without privity”<sup>9</sup> because it constitutes a unilateral offer to arbitrate disputes involving certain types of foreign investments rather than a bilateral contract between host state and the individual investor.<sup>10</sup> The offer to arbitrate is typically reflected in an international treaty, such as a bilateral investment treaty (BIT) or free trade agreement (FTA), but can also be found in the host country’s national laws.<sup>11</sup>

Although investment proceedings are somewhat *sui generis*, international commercial arbitration also has experience with what might be termed implied contracts to arbitrate, primarily in matters involving non-signatories.<sup>12</sup> While those issues need to be more fully evaluated before a final conclusion can be reached about the merits of Professor Spitko’s thesis,<sup>13</sup> the proposition appears at least arguable as a matter of

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million and 6.8 million); Lyman Stone, *In An Age of Global Citizenship, American Expatriates Increase*, FEDERALIST (May 4, 2015), <http://thefederalist.com/2015/05/04/in-an-age-of-global-citizenship-american-expatriates-increase/> (estimating approximately 2.8 million Americans lived abroad as of 2013, excluding military and diplomatic personnel, long-term tourists and temporary workers).

7. See Nicholas D. Zeltzer, Note, *Foreign-Economic-Retirement Migration: Promises and Potential, Barriers and Burdens*, 16 ELDER L.J. 211, 212 (2008).

8. See Spitko, *supra* note 1, at 55.

9. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVESTMENT L.J. 232, 247, 250, 257 (1995).

10. See CAMPBELL McLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 52–54 (2008) (concluding the concept of investment arbitration as constituting an offer to arbitrate “is no longer controversial”).

11. See *id.* at 25–43.

12. See Thomson-CSF, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 776 (2d Cir. 1995); S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT’L L. 915, 993 (1998); S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT’L L. 47, 52 n.29 (2012) [hereinafter Strong, *Agreement*].

13. For example, questions could arise as to whether arbitration awards relating to wills would be considered “an agreement in writing” under certain international conventions facilitating

international arbitration law. However, questions arise as to whether the same conclusion can be reached pursuant to cross-border succession law.

The diversity of national laws on succession make a comprehensive international and comparative analysis impossible in the current Response. However, the European Union (E.U.) recently adopted a regional instrument known as the European Succession Regulation (Regulation) that is applicable in twenty-five different countries and provides a useful framework for analysis of the relevant issues.<sup>14</sup> The Regulation not only facilitates resolution of decedents' estates within the E.U. but also interacts with foreign law, including U.S. law, in a potentially unanticipated manner.<sup>15</sup> As a result, the Regulation offers a good starting point for analysis of Professor Spitko's thesis on the will as an implied unilateral arbitration contract.<sup>16</sup>

## I. BACKGROUND ON THE REGULATION

At this point, there is not a great deal of commentary or case law construing the Regulation, since it only came into effect on August 17, 2015.<sup>17</sup> However, by its terms, the Regulation addresses a wide range of issues relating to "conflict of laws, jurisdiction, mutual recognition and enforcement of decisions in the area of succession."<sup>18</sup> As a piece of E.U. legislation, the Regulation may at first appear relevant only to E.U. nationals. However, the applicability of the Regulation is actually based on "habitual residence," which means that the estates of U.S. nationals (including dual U.S. nationals) who are habitually resident in the E.U. will be subject to the principles and procedures described in the Regulation.<sup>19</sup>

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recognition and enforcement of foreign arbitral awards in international commercial arbitration. *See Strong, Agreement, supra* note 12, at 55.

14. *See* Council Regulation 650/2012, 2012 O.J. (L 201) 107 [hereinafter Regulation]. The applicability of the Regulation in three additional Member States (Ireland, Denmark and the United Kingdom) is questionable. *See id.* paras. 82–83.

15. *See id.*

16. Although the Regulation addresses a wide variety of testamentary documents as well as intestate succession, the focus in this discussion will be on its effect on wills, which are expressly covered by the instrument. *See id.* para. 9, arts. 1, 3(1)(a). Nevertheless, many of the points made here are also relevant to trust arbitration, although the Regulation only applies to testamentary trusts, as opposed to commercial trusts. *See id.* paras. 9, 13, arts. 1(1), 3(1)(a), 3(1)(d).

