ICC Dispute Resolution Services

ICC Dispute Resolution Bulletin

2022 | ISSUE 2 | EXTRACT

ICC Dispute Resolution Bulletin | 2022 Issue 2

E-journal of the International Chamber of Commerce (ICC)
Périodique numérique de la Chambre de commerce internationale

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (stn@iccwbo.org). Suggestions for book reviews are also welcome.

ICC Publication No. @22BUL2
ISBN: 978-92-842-0636-0
ISSN: 2520-6052

Price | Prix

Subscription | abonnement : 180 euros (excl. VAT | hors TVA)

Per issue | par numéro : 49 euros (excl. VAT | hors TVA)

Publication date | Date de parution

September 2022 | Septembre 2022

Published by ICC | Édité par ICC

Président, directeur de la publication : John Denton

Head Office
33-43 avenue du Président Wilson
75116 Paris, France

Directeur général, directeur adjoint de la publication : Emmanuel Jolivet

Subscriptions/Individual issues

publications@iccwbo.org

The ICC Dispute Resolution Bulletin is available :

- ICC Knowledge 2 Go at **https://2go.iccwbo.org/**
- ICC Digital Library at **http://library.iccwbo.org/**

Who Decides? Judicial Review of Arbitral Jurisdiction in the U.S. and Germany — particularly under Article V(1)(c) of the New York Convention

Andreas Frischknecht, Greta Körner and Alex Lupsaiu

Andreas Frischknecht is a Partner with Chaffetz Lindsey LLP in New York and acts as counsel in international commercial arbitration and arbitration-related litigation, with a particular focus on award enforcement. He has extensive experience with a variety of recurring issues in cross-border disputes, including sovereign immunity, data privacy and discovery in aid of foreign proceedings under 28 U.S.C § 1782.

Greta Körner is an attorney admitted to practice in New York and fully qualified to practice law in Germany (Ass. jur.).

Alex Lupsaiu is an associate with Chaffetz Lindsey LLP in New York. He represents clients in arbitration proceedings and other commercial disputes, particularly in the renewable energy and manufacturing sectors.

In this article, the authors show that courts in the United States and Germany differ fundamentally in their approach to arbitral jurisdiction and the degree to which it is subject to judicial review. But, despite the stark differences in theory, the practical outcomes in both jurisdictions appear remarkably similar. In Germany, as in the United States, decisions upholding arbitral jurisdiction appear to be the norm, and parties asserting that a particular claim or dispute is beyond the scope of their agreement to arbitrate are likely to face a steep uphill climb.

Introduction

It is axiomatic that 'arbitration is a creature of contract', such that 'a person may only be compelled to arbitrate a dispute to the extent that he has agreed to do so'.[1] Consistent with this foundational principle, Article V(1)(c) of the New York Convention (the 'Convention') provides that an enforcing court 'may' refuse to enforce an arbitral award 'at the request of the party against whom it is invoked' if that party furnishes proof that '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration'.[2] By its terms, therefore, the Convention contemplates judicial scrutiny of arbitral jurisdiction at the enforcement stage.

In the U.S., the application of Art. V(1)(c) has been complicated by courts' tendency to view the power to decide arbitral jurisdiction in binary terms as vested *either* in the arbitral tribunal *or* the reviewing court. As framed by the U.S. Supreme Court, the question thus boils down to '*who decides*' whether the parties agreed to submit their dispute to arbitration.[3] Yet, the lower federal courts have been quick to find that the parties intended to delegate this authority to the arbitral tribunal based merely upon their incorporation by reference of institutional rules authorizing the arbitrators, consistent with competence-competence principles, to determine their own jurisdiction in the first instance. The practical result is that, in most cases, a tribunal's finding of jurisdiction will not be subject to independent judicial review in a subsequent U.S. enforcement proceeding.

Germany, by contrast, has taken a very different approach. In principle, parties there are *always* entitled to an independent judicial determination of arbitral jurisdiction, regardless of whether the arbitral tribunal *also* has the power, under competence-competence principles, to rule on its own jurisdiction. Indeed, in Germany, parties cannot validly derogate, by contract, from the rule that only the state courts have final authority to determine jurisdictional issues. Yet, despite German judges' seemingly unfettered power to overrule an arbitral tribunal's jurisdictional determinations, a review of the relatively few published German court decisions in this area suggests that German courts, in practice, rarely make use of that power. As a result, despite the stark differences in approach, the bottom line in both the U.S. and Germany is that a challenge to jurisdiction at the enforcement stage, in most cases, is unlikely to succeed.

1 *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002).

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, Art. V(1)(c).

3 *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

I. United States

A. Highly deferential review of arbitral jurisdiction

1. Decision in the *First Options* case

In the U.S., the framework for judicial review of an arbitral tribunal's determinations concerning its own jurisdiction derives from the U.S. Supreme Court's seminal 1995 decision in *First Options of Chicago, Inc. v. Kaplan*.[4] There, the Court addressed the question of whether arbitral tribunals or courts 'should have the primary power to decide' whether the parties 'agreed to arbitrate the merits' of their dispute.[5] The Court referred to the latter question as one of 'arbitrability',[6] but outside the U.S., it more typically would be characterized as a question of arbitral *jurisdiction*.

Whether arbitral tribunals or courts have primary authority to determine arbitrability, the Court explained, turns on whether 'the parties agree[d] to submit the arbitrability question itself to arbitration'.[7] If so, the Court reasoned, the standard for judicial review of a tribunal's determination as to arbitrability 'should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate'.[8] In that circumstance, a tribunal's jurisdictional determinations are not subject to any closer judicial scrutiny than its decision on the merits.[9] Thus, where the parties have agreed to arbitrate issues of arbitrability, *First Options* instructs that a reviewing court 'should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances'.[10] And, virtually in the same breath, the Court's unanimous opinion includes even more categorical language, to the effect that 'a court *must defer* to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration'.[11]

Given this framework, the critical question becomes 'how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration'.[12] In that respect, the Court made clear, a reviewing court 'should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so'.[13] The rationale for this heightened standard, the Court explained, ultimately lies in 'the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration'.[14]

At issue in *First Options* was a married couple's objection that they never agreed to arbitrate their dispute with a stock clearing firm. The Supreme Court found insufficient evidence that the couple 'clearly agreed to have the arbitrators decide (i.e. to arbitrate) the question of arbitrability'.[15] In particular, the Court deemed the mere fact that the couple had 'fil[ed] with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction' insufficient to show 'a clear willingness to arbitrate that issue, i.e. a willingness to be effectively bound by the arbitrator's decision on that point'.[16] To the contrary, the Court explained, 'insofar as the [couple] forcefully object[ed] to the arbitrators deciding their dispute with [the stock clearing firm], one naturally would think that they did not want the arbitrators to have binding authority over them'.[17]

