INTRODUCTION

Proper jurisdiction for the arbitrators is the foundation for every arbitral tribunal and for every arbitration award. Without proper jurisdiction, the arbitration may be a waste of time instead of an effective dispute resolution. An arbitration award derived from arbitral proceedings where the jurisdiction is lacking or flawed is subject to challenge, either separately or in connection with efforts for enforcement by the winning party. Challenge proceedings take additional time, adding to the waste of time for the proceedings that led to the potentially ineffective arbitration award, and incur cost for all involved. The disputing parties are disappointed and the arbitration institute, the arbitrators, the venue, and counsel end up—at least to an extent—tainted by the failure to produce a solid arbitration award.

SEPARABILITY/KOMPETENZ-KOMPETENZ

We all know the “doctrine of separability.” It has been well developed and established for decades and is basically not in question. The short definition, of course, is that the validity of an arbitration agreement is not dependent on the validity of the material agreement in which it occurs. The arbitration agreement is a separate agreement and, as such, can be enforced separately from the underlying contract.¹

And the principle of “Kompetenz-Kompetenz” is the next logical step flowing from the doctrine of separability, under which the arbitrators have jurisdiction under the arbitration agreement to decide if they have jurisdiction over the matter in dispute under the contract. Without “Kompetenz-Kompetenz” there would be obvious problems even getting started.

This is all well and good and essentially uncontroversial. But the application of the principles in real life is not without complications.

Separate, as in the arbitration agreement being separate from the underlying contract, does not mean that there is no link between the two agreements, the underlying contract, and the arbitration agreement. Obviously there is. In the arbitration agreement, the parties have agreed to resolve by arbitration disputes arising under or out of a particular contract, nothing more nothing less. The parties have not agreed to arbitrate every conceivable dispute whether related to the subject matter of the contract or not. The powers granted to the arbitrators under the principle of “Kompetenz-Kompetenz” is thus not without boundaries.

NARROW OR BROAD LANGUAGE ARBITRATION CLAUSE

The basis for “Kompetenz-Kompetenz” is the arbitration agreement and its wording, just as any other agreement. In case the agreement is unclear or if the content is disputed, it needs interpretation and its meaning has to be established by a just decision.

In many contracts, there are still hand-crafted arbitration clauses, and the variations are endless. There are quite narrow clauses with language explicitly defining the type of dispute or providing other exact parameters for the application of the arbitration clause, or broader language clauses aiming wider.

An example of a narrow language arbitration clause is the following:

Disputes concerning the proper performance of the process equipment to be supplied under this contract shall be decided by arbitration according to Swedish law.

As an arbitration lawyer, you will take some comfort from the fact that contracts lawyers in the last decade have become more aware of the importance of carefully drafting arbitration clauses. The arbitration agreement is no longer, or at least not as often, a clause thrown in at the eleventh

\[Id.\]