17. *See id.* art. 83(1). The U.K.-based Society of Trust and Estate Practitioners (STEP) has put out a number of useful practice guides, including some written from the perspective of non-Member States. *See European Succession Regulation*, STEP, <http://www.step.org> (last visited Sept. 28, 2016) (search on European Succession Regulation).

18. *See* Regulation, *supra* note 14, para. 5. The Regulation also creates a European Certificate of Succession to facilitate resolution of succession matters in E.U. Member States. *See id.*

19. *See id.* paras. 23–24, art. 4. The concept of "habitual residence" is subject to a variety of considerations and exceptions. *See id.* paras. 32–35, art. 21. A decedent's habitual residence

U.S. law can be introduced into the Regulation regime by virtue of Articles 20 and 21, which allow decedents to choose the law applicable to their estate plans.<sup>20</sup> Article 20 specifically states that “[a]ny law specified by this Regulation shall be applied whether or not it is the law of a Member State.”<sup>21</sup> As a result, parties and their counsel need to be aware of how the Regulation interacts with U.S. law, including Professor Spitko’s theory of the will as an implied unilateral arbitration contract. As the following analysis suggests, some factors favor the enforceability of an arbitration provision found in a will that is subject to the Regulation while other factors do not.

## II. FACTORS FAVORING THE ENFORCEABILITY OF ARBITRATION PROVISIONS IN WILLS GOVERNED BY U.S. LAW AND SUBJECT TO THE REGULATION

Several factors suggest that arbitration provisions in wills of U.S. nationals habitually resident in the E.U. at the time of death will be enforceable under the Regulation. First, one of the overarching goals of the Regulation is to respect and promote personal autonomy in matters involving the disposition of a decedent’s estate.<sup>22</sup> Although the law governing matters of succession is usually that of the habitual residence of the deceased, decedents are free to choose the law of their nationality to govern their will and other testamentary instruments.<sup>23</sup> As a result, it appears possible for American citizens who are habitually resident in the E.U. to choose to have any disputes arising out of their wills heard in arbitration, if the will is governed by a U.S. law that considers arbitration provisions in a will to be enforceable, including under Professor Spitko’s theory of the will as a type of implied unilateral arbitration contract.<sup>24</sup>

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can affect not only the choice of law but the forum in which succession proceedings will be heard. *See id.* arts. 4–19, 21.

20. *See id.* para. 38, arts. 20–21; Leigh-Alexandra Basha, *How to Advise Wealthy U.S. Families Who Own Foreign Property: Tax, Reporting, and Succession Issues*, in *PLANNING TECHNIQUES FOR LARGE ESTATES* para. 15.3 (2016), Westlaw SX020 ALI-CLE 2057 (“The Regulation provides that a testator can choose the law of his or her nationality to govern his or her worldwide succession. This means that U.S. citizens can choose U.S. law (more specifically the state law to which they have the closest connection) to govern their worldwide succession, including their ownership of French [or other E.U.] property and easily avoid the French [or other E.U.] forced heirship rules.”); *see also* Regulation, *supra* note 14, para. 40 (“A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession.”).

21. Regulation, *supra* note 14, art. 20.

22. *See id.*

23. *See id.* para. 38, arts. 20–21. Limiting choice of law to the law of the decedent’s nationality allows states to protect certain important public policies regarding succession, such as those involving forced heirship.

24. Most U.S. law governing estates is state, rather than federal, in nature. It is unclear whether and to what extent the Regulation would require a U.S. citizen to choose the law of the

This conclusion is supported by those aspects of the Regulation that allow party autonomy in forum selection. For example, Article 5 states that “[w]here the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.”<sup>25</sup> Although this provision has its limitations (for example, it does not expressly contemplate arbitration or allow a decedent to choose a court seated outside the E.U.), it nevertheless reflects a certain amount of testamentary freedom regarding forum selection.

One potentially significant problem with the Regulation’s forum selection provision involves the way in which it contemplates active agreement of all concerned parties as well as a writing that is dated and signed by those persons.<sup>26</sup> However, this requirement need not be fatal to the arbitration of will disputes, particularly in those jurisdictions that have adopted mechanisms (such as the direct benefits estoppel theory) that allow an arbitration provision in a will to bind a beneficiary who has not expressly consented to that particular procedure if that beneficiary seeks to take under the will.<sup>27</sup> The problem is that one of the primary benefits of Professor Spitko’s characterization of a will as an implied unilateral arbitration contract is that it allows the use of arbitration even in cases where actual and purported beneficiaries, including intestate takers, do not claim under the will.<sup>28</sup>