First Options concerned a domestic arbitration, but U.S. courts take the same approach when considering a jurisdictional challenge to the enforcement of a foreign award under Art. V(1)(c) of the Convention. This uniform approach is consistent with the U.S. Federal Arbitration Act, which provides that the law governing domestic awards in Chapter 1 of the Act also applies to proceedings to enforce a Convention award under Chapter 2 of the Act 'to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the Convention as ratified by the U.S.'.[18]

Federal courts have found no conflict between *First Options*, which permits delegation of arbitrability to the arbitrator, and the requirements of the Convention under Art. V(1)(c). Instead, they have merely noted that 'every country adhering to the competence-competence principle allows *some form of judicial review* of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that

4 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
5 *Id.* at 942.
6 *Id.*
7 *Id.* at 943.
8 *Id.*
9 As discussed in the subsequent Part on the German approach, this is not the case for review of arbitral decisions in Germany. In Germany, courts will scrutinize jurisdictional decisions by a tribunal more closely, reflecting a value judgment by German courts that merits decisions deserve more deferential review.
10 *First Options of Chicago,* 514 U.S. at 943.
11 *Id.*(emphasis added). On the other hand, if 'the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently'. (emphasis in original). *Id.*
12 *Id.* at 944.
13 *Id.*
14 *Id.* at 945.
15 *Id.* at 946.
16 *Id.*
17 *Id.*
18 9 U.S.C. § 208.

no valid arbitration agreement ever existed'.[19] However, there has been no suggestion that Art. V(1)(c), which permits judicial review of an arbitrator's jurisdiction, requires *independent* or *de novo* judicial review of an arbitral tribunal's finding of jurisdiction (that is, review without deference to the tribunal's existing determination) where the competence-competence principle authorized the tribunal to determine its own jurisdiction in the first instance. On the contrary, the Second Circuit has held that, where a party has 'clearly and unmistakably agreed to arbitrate issues of arbitrability', that party 'is not entitled to an independent judicial redetermination of that same question' in a subsequent enforcement proceeding under the Convention.[20]

2. 'Clear and unmistakable' evidence of agreement to delegate primary authority to arbitral tribunal

Incorporation of institutional rules. The Supreme Court in *First Options* did not elaborate on what might constitute sufficiently 'clear and unmistakable' evidence of the parties' intent to delegate the issue of arbitrability (i.e. arbitral jurisdiction) to the tribunal. However, the lower federal courts have almost uniformly held that the parties' incorporation by reference, in their arbitration agreement, of institutional arbitration rules that include a competence-competence provision satisfies the 'clear and unmistakable' standard.[21]

At first blush, the Tenth Circuit might appear to have reached a different conclusion *in Riley Manufacturing Company. v. Anchor Glass Container Corporation*,[22] where the court held that domestic courts retain the authority to review arbitrability even where the parties' arbitration agreement incorporates institutional rules. However, as the Tenth Circuit has since observed in a more recent decision, *Riley Manufacturing* involved an earlier version of the AAA rules that did not include a provision concerning the arbitration of arbitrability.[23] Thus, *Riley Manufacturing* does not call into question the general consensus among U.S. federal courts that the parties' incorporation of institutional rules that follow the competence-competence principle constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability.[24]

Yet the case law provides little, if any, supporting analysis or reasoning for why such incorporation by reference should be deemed sufficient under *First Options*. For example, *Shaw Group Inc. v. Triplefine International Corp*. involved a dispute over the construction of a nuclear power plant in Taiwan and a dispute resolution clause providing for arbitration under the ICC rules.[25] The Second Circuit found clear and unmistakable evidence of the parties' intent to arbitrate arbitrability where they broadly agreed to refer 'all' disputes to arbitration under the ICC Rules, which reflect the competence-competence principle.[26] The court observed that, under applicable Second Circuit precedent, contractual language referring 'all' disputes to arbitration is sufficiently 'plain and sweeping' to capture disputes about arbitrability. Moreover, the court found that because the ICC Rules confer 'initial responsibility' upon the arbitral tribunal to determine arbitrability, their incorporation evidences the parties' clear and unmistakable intent to arbitrate arbitrability.[27] However, the court did not explain why conferring 'initial responsibility' upon the tribunal could be deemed tantamount to delegating the *final* decision on arbitrability to the arbitrators, without the possibility of meaningful judicial review.

19 *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) (emphasis added); see also David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 382 (2018).

20 *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012).

21 A rare example of a case in which a federal district court in Illinois, in the absence of controlling appellate authority in the Seventh Circuit, bucked this prevailing consensus is *Taylor v. Samsung Elecs. Am., Inc.*, No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. 16 Mar. 2020). The court there acknowledged that 'the overwhelming majority of courts that have addressed this point have concluded that an arbitration agreement's incorporation by reference of a rule like this is sufficient to delegate to the arbitrator the determination of validity and arbitrability', but the court nonetheless disagreed. As it explained, '[i]t is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to delegate those issues to the arbitrator and preclude a court from answering them'. *Id.*

22 *Riley Manufacturing Company. v. Anchor Glass Container Corporation*, 157 F.3d 775 (10th Cir. 1998), at 780.

23 See *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017).

24 *Id.*

25 *Shaw Group Inc. v. Triplefine International Corp.*, 322 F.3d 115, 118 (2d. 2003).

26 *Id.*

27 *Id.* at 125.

Other Circuits have adopted a similar approach.[28] In *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, the Fifth Circuit, without further elaboration, 'agree[d] with most of our sister circuits that the express adoption of [the AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability'.[29]

It is hard to overstate the significance of these decisions holding that incorporation by reference of institutional rules precludes independent judicial review of the arbitral tribunal's jurisdictional determinations. Parties routinely incorporate institutional rules by reference in their arbitration agreements, and virtually all of the main institutional rules contain a competence-competence provision. Consequently, the practical effect of the federal courts' broad reading of what constitutes 'clear and unmistakable evidence' of the parties' intent under *First Options* is that the vast majority of jurisdictional determinations by arbitral tribunals are effectively shielded from independent judicial review in the United States.

Procedural stipulation. Even in an *ad hoc* arbitration, absent any institutional rules authorizing the arbitral tribunal to determine its own jurisdiction, a party may be deemed to have agreed during the arbitration itself to grant the arbitral tribunal primary authority to determine its own jurisdiction. For example, in *Beijing Shougang Mining Investment Co. v. Mongolia*, three Chinese companies commenced an ad hoc arbitration, seated in New York, against Mongolia under the 1991 Mongolia-China bilateral investment treaty. The arbitration concerned an alleged expropriation by Mongolia of the claimants' investments in an iron-ore mine in that country. The tribunal rendered an award dismissing the investors' claims for lack of jurisdiction, concluding that the treaty conferred jurisdiction only over disputes over the amount of compensation owed for an expropriation, but not over the threshold question of whether an expropriation had occurred.

The claimants subsequently petitioned the district court in the Southern District of New York to set aside the jurisdictional award and compel arbitration with Mongolia, but the court declined to do so and instead confirmed the award.[30] The claimants then appealed to the U.S. Court of Appeals for the Second Circuit, arguing that the district court should have reviewed the jurisdictional award *de novo* because the parties did not 'clearly and unmistakably' delegate the determination of arbitrability to the tribunal under *First Options*.

The Second Circuit disagreed. It found clear and unmistakable evidence of the parties' intent based upon a procedural agreement reached during the course of arbitration.[31] Specifically, 'in Procedural Order No. 1, the Parties agreed that the first phase of the arbitration would cover jurisdictional and liability disputes' (with a second quantum phase to follow if necessary). That agreement, the court held, 'was sufficient in the context of the present arbitration to evidence the Parties' intent to submit arbitrability issues to arbitration'.[32]

As *First Options* makes clear, a party's decision to contest arbitrability before the tribunal, standing alone, is not clear and unmistakable evidence of that party's intent to arbitrate arbitrability. However, in *Beijing Shougang*, the Second Circuit deemed it significant that the parties reached a procedural agreement that the first phase of the arbitration would encompass jurisdictional disputes 'after it had already become clear that the key jurisdictional issue to be argued during the first phase was the scope of the [treaty's] arbitration clause'.[33]

Moreover, Procedural Order No. 1 was not the sole basis for the Second Circuit's decision. Rather, the claimants' 'conduct during the arbitration' further 'reinforced' the court's conclusion that they 'intended to submit issues of arbitrability to the arbitrators'.[34] In particular, toward the end of briefing, the claimants submitted a letter 'requesting that the tribunal issue an order specifically for the purpose of remind[ing] the parties that any award rendered by the Tribunal is *final* and binding[.]'[35] The court emphasized that claimants' letter 'strongly

28 *Fallo v. High-Tech Inst.*, 559 F.3d 874, 880 (8th Cir. 2009), stating without elaboration: 'the parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer [the question of arbitrability]'; *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), stating, without elaboration:, '"[w]e...conclude that the 2001 Agreement, which incorporates the AAA Rules ... clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator')(reversed on other grounds); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005), (stating, without elaboration, '[b]y incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid'); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005), (stating, without elaboration, 'when ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator').

29 *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

30 *Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia*, 415 F. Supp. 3d 363 (S.D.N.Y. 2019), aff'd, 11 F.4th 144 (2d Cir. 2021).

31 *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 147-48 (2d Cir. 2021).

32 *Id.* at 154.

33 *Id.* at 148.

34 *Id.* at 157.

35 *Id.* at 158 (internal quotation marks omitted, emphasis and alteration in original).

belie[d]' their argument 'that they did not believe that the tribunal had authority to conclusively determine jurisdictional issues'.[36]

B. Limited judicial review where parties are deemed to have delegated primary authority to arbitral tribunal

As just discussed, a U.S. court will not review de novo an arbitral tribunal's decision concerning its own jurisdiction where the parties are deemed to have delegated that authority to the tribunal. However, it is less clear whether a court retains some authority to conduct a more limited review under those circumstances. As discussed above (I.A.1), *First Options* contains seemingly contradictory language concerning the court's residual power to scrutinize arbitral jurisdiction. On the one hand, the U.S. Supreme Court instructed that courts 'should give considerable leeway to the arbitrator' (apparently leaving room for at least some limited form of review).[37] But the Court added, in ostensibly categorical terms, that a reviewing court '*must defer* to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration'.[38]

Despite this seemingly conflicting language, the lower federal courts have generally settled on reviewing jurisdictional challenges with deference to the tribunal's determination. For example, as previously noted, the Second Circuit has held that where the parties clearly and unmistakably agreed to arbitrate issues of arbitrability, the party resisting confirmation of the award 'is not entitled to an independent judicial redetermination of that same question'.[39] Rather, the court found that a 'deferential standard of review [is] properly applied to foreign awards'.[40] The court justified this conclusion primarily in pragmatic terms, based on its concern that permitting *de novo* review of arbitrators' determinations concerning their own jurisdiction 'would entail an enormous waste of resources contrary to the purposes of the New York Convention'.[41]

Similarly, in *Chevron Corp. v. Republic of Ecuador*, the U.S. District Court for the District of Columbia found that an arbitrator's jurisdictional determination was entitled to 'substantial deference' in the face of clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.[42] Notably, the federal courts have declined to articulate a precise standard of review, likely because jurisdictional challenges typically fail if the tribunal's determination is afforded even a modest degree of deference.[43] Indeed, some courts, such as the Eight Circuit in *Fallo v. High-Tech Institute*, have affirmed an arbitrator's determination while omitting discussion of a standard of review altogether. Rather, the court there flatly held that where there is clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, the parties intended the arbitrator to answer that question.[44] The bottom line is that, whenever parties are deemed to have delegated the initial decision on jurisdiction to the arbitral tribunal, any judicial review of the tribunal's decision will be conducted with a very light touch, such that any attempt to challenge the tribunal's jurisdictional determination is likely to fail.

C. Criticism of federal courts' broad reading of *First Options*

The federal courts' liberal application of the 'clear and unmistakable evidence' standard under *First Options* has been the subject of scholarly criticism. Most notably, Professor George Bermann of Columbia Law School recently submitted an *amicus curiae* brief in the U.S. Supreme Court criticizing the nearly unanimous view among federal courts that incorporation of institutional rules containing a competence-competence provision constitutes clear and unmistakable evidence of intent to delegate arbitrability to the arbitral tribunal.[45] Professor Bermann argued that a competence-competence provision merely confers authority upon arbitrators to decide their own jurisdiction in the first instance, but does not grant them the *exclusive* authority to determine jurisdiction.[46] As he put it, the competence-competence principle 'empowers tribunals, but does not disempower courts'.[47]

36 *Id.*

37 *First Options*, 514 U.S. at 943.

38 *Id.* (emphasis added).