There are several potential ways to evade this particular requirement. For example, it might be possible to frame the writing requirement in the Regulation as evidentiary rather than substantive in nature.<sup>29</sup> Even if the requirement was found to be substantive, it might be considered unnecessary in jurisdictions adopting Professor Spitko’s theory of the will as an implied unilateral arbitration contract, since the validity of that act would be governed by the chosen law.<sup>30</sup>

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state in which he or she was born, as opposed to the law of another U.S. state with which the decedent was connected. *See id.* art. 36(2)(b) (stating that for states with multiple territorial units, provisions relating to the nationality of the decedent “shall . . . be construed as referring to the law of the territorial unit with which the deceased had the closest connection”).

25. *Id.* art. 5(1); *see also id.* para. 28.

26. *See id.* art. 5(2) (noting the writing “shall be . . . dated and signed by the parties concerned”).

27. *See* Spitko, *supra* note 1, at 49–50.

28. *See id.* at 56.

29. *See* Strong, *Agreement*, *supra* note 12, at 67. A writing requirement can be imposed for substantive purposes (i.e., to show actual consent) or evidentiary purposes (i.e., to show the content of the agreement). *Id.* If the writing requirement is evidentiary, then a writing that is not signed by the parties (i.e., an arbitration provision in a will) could reflect the content of the agreement. *Id.*

30. *See* Regulation, *supra* note 14, art. 22(3) (“The substantive validity of the act whereby the choice of the law was made shall be governed by the chosen law.”).

Alternatively, courts might construe the term “choice-of-court agreement” strictly to exclude arbitration agreements.<sup>31</sup> To some extent, it is unclear whether proponents of Professor Spitko’s theory would prefer to have arbitration agreements considered a type of choice of court agreement or not. If the two mechanisms are considered analogous, then the Regulation would appear to support the choice of arbitration pursuant to the principle of party autonomy; however, the Regulation’s restrictions on choice of court agreements may be sufficiently rigorous to deny recognition of an arbitration provision that does not contain the written agreement of all concerned parties.<sup>32</sup>

When considering this issue, courts will doubtless look at the Regulation in its entirety, including language stating that

[f]or the purposes of this Regulation, the term ‘court’ should . . . be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial function in a given succession by delegation of power by a court.<sup>33</sup>

Other provisions similarly state that “succession matters in some Member States may be dealt with by non-judicial authorities, such as notaries” and contemplate the possibility of amicable out-of-court settlements (which might even include mediated settlements) involving a particular succession dispute.<sup>34</sup> These statements could support an argument in favor of arbitration of disputes arising under the Regulation because they demonstrate the legitimacy of various types of non-judicial forms of dispute resolution. This conclusion is supported as a matter of theory, since most if not all jurisdictions frame arbitration as involving a grant of jurisdictional authority from the state.<sup>35</sup>

This outcome may be further supported by Article 23(2) of the Regulation, which states that

[t]he [chosen] law shall govern in particular:

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31. *See id.* art. 5.

32. *See id.*

33. *Id.* para. 20; *see also id.* art. 3(2).

34. *Id.* para. 36.

35. *See* JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* paras. 5-1 to 5-31 (2003) (discussing theoretical basis of arbitration); S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 *STAN. J. COMPLEX LITIG.* 295, 331–50 (2013).

- (a) the causes, time and place of the opening of the succession [and]
- (b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights . . . .<sup>36</sup>

While this provision does not explicitly mention the method by which disputes are to be resolved, the reference to the “time and place of the opening of the succession” and the determination of the beneficiaries’ shares and obligations could be read to require enforcement of an arbitration provision in the will.

Although the Regulation’s definition of the term “court” is quite broad, some limitations do exist.<sup>37</sup> For example, Article 3 indicates that decisions rendered by judicial and similar types of authority need to be capable of being “made the subject of an appeal to or review by a judicial authority” and must “have a similar force and effect of as a decision of a judicial authority on the same matter,” which could be interpreted to preclude arbitration of Regulation-related disputes.<sup>38</sup> However, this argument does not carry much weight, since arbitral awards are currently subject to judicial review, albeit of a limited nature, and are considered final and binding to the same extent as judicial decisions.<sup>39</sup>

Support for arbitration of disputes arising under the Regulation can also be found in Article 75, which states that “[t]his Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation.”<sup>40</sup> All of the Member States of the E.U. are currently signatories of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which states, in mandatory terms, that

[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal

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36. Regulation, *supra* note 14, art. 23(2)(a)–(b). This article includes a number of other issues that may be governed by the chosen law. *See id.* art. 23.

37. *See id.*

38. *Id.* art. 3(2).

39. *See* LEW ET AL., *supra* note 35, at para. 24-1; *see also infra* note 59 and accompanying text (regarding scope of arbitral review).

40. Regulation, *supra* note 14, art. 75(1); *see also id.* para. 73. *But see id.* para. 75(2) (giving precedence to the Regulation in matters involving two Member States).

relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>41</sup>

At this point, it is unclear whether the New York Convention applies to wills, although commentators have argued that it is applicable to other testamentary instruments, such as testamentary trusts.<sup>42</sup> Perhaps the biggest obstacle to the enforcement of arbitration provisions in wills arises under Article II(2), which states that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>43</sup> As Professor Spitko notes, opponents of succession-related arbitration often argue that a will is not a contract, although that argument has not precluded arbitration in trust-related disputes, particularly among courts who define an “arbitration agreement” more broadly than a “contract.”<sup>44</sup> Furthermore, courts have not yet contemplated the possibility that a will could be considered an implied unilateral contract between the testator and the state and whether that type of arrangement could be considered enforceable, perhaps in a manner similar to that involving offers to arbitrate in the context of international investment disputes.<sup>45</sup> While this issue needs to be explored further, disputes that are successfully brought within the terms of the New York Convention will benefit from the mandatory provisions of Article II(1) and thus will be sent to arbitration.<sup>46</sup>

The European Convention on Human Rights (European Convention) is another international treaty worth considering.<sup>47</sup> Some commentators have claimed that Article 6.1 of the European Convention precludes certain types of arbitration, such as those involving testamentary trusts, on the grounds that the European Convention guarantees parties the right

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41. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(1), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]; see also Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Sept. 28, 2016) (listing Contracting Parties, which includes the United States).

42. See Sarah Ganz, *Enforcement of Foreign Arbitral Awards Arising from an Internal Trust Arbitration: Issues Under the New York Convention*, in ARBITRATION OF TRUST DISPUTES, *supra* note 4, at 494; Margaret L. Moses, *International Enforcement of an Arbitration Provision in a Trust: Questions Involving the New York Convention*, in ARBITRATION OF TRUST DISPUTES, *supra* note 4, at 467; Strong, *Two Bodies*, *supra* note 4, at 1213–19.

43. New York Convention, *supra* note 41, art. II(2).

44. See Spitko, *supra* note 1, at 57–58; Strong, *Two Bodies*, *supra* note 4, at 1209–30.

45. See Spitko, *supra* note 1, at 67; see also *supra* notes 9–11 and accompanying text.

46. See New York Convention, *supra* note 41, art. II(1).

47. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

to a public trial, which differs from arbitration.<sup>48</sup> However, numerous forms of arbitration have been determined to be consistent with the European Convention.<sup>49</sup> As a result, arbitration of disputes arising under the Regulation would not be per se barred by the European Convention, although further analysis would be necessary to ensure that this type of arbitration fell within the permitted parameters.<sup>50</sup> Similar issues might arise under the Charter of Fundamental Rights of the European Union, which is explicitly mentioned in the Regulation and which also protects the right to a fair and public trial.<sup>51</sup>

### III. FACTORS DISFAVORING THE ENFORCEABILITY OF ARBITRATION PROVISIONS IN WILLS GOVERNED BY U.S. LAW AND SUBJECT TO THE REGULATION

As the preceding discussion suggested, a variety of factors favor the enforceability of an arbitration provision in a will that is governed by U.S. law and subject to the Regulation. However, other elements suggest the opposite conclusion.

The first issue to consider involves the silence of the Regulation regarding arbitration. Although further research is necessary to determine whether and to what extent silence can be used as a means of interpreting the Regulation as a matter of European law, opponents to arbitration are sure to argue that the failure to contemplate arbitration suggests that mechanism should not be permitted in succession-related matters, even if U.S. law controls.

Another anticipated argument against enforcement of arbitration

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48. See Mark Herbert, *Trust Arbitration in England and Wales: The Trust Law Committee, in ARBITRATION OF TRUST DISPUTES*, *supra* note 4, at 228, 246–52 (considering Article 6.1 in the context of trust disputes). Article 6.1 states

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention, *supra* note 47, art. 6.1.