39 *Schneider*, 688 F.3d at 74; see also *Beijing Shougang Mining Inv. Co*, 11 F.4th at 161: '[E]ven if we would not necessarily reach the same interpretation, any difference in opinion is not enough to conclude that the arbitrators stray[ed] from interpretation and application of the agreement and effectively dispense[d] [their] own brand of … justice.' (internal citations and quotations omitted).

40 *Schneider*, 688 F.3d at 74.

41 *Id.*

42 *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57, 67 (D.D.C. 2013).

43 *Id.* at 68: 'The Court need not determine exactly what standard of deference to employ, as even under a very mildly deferential standard, the Tribunal's decision appears well reasoned and comprehensive.'

44 *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); the court simply held without elaboration that 'the district court erred when it held that it had the authority to determine the question of arbitrability because the parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer that question'. For a further reference to this case, see supra note 28.

45 **Brief of Amicus Curiae** Prof. George A. Bermann in Support of Respondent, *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2020) (No. 19-963) at p. 4. Although Prof. Bermann submitted his amicus brief while the Supreme Court was considering the merits of the case, the Court declined to address Bermann's argument criticizing the federal doctrine.

46 *Id.* at p. 11.

47 *Id.* at p. 8.

Professor Bermann further noted, as observed above (I.A.2), that the federal courts have not explained how or why incorporation of institutional arbitration rules satisfies the 'clear and unmistakable' test, particularly given (i) the basic tenet that parties should not be forced to arbitrate issues they did not agree to arbitrate, and (ii) the fact that parties frequently do not consider whether the institutional rules referenced in their arbitration agreement adhere to the competence-competence principle (and how that might impact their subsequent ability to seek judicial review).[48] Since Professor Bermann is also the chief reporter of the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, it is perhaps unsurprising that the Restatement similarly concludes that the incorporation of arbitral rules does not constitute clear and unmistakable evidence of an intent to arbitrate arbitrability.[49]

II. Germany

Outside the U.S., the notion that an arbitral tribunal's power to determine its own jurisdiction, standing alone, restricts or even outright precludes any subsequent judicial review appears to be something of an outlier.[50] Germany, for example, has codified the following contrary rule: while the arbitral tribunal has the power to rule on its own jurisdiction (*Kompetenz-Kompetenz*), the final decision is allocated to the state courts.

A. Similar jurisdictional analysis in domestic arbitrations and under Article V

Conceptually, German judges approach issues of arbitral jurisdiction from the almost diametrically opposite perspective of their American counterparts. The German courts' approach is shaped by the fact that German law governing the enforcement of domestic awards not only authorizes courts to determine jurisdictional issues but provides that courts *must* have the final say on matters of arbitral jurisdiction. German courts take the same approach when considering the enforcement of foreign awards under the New York Convention.

48 *Id.* at p. 13.

49 Restatement (Third) U.S. Law of International Commercial Arbitration, § 2.8, reporter's note b(iii) (Tentative Draft No. 4, 2015) (approved, **http://2015annualmeeting.org/actions-taken).**

50 Borris/Hennecke, Wolff (ed.), *New York Convention - Article-by-Article Commentary* (2nd ed. 2019), Art. V para. 199: 'courts are not bound by the arbitral tribunal's decision on jurisdiction under almost all arbitration laws'. For an overview of allocations of jurisdictional competence in different national legal regimes, see Born, *International Commercial Arbitration*, Vol. 1, (2n ed., 2014), §7.03, pp. 1076–1236.

1. Mandatory court review of arbitral jurisdiction in domestic proceedings

In domestic arbitrations, a party can raise a jurisdictional defense in different ways, depending on the stage of the proceedings.[51] First, a party may seek *'preventive' review of* the prospective tribunal's jurisdiction before the arbitral proceeding has commenced. In many cases, this occurs when the party desiring to arbitrate files an application to compel arbitration.[52] However, it is also possible for a party desiring to avoid arbitration to apply for a preventive ruling that arbitral jurisdiction is lacking.[53] Second, during the pendency of the arbitral proceeding, a party may seek *'parallel' review* by appealing an arbitral tribunal's interim decision on jurisdiction to the Higher Regional Court.[54] Finally, at the enforcement stage, a party may seek *'repressive' review*,[55] either by way of an application to set aside,[56] or as a defense to an application to confirm the arbitral award.[57] In all of these scenarios, the German court will review arbitral jurisdiction *de novo*.

51 The following terms are taken from Münch, *Münchener Kommentar zur ZPO* (6th ed., 2022), Sect. 1040, para. 30.

52 This occurs by way of a so-called '*Schiedseinrede*' pursuant to Sect. 1032(1) ZPO. It provides: 'Where an action is brought before a court in a matter that is the subject of an arbitration agreement, the court is to dismiss the action as inadmissible, provided that the respondent has raised a corresponding objection prior to commencement of the hearing on the merits of the case, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed'.

53 See Sect. 1032(2) ZPO, which provides: 'Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings'. This rule is particular to German law and was not provided for by the UNCITRAL model law. The drafters of the German law included the option for a preventive ruling, which already existed under the old law, for reasons of 'procedural economy', see *Federal Law Gazette*, BT-Drs. 13/5274, p. 38.

54 See Sect. 1040(3) ZPO, which provides: 'Where the arbitral tribunal considers that it has jurisdiction, its decision on an objection raised pursuant to subsect. (2) generally takes the form of an interlocutory decision. In this case, either party may request a court decision within one month of having received the written notice of the interlocutory decision…'.

55 See *Münchener Kommentar zur ZPO* (2nd ed., 2014) supra note 51.

56 Pursuant to Sect. 1059(2)(1)(c) ZPO, which provides: 'An arbitral award may be set aside only if: … the party filing the application shows sufficient cause that: … the arbitral award deals with a dispute not contemplated by the separate arbitration agreement or not covered by the terms of the arbitration clause, or that it contains decisions that are beyond the scope of the arbitration agreement; however, where it is possible to separate that part of the arbitral award relating to points at issue that had been submitted to arbitration from the part relating to points at issue that had not so been submitted to arbitration, only the latter part of the arbitral award may be set aside …'.

57 Pursuant to Sect. 1060(2) ZPO, which provides 'The application for a declaration of enforceability is to be denied, and the arbitral award is to be set aside, if one of the grounds for setting aside designated in Sect. 1059(2) is given'.

Among these three phases, judicial review is most common during the pendency of the arbitration, when a party appeals an interim decision of the tribunal.[58] Sect. 1040 ZPO delineates the roles and powers of the arbitral tribunal and the courts in that scenario and exemplifies Germany's approach to judicial review of arbitral jurisdiction in general. Pursuant to Sect. 1040(1) ZPO, if an arbitral proceeding is already underway and a party raises an objection to the tribunal's jurisdiction, the tribunal has authority to rule on its own jurisdiction (competence-competence), irrespective of whether the parties have included a competence-competence clause in their arbitration agreement. Sect. 1040(1) ZPO provides:

> The arbitral tribunal may decide on its own competence, and in this context also regarding the existence or the validity of the arbitration agreement. […]

However, this competence-competence is not absolute; rather, Sect. 1040(3)(2) ZPO explicitly invests the courts with final authority to determine arbitral jurisdiction. As a matter of principle, a decision by an arbitral tribunal concerning its own jurisdiction should take the form of an interim award.[59] The tribunal's jurisdictional determination is merely 'provisional' because the aggrieved party may challenge it before the state courts through an interlocutory appeal pursuant to Sect. 1040(3)(1),(2) ZPO.[60] Under that provision:

> Where the arbitral tribunal believes it has competence, it shall rule on an objection … in an interim decision as a matter of principle. In such event, each of the parties may apply for a court decision to be taken, doing so within one month of having received the written notice as to the interim decision.

Thus, while the tribunal has the 'first word' concerning its competence, the state courts invariably have the 'final word' if the aggrieved party appeals.[61] This provision is based on Article 16 of the UNCITRAL Model law, and its adoption in 1998 brought about a change in German jurisprudence.[62] Before the adoption of the Model law, parties could, if they wished, validly allocate the final authority to decide jurisdictional matters to the tribunal in their arbitration agreement.[63] But under current Sect. 1040 ZPO, parties no longer have that option. The *Bundesgerichtshof* (*BGH*), Germany's highest court of civil jurisdiction, has held that parties cannot contract out of the state courts' mandatory final authority to determine jurisdictional issues.[64] Accordingly, a competence-competence clause purporting to allocate the final decision exclusively to the arbitral tribunal would be invalid under German law.[65] This result is consistent with the legislative intent behind the adoption of the Model law in 1998,[66] and the interpretation of the new statute by legal scholars prior to the *BGH*'s decision.[67] Some academics even argue that in the German legal system, this rationale is indispensable because arbitration agreements affect the parties' access to (state) justice, and the state courts' final authority to determine arbitral jurisdiction safeguards this important principle, which is embedded in the German constitution.[68]

58 Buchwitz, *Schiedsverfahrensrecht* (1st ed., 2019), p. 259.

59 Pursuant to Sect. 1040(3)(1) ZPO, while the interim award procedure is the rule, deviations are possible and the tribunal may also rule on its jurisdiction in the final award. In practice, this may occur where the objection of lack of jurisdiction is obviously meritless, i.e., ultimately only serves to delay the proceedings; in this case, it may be obvious to hear the case very quickly and to affirm jurisdiction incidentally only in the decision on the merits, see Münch, supra note 51, para. 27.

60 Academics have called this concept 'provisional competence-competence': Münch, supra note 51, para. 4 et seq.: 'provisorische Kompetenz-Kompetenz des Schiedsgerichts'. It is noteworthy that arbitral proceedings continue during the interlocutory appellate procedure in front of the Higher Regional Court. Sect. 1040(3)(3) ZPO holds that 'For the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award'. This ensures that the arbitration process isn't slowed down in the face of state court intervention.

61 Münch, supra note 51, para. 2.

62 Germany adopted the model law in 1998 (Schiedsverfahrens-Neuregelungsgesetz, 22.12.1997, *BGBl.* 1997 I, p. 3224). Art. 16(3) UNCITRAL model law provides: 'The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award'.

63 Münch, supra note 51, para. 50; see *BGH*, 5 May 1977 – III ZR 177/74, NJW 1977, 1397, 1400, in which the Court held that 'parties may validly agree that doubts as to the jurisdiction of the arbitral tribunal are to be decided by the tribunal itself. Constitutional … objections against this do not prevail'. Therefore, under the old law, state court review was restricted to the validity of the Kompetenz-Kompetenz clause. As long as it was validly concluded, state courts were not allowed to overrule the tribunal's decision on its own jurisdiction; see also *Federal Law Gazette*, BT-Drs. 13/5274, p. 44.

64 *BGH*, 13 Jan. 2005 – III ZR 265/03, NJW 2005, 1125; see also Huber/Bach, *Commentary on BGH*, 13 Jan. 2005 – III ZR 265/03, *SchiedsVZ* 2005, 95, 99: 'The courts' competence to finally decide is mandatory and may not be derogated by party agreement.'; see also *BGH*, 24 July 2014 – III ZB 83/13, NJW 2014, 3652.

65 *Id.* This approach of holding agreements to finally resolve jurisdictional disputes by arbitration invalid has not been adopted by all UNCITRAL model law jurisdictions and has not been without criticism, see Born, supra note 50, §7.03[A], p. 1097.

66 *Federal Law Gazette*, BT-Drs. 13/5274, p. 44.

67 For an overview, see Huber/Bach, supra note 64, p. 95 at footnote 10.

68 See Buchwitz, supra note 58, p. 252; Voit, *Zivilprozessordnung*, Musielak/Voit (eds.) (19th ed., 2022), Sect. 1040, para. 1: '[Sect. 1040 ZPO] ensures that the final decision on [jurisdiction]

The principle that courts have plenary authority to review arbitral jurisdiction and owe no deference to the arbitral tribunal's jurisdictional determinations applies at every procedural stage.[69] In other words, a German court will conduct the same plenary review of the arbitral tribunal's jurisdiction both in the context of an application to compel arbitration and in post-arbitration proceedings to set aside or enforce an award.[70]

2. Same standard of (plenary) review for jurisdictional challenges to awards under the New York Convention

German courts also take the same approach when considering a jurisdictional defense to enforcement of a New York Convention award under Art. V(1)(c) of the Convention. Germany has implemented the Convention by reference in its Code of Civil Procedure (ZPO). Thus, Sect. 1061(1) ZPO provides generally that the recognition and enforcement of foreign arbitral awards is governed by the Convention.[71] The party seeking enforcement of a Convention award must apply to the competent Higher Regional Court (*Oberlandesgericht* or *'OLG'*) for a declaration of enforceability.[72] The party resisting enforcement may then raise any defense under Art. V(1), including a jurisdictional defense under the Art. V(1)(c), before the Higher Regional Court. While the language of Convention Art. V(1) ('may be refused') suggests that courts have discretion to enforce an award even where one of the defenses enumerated in that provision has been established, German case law and academic commentary holds that courts possess no such discretion.[73] Rather, if the enforcing court finds that one or more grounds for non-enforcement under Art. V(1) exist, it must deny the application for a declaration of enforceability on those grounds.[74]