49. See LEW ET AL., *supra* note 35, paras. 5-57 to 5-67 (discussing cases); Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights*, 21 J. INT'L ARB. 413, 416–19, 426–47 (2004) (stating that parties consenting to arbitration waive their rights under Article 6(1) of the European Convention).

50. See European Convention, *supra* note 47.

51. See Charter of Fundamental Rights of the European Union, art. 47, Oct. 26, 2012, 2012 O.J. (C 326) 391 [hereinafter E.U. Charter]; Regulation, *supra* note 14, paras. 58, 81.

provisions in wills arises out of the Regulation's public policy provisions.<sup>52</sup> In many ways, this claim would appear difficult to make, since the language in question—“[t]he application of a provision of the law of any State [including that of the United States] specified by this Regulation may be refused *only* if such application is *manifestly incompatible* with the public policy (*ordre public*) of the forum”—suggests a somewhat heightened standard.<sup>53</sup> However, the right to a public trial is considered fundamental in European jurisprudence and may therefore receive robust protection, particularly given the deep-seated hostility some members of the succession law community exhibit toward arbitration.<sup>54</sup>

The interpretation of the public policy exception may be further affected by language in the Regulation stating that “[t]he rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.”<sup>55</sup> At this point, it is unclear whether and to what extent courts will consider arbitration sufficiently protective of the rights of the designated class of persons, particularly if some of the affected individuals—for example, creditors—can be considered third parties that should not be required to participate in an arbitration.<sup>56</sup>

Another issue that may be relevant to the interpretation of the public policy exception involves the fact that court settlements are considered proper under the Regulation.<sup>57</sup> Although such settlements require a court to approve the terms of the agreement before the agreement is considered binding, it is to some extent unclear why party autonomy should prevail in matters involving negotiation or mediation but not arbitration.<sup>58</sup> Indeed, the only reason why a court would deny approval to a negotiated or mediated settlement would be in cases where the process violated basic

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52. See Regulation, *supra* note 14, para. 58, art. 35.

53. *Id.* art. 35 (emphasis added). *Ordre public* is the civil law version of public policy and is sometimes construed to be somewhat broader than public policy in the U.S. sense. See Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 ARB. INT'L 333, 334 (2004) (“In the Anglo-Saxon legal tradition, the meaning of ‘public policy’ is relatively narrow, referring to ‘matters of public morals, health, safety, welfare, and the like’ and is distinguishable from matters related to due process. In the continental European tradition public policy, or *ordre public*, refers to a wider range of judicial concerns, a range that ‘encompasses breaches of procedural justice.’” (footnotes omitted)).

54. See E.U. Charter, *supra* note 51, art. 47; European Convention, *supra* note 47, art. 6.1; Strong, *Two Bodies*, *supra* note 4, at 1162 & n.16 (discussing the “blinding prejudice” of some members of the succession law community toward arbitration); see *supra* notes 48–51 and accompanying text.

55. Regulation, *supra* note 14, para. 7.

56. Professor Spitko's article does not appear to distinguish between creditor claims and beneficiary claims.

57. See Regulation, *supra* note 14, arts. 3(h), 61.

58. See *id.* art. 3(h).

principles of procedural fairness or where the content of the agreement violated public policy. Both grounds of objection are also available in matters resolved through arbitration, which suggests that arbitration should be considered on a par with negotiation and mediation under the Regulation.<sup>59</sup>

#### IV. CONCLUSION

As the preceding discussion suggests, Professor Spitko's theory of the will as an implied unilateral arbitration contract is not only important domestically, but also internationally. While it is unclear whether and to what extent his thesis will be applicable to disputes arising under the Regulation, this is an issue that needs to be considered whenever a U.S. citizen residing in the E.U. drafts a will governed by U.S. law and includes an arbitration provision. While such provisions may not currently be routine, the increased interest in arbitration of probate-related disputes suggests they will not be long in coming.

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59. See, e.g., New York Convention, *supra* note 41, art. V; United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, arts. 34-35, 18th Sess., 112th plen. mtg., U.N. Doc. A/40/17 (June 21, 1985), amended by UNCITRAL Model Law on International Commercial Arbitration, 39th Sess., 64th plen. mtg., U.N. Doc. A/61/17 (July 7, 2006).