Importantly, when considering an Art. V defense to enforcement, the enforcing court makes its own assessment and is not bound by the arbitral tribunal's legal or factual determinations.[75] This principle applies to all Art. V defenses, including under Art. V(1)(c). In fact, commentary holds that courts will review the jurisdiction of the tribunal *de novo* even if the parties have included a competence-competence clause in their arbitration agreement designed to preclude judicial review of the tribunal's jurisdictional determinations.[76] In other words, the domestic rule that parties cannot validly grant to the arbitral tribunal the sole or final authority

is always left to the state court. This takes account of the fact that the arbitration agreement affects the parties' right to access to justice'. The right to access to justice ('*Justizgewährungsanspruch*') follows from Art. 2(1) of the German Constitution in conjunction with the rule of law principle and includes 'the right of access to courts and a fundamentally comprehensive factual and legal examination of the subject matter of the dispute, as well as a binding decision by the judge' (see e.g., German Constitutional Court, 9 Dec. 2009 – 1 BvR 1542/06, NJW-RR 2010, 1474, 1475).

69 Münch, supra note 51, para. 49.

70 *Id.*

71 Sect. 1061 (1) ZPO holds that '(1) The recognition and enforcement of foreign arbitration awards is governed by the Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards (published in *Federal Law Gazette* (Bundesgesetzblatt, BGBl) 1961 II p. 121). The stipulations of other treaties concerning the recognition and enforcement of arbitration awards shall remain unaffected hereby'. In determining the applicability of the convention, German law follows an exclusively territorial approach: The classification of an award as foreign or domestic is determined solely by the place of arbitration pursuant to Sect. 1025(1) and (4) ZPO. As an example, an award between two German limited liability companies with an arbitration in Zurich, Switzerland under the DIS Rules falls under the New York Convention (*OLG München*, 14 Nov. 2011 – 34 Sch 10/11, *SchiedsVZ* 2012, p. 43.). The category of 'non-domestic' awards does not exist under German law, see Münch, supra note 51, Sect. 1061, para. 7, holding that a separate category for 'non-domestic' awards would contradict the clear categorization of the territoriality approach. Unlike the U.S. approach, German law dictates that when the place of arbitration is in Germany, the award is considered domestic and, consequently, the New York Convention does not apply.

72 Enforcement actions of foreign awards fall within the jurisdiction of the Higher Regional Courts (*Oberlandesgerichte*) pursuant to Sect. 1062(1) (No. 4) ZPO. The Higher Regional Courts are the second highest courts in ordinary civil jurisdiction in Germany; they are positioned above state courts (Landgerichte) and below the Federal Court of Justice (*Bundesgerichtshof*). Sect. 1062(1) (No. 4) ZPO provides: 'The higher regional court designated in the arbitration agreement or, if no such designation was made, the higher regional court in the district of which the place of arbitration is located, is competent for decisions on applications regarding: ... 4. ... the declaration of enforceability of the arbitral award (Sect. 1060 et seq.), or the setting aside of the declaration of enforceability (Sect. 1061)'.

73 Adolphsen, *Münchener Kommentar zur ZPO* (6th ed., 2022), UNÜ Art. 5, para. 4; *OLG Düsseldorf*, 21 July 2004 – VI-Sch (Kart) 1/02, juris para. 25, referring to Art. V(2)(b): 'This provision, despite its wording suggesting a different interpretation, is to be understood as meaning that if the arbitral tribunal has ordered the respondent to perform contrary to public policy, the award is to be denied recognition, with no room for discretion'.

74 The Federal Government noted this during the legislative process of implementing the New York Convention in 1960, see *Federal Law Gazette*, BT-Drs. 3/2160, p. 26.

75 *BGH*, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866, 867, para 13; *OLG Koblenz*, 27 Nov. 2012 – 2 Sch 2/12, juris para. 15; Geimer, *Zivilprozessordnung*, Zöller (ed.) (34th ed., 2022) Sect. 1061, para. 20, 24.

76 Schlosser, *Kommentar zur Zivilprozessordnung*, Stein/Jonas (eds.) (23rd ed., 2014), Annex to Sect. 1061, para. 156: 'Germany does not recognize any competence-competence, even with regards to foreign arbitral tribunals. ... A fortiori, the exequatur court is not bound by any competence-competence, even if it is recognized in the country of the seat of the arbitration'; see also *Geimer*, supra note 75, Annex to Sect. 1061 ZPO, Art. V New York Convention, para. 1: 'It is irrelevant if the tribunal decided that there is a valid arbitration agreement; the tribunal has no competence-competence in the sense that it could render a decision on the validity of the arbitration agreement which is binding for the state court'; D. Solomon, 'Interpretation and Application of the New York Convention in Germany', *Recognition and Enforcement of Foreign Arbitral Awards, Ius Comparatum*, Bermann (ed.), 2017, p. 348: 'However, it is always possible and necessary for the German court to review the foreign decision for any violation of German public policy. As far as decisions of the arbitral tribunal concerning the existence of a valid arbitration agreement are concerned, German courts do not grant the tribunal any *Kompetenz-Kompetenz*'. Note that some of these commentators refer to Art. V(1)(a) of the Convention, which allows for refusal to enforce an award where the arbitration agreement is invalid, but that this principle equally applies to the defense of Art. V(1)(c).

to determine matters of arbitral jurisdiction also applies, *mutatis mutandis*, in enforcement proceedings under the Convention.

For completeness, we note that a German court may decline to examine a jurisdictional challenge under certain circumstances – but not out of deference to the arbitral tribunal. For example, a court may decline to entertain a jurisdictional defense to enforcement where the resisting party is deemed to have waived its objection.[77] Moreover, where an award has been the subject of set-aside proceedings in the country of origin (that is, at the arbitral seat), a German court ordinarily will defer to an existing decision by the courts in that country concerning the arbitral tribunal's jurisdiction (or lack thereof).[78]

B. No successful challenge to enforcement under Art. V(1)(c) among the relatively few reported cases

Jurisdictional objections to enforcement under Art. V(1)(c) of the Convention have not played a major role in the reported German case law.[79] Notably, among the few published decisions in which the party resisting enforcement invoked a jurisdictional defense under Art. V(1)(c), we did not find *a single reported instance* where enforcement was refused.[80] Instead, all reported decisions have granted enforcement of the foreign award.[81]

For example, the *OLG (Higher Regional Court) Naumburg* took this approach in a 2011 decision enforcing an award rendered in a Zurich-seated ICC arbitration.[82] The claimant in the underlying arbitration there sought indemnification from the respondent for a penalty it had paid to a third party. Among the issues the arbitral tribunal considered in reaching its decision was whether the third party had a valid claim against the claimant. The tribunal found that it did. In the subsequent enforcement proceeding in Germany, the respondent argued that the tribunal exceeded its authority by ruling on the existence of the penalty claim, and that enforcement should be denied on that basis under Art. V(1)(c).[83] But the court disagreed; it characterized the tribunal's ruling on the penalty issue as merely incidental to the indemnification claim.[84] In reaching that issue, the court explained, the tribunal did not exceed its authority, particularly as the parties' arbitration agreement covered 'all ensuing disputes':

> At this point it should be noted that the parties have expressly assigned 'all ensuing disputes' to the arbitral tribunal - this does not in principle imply a limitation to the relationship between the two main parties.[85]

77 A party is generally precluded from challenging the jurisdiction of the tribunal at the enforcement stage if it participated in the arbitral proceedings without timely challenging the jurisdiction of the tribunal. For an overview, see Solomon, supra note 76, p. 347, who notes that '[i]n most cases, this type of waiver is accepted by the courts without making it clear whether the waiver arises out of the law governing the arbitration procedure or the law of the enforcing state'. The European Convention on International Commercial Arbitration ('EuC') specifically provides for such a preclusion: pursuant to Art. V(2) EuC, a party may not raise objections to the jurisdiction of the arbitral tribunal if it has failed to raise this objection during the arbitral proceeding as required by Art. V(1) EuC. In the context of the New York Convention, the EuC then precludes the defense under Art. V(1)(c) due to the 'more favorable law provision' of Art. VII(1) of the Convention. Under the old law, Art. V defenses were also precluded where a party did not make use of existing remedies against the award at the place of arbitration within a statutorily prescribed time limit. In a decision in 2010, the BGH clarified that under the new law, such wide-ranging preclusion is no longer available. The court held that only under narrow circumstances may a waiver result from such behavior, primarily when it constitutes an infringement of the good faith principle, *BGH*, 16 Dec. 2010 – III ZB 100/09; see also Kröll, Arbitration in Germany - The Model Law in Practice, Böckstiegel, Kröll, Nacimiento (eds.) (2nd ed. 2015), Sect. 1061 ZPO, para. 56.

78 See, e.g. *OLG Brandenburg*, 20 May 2020 – 11 Sch 1/19, NJOZ 2020, p. 1545, 1551, para. 80 et seq; see also D. Solomon, supra note 76, p. 348.

79 See D. Solomon, supra at note 76, p. 357: 'Article V(1)(c) of the Convention has not played a major role in German decisions on recognition and enforcement of foreign awards'.

80 The authors are aware of twenty-six reported decisions between the years of 1976 and 2020 (i.e., encompassing an extended period both before and after Germany's adoption of the Model law in 1998) in which the party opposing enforcement raised the Art. V(1)(c) defense. In these cases, the court (sometimes very briefly) discussed this ground for refusal but ultimately denied its presence and/or noted that the party was precluded from raising the defense (for the doctrine of preclusion in this context, see supra, note 77). Note that there is one case in which the *BGH* overturned a decision by the *OLG Frankfurt* refusing enforcement on Art. V(1)(c) grounds, but the decision of the *OLG Frankfurt* was not reported, see *BGH*, 12 Feb. 1976 - III ZR 42/74, NJW 1976, 1591.

81 This alone does not necessarily mean that no decisions refusing enforcement on the basis of Art. V(1)(c) exist. In Germany, not all court decisions are published or reported. Generally, judges themselves determine whether a decision is 'worthy of publication'. A study from 1993 found that between 1987 – 1993, only 0.46% of all German court decisions were published, Reinhard Walker, *Die Publikationsdichte - ein Maßstab für die Veröffentlichungslage gerichtlicher Entscheidungen*, JurPC Web-Dok. 36/1998, para. 7. A more recent paper estimates that the adjusted publication rate of German ordinary courts (criminal and civil cases) did not once surpass 1.01 % in several years assessed between 1971 and 2019, Hanjo Hamann, *Der blinde Fleck der deutschen Rechtswissenschaft – Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung*, Juristenzeitung 2021, p. 656, 658. However, one would assume that a decision refusing enforcement would be deemed 'worthy of publication' and therefore be reported. It is therefore evident that the number of decisions refusing enforcement on the basis of Art. V(1)(c) is either non-existent or very small.

82 *OLG Naumburg*, 4 Mar. 2011 – 10 Sch 4/10, *SchiedsVZ* 2011, 228.

83 *Id.* at p. 229.

84 *Id.* at p. 230.

85 *Id.* at, p. 230.

Likewise, the *OLG Koblenz* found no jurisdictional defect in an arbitral award rendered outside the time limit stipulated in the procedural rules the parties had incorporated into their arbitration agreement.[86] Those procedural rules called for the tribunal to render its award within ten months following the conclusion of the arbitration agreement.[87] However, the tribunal in the ensuing arbitration seated in Strasbourg, France, did not issue its award until 19 months after the arbitration agreement was concluded.[88] In considering the claimant's enforcement application, the German court emphasized its independent authority to review the enforceability of the award under the Convention:

> When examining the requirements of Art. 3 et seq. of the New York Convention, the state court is bound neither by the legal assessment nor by the factual findings of the arbitral tribunal.[89]

The court acknowledged that the award theoretically could be framed as 'beyond the scope of the submission to arbitration' within the meaning of Art. V(1)(c) of the Convention.[90] However, the court rejected the respondent's argument that the award was jurisdictionally defective on that basis: it reasoned that the arbitral proceedings were based on a valid arbitration agreement, and there was no reason not to continue them even after the ten-month deadline had passed. Citing a similar decision by the French *Cour de Cassation*, the court thus found that the expiration of the time limit did not render the arbitration clause inoperative.[91]

In another recent decision, the *OLG Brandenburg* rejected a party's attempt to restrict the scope of an arbitration clause to only claims arising directly from the parties' contract. The claimant in that case sought to enforce an award arising out of a Vienna-seated arbitration under the Vienna International Arbitration Centre ('VIAC') rules. The sole arbitrator had awarded the claimant damages on both contractual and statutory grounds. In resisting enforcement, the respondent subsequently invoked Art. V(1)(c) of the New York Convention, among other defenses. Specifically, the respondent argued that the arbitration clause, which provided for arbitration of all 'disputes or claims arising out of or in connection with *this contract*, including disputes relating to its validity, breach, termination or nullity' (emphasis added), did not extend to statutory claims, such as tort claims.[92]

The German court analyzed the sole arbitrator's jurisdiction *de novo*, concluding that the arbitrator had not exceeded her competence in awarding tort damages on statutory grounds. In particular, the court found that the arbitration clause covered both contractual and statutory claims.[93] The court reasoned that the clause's wording did not distinguish between contractual and statutory claims. Nor could the clause's intent and purpose justify restricting its scope of application to only claims arising directly out of the contract.[94] The court explained that the parties had chosen to use the VIAC model arbitration clause, and that the purpose of such model clauses is precisely to cover, as comprehensively as possible, all disputes arising from the contract without differentiating between different types of claims.[95] The court stressed that such a differentiation depending on the type of claim could be validly assumed only where the parties explicitly so provide.[96]

Finally, in a case that began before the *OLG Hamburg* but was ultimately decided by the *Bundesgerichtshof*, both courts rejected a jurisdictional challenge based on the identity of the counterparty. That case involved a Seoul-seated Korean Commercial Arbitration Board ('KCAB') arbitration in a dispute arising out of a distributorship agreement.[97] The tribunal awarded the claimant certain outstanding payments and other damages.[98] During the arbitration, the respondent unsuccessfully objected to the tribunal's jurisdiction, asserting that its contractual counterparty was in fact the claimant's subsidiary rather than the claimant itself.[99] The claimant, having prevailed, later sought to enforce the resulting merits award in Germany; the respondent, in turn, objected to enforcement under Art. V(1)(c) of the Convention.

The *OLG Hamburg* granted enforcement of the award, finding no excess of jurisdiction under Art. V(1)(c) because the respondent's objection based on the identity of the counterparty did not implicate the arbitral tribunal's competence.[100] Rather, the court held, the

86 *OLG Koblenz*, 27 Nov. 2012 – 2 Sch 2/12, juris.
87 *Id.* at para. 22.
88 *Id.*
89 *Id.* at para. 15.
90 *Id.* at para. 22.
91 *Id.*
92 *OLG Brandenburg, 20 May 2020 – 11 Sch 1/19, NJOZ 2020,* p. 1545, 1549.
93 *Id.* at p. 1553, para. 95 et seq.
94 *Id.* at p. 1553, para. 97.
95 *Id.*
96 *Id.*
97 *OLG Hamburg*, 29 June 2015 – 6 Sch 19/14, BeckRS 2016, 538 and subsequently *BGH*, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866.
98 *OLG Hamburg*, supra note 97, at p. 538, para. 3.
99 *Id.* at para. 2.
100 *Id.* at para. 15.

respondent's argument concerned the merits of the case.[101] In the ensuing appellate proceedings before the *BGH*, the respondent argued that the *OLG Hamburg* had decided the case on the implicit, erroneous assumption that it was bound by the tribunal's decision concerning its own jurisdiction. By taking this approach, the respondent claimed, the *OLG Hamburg*'s decision violated its right to be heard. However, the *BGH* rejected this argument and affirmed the lower court's ruling: The *BGH* found no indication that the *OLG Hamburg* had assumed it was bound by the arbitral tribunal's determination. Rather, the lower court considered the objection unfounded because it did not concern the jurisdiction of the tribunal, but the substantive merits of the claim.[102] On that basis, the *BGH* held that the *OLG Hamburg*'s decision:

> [...] does not violate the principle that the final decision on the jurisdiction of the arbitral tribunal is reserved to the state courts.[103]

C. Pro-enforcement outcomes despite *de novo* review

While the sample size of reported German court decisions is small, a review of the cases suggests the reason jurisdictional objections are rarely successful is that German courts, while they review the arbitral tribunal's jurisdiction *de novo* and without deference to the tribunal, nonetheless tend to interpret the underlying arbitration agreement broadly.

Indeed, it is a well-established principle under German law that an arbitration agreement's objective scope is to be interpreted broadly.[104] For example, what type of claims are covered by an arbitration agreement is to be determined by a broad reading of the arbitration clause.[105] Academics have observed that this gives effect to the principle that 'things that belong together should also remain together', as this is usually closest to the parties' true intent.[106]

As the decisions discussed above show, German courts appear to apply this same principle in the context of foreign awards and enforcement under the Convention. As a result, absent unusual circumstances, a jurisdictional challenge to enforcement in Germany under Art. V(1)(c) of the Convention is unlikely to succeed. Ultimately, one can argue that this outcome is consistent with the pro-enforcement bias of the Convention itself.[107]

Conclusion

Perhaps it should come as no surprise that courts in both Germany and the U.S. tend to uphold arbitral jurisdiction in the vast majority of cases. There is no reason to think that arbitrators routinely exceed their jurisdiction; on the contrary, most tribunals are careful to remain within the limits of their authority. Hence, in the ordinary case, the distinction between 'independent' and 'deferential' judicial review is unlikely to affect the outcome.

But, at the margins, independent judicial review nonetheless provides a critical safety valve to ensure that the principle of consent, from which arbitral legitimacy derives, is vindicated in circumstances where an arbitral tribunal truly has exceeded its jurisdiction. To that extent, it serves a real and important purpose. And, in that respect, the differences between the German and American approaches to judicial review are fundamental. Thus, in principle, German courts are both empowered and required to overrule an arbitrator's finding of jurisdiction if it cannot be supported by even a broad reading of the parties' arbitration agreement. The arbitral tribunal's reasoning does not constrain the court's analysis in any way.

By contrast, the authority of courts in the U.S. to consider issues of jurisdiction upon which an arbitral tribunal has already passed is far more limited, at least in the vast majority of cases where the parties are deemed to have delegated to the tribunal the primary authority to determine its own jurisdiction. The line between highly deferential review, and no meaningful review at all, is often hard to discern, and the risk remains that even a substantially erroneous finding of jurisdiction might be allowed to stand under this 'hands off' approach. That risk would be considerably reduced if courts were to follow the Restatement's approach and find that the mere incorporation of institutional rules in an arbitration agreement does not amount to clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

---

101 *Id.*

102 *BGH*, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866, para. 12.

103 *Id.* at para. 13.

104 See e,g., BGH, 27 Feb. 1970 – VII ZR, 68/68 and Münch, supra note 51, Sect. 1029, para. 125, with further references. The author emphasizes that this principle does not apply to the subjective scope of the arbitration agreement.

105 Saenger, *Zivilprozessordnung* (9th ed., 2021), Sect. 1029, para. 15.

106 Münch, supra note 51, at footnote 104, para. 129.

107 The general principle set forth by Art. III, that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them', has been referred to by a number of courts as embodying Convention's 'pro-enforcement bias', *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016 ed.), Art. III, p. 78.