



JURISDICTIONAL CLAUSES IN BITS: A COMPARATIVE STUDY OF GERMAN AND UZBEK APPROACHES TO CONSENT IN INVESTMENT ARBITRATION

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Abstract: This article examines the role of jurisdictional clauses in bilateral investment treaties (BITs), focusing on the legal concept of consent to arbitration in German and Uzbek practice. It explores how each country formulates, interprets, and enforces such clauses, and evaluates the impact of domestic law and international obligations on their effectiveness. By analyzing treaty language, national court decisions, and investment arbitration practice, the study reveals divergent trends: Germany's increasingly constrained consent framework under EU law and Uzbekistan's liberal, investor-friendly stance. The article concludes with recommendations on preserving legal predictability and investor confidence in light of evolving jurisdictional doctrines.

Keywords: jurisdictional clauses, investment arbitration, consent to arbitration, BITs, Germany, Uzbekistan, party autonomy, international investment law, forum selection, EU law

Jurisdictional clauses are the cornerstone of investment arbitration. Their precise wording and legal interpretation define the scope of arbitral jurisdiction and the legitimacy of investor-State dispute settlement (ISDS). Under international law, consent to arbitration must be clear, unequivocal, and mutually recognized. In bilateral investment treaties (BITs), this consent is often unilaterally offered by the host State and perfected by the investor through initiation of arbitration proceedings.

This article undertakes a comparative analysis of how Germany and Uzbekistan articulate and operationalize jurisdictional clauses in their BITs. Germany, as an EU Member State, is subject to constraints imposed by the Court of Justice of the European Union (CJEU), particularly following *Achmea* and *Komstroy*. Uzbekistan, by contrast, retains a flexible and autonomous approach to dispute settlement, driven by national development goals and a need to attract foreign direct investment (FDI).

The analysis is grounded in doctrinal methodology, supported by treaty texts, arbitral jurisprudence, and national court rulings. It contributes to private international law (PIL) by clarifying how jurisdictional clauses function in practice and how their effectiveness is shaped by intersecting legal orders.

In BITs, jurisdictional clauses serve to define the scope of disputes that may be referred to arbitration. Typically, they include:

- The types of disputes (legal vs. factual);
- The arbitration forum (ICSID, UNCITRAL, ad hoc);
- Applicable procedural and substantive law;
- Conditions precedent (negotiation, cooling-off period).

From a PIL standpoint, such clauses are an expression of party autonomy and serve as instruments of forum selection. Their binding force derives from the law of treaties (e.g., Vienna Convention on the Law of Treaties, Article 26), and their recognition is reinforced by enforcement regimes such as the New York Convention.

Germany has historically supported investor-State arbitration through its extensive BIT network. Its treaties often included “open offer” clauses, granting foreign investors access to ICSID or UNCITRAL arbitration without needing separate consent instruments.

However, the legal landscape has shifted significantly following the CJEU’s decisions:

- *Achmea* (C-284/16) invalidated intra-EU BIT arbitration;
- *Komstroy* (C-741/19) extended similar reasoning to the Energy Charter Treaty (ECT) within the EU context.

Post-Achmea, Germany terminated many of its intra-EU BITs and now relies on the EU legal framework to handle intra-Union investment disputes. For extra-EU treaties, Germany remains committed to ISDS, although treaty renegotiation often reflects new EU model BIT language, emphasizing transparency and sustainable development.

German courts, such as the Federal Court of Justice (BGH), tend to respect valid arbitration clauses unless directly conflicting with EU obligations. The Federal Constitutional Court (BVerfG) has not yet overruled CJEU jurisprudence but retains an active interest in protecting constitutional identity.

Uzbekistan takes a markedly different path. As part of its economic reform agenda, the country has prioritized legal openness and investor security. The Law “On Investments and Investment Activity” (2019) provides a statutory guarantee of access to international arbitration.

Uzbekistan’s BITs generally:

- Offer broad jurisdiction over “any dispute concerning investments”;
- Allow choice between ICSID, UNCITRAL, or ad hoc tribunals;
- Contain few jurisdictional limitations or carve-outs.

This liberal approach is reflected in arbitral practice, where Uzbekistan has appeared before ICSID and other tribunals without contesting jurisdiction based on consent issues. Moreover, domestic courts—though still evolving in sophistication—demonstrate growing acceptance of foreign arbitral awards, aligned with the New York Convention.

This framework enhances predictability and reflects Uzbekistan’s strategy of aligning with international standards while retaining sovereign control over policy areas not covered by BITs.

- Both countries recognize the legal force of jurisdictional clauses under international law.
- Both are parties to the New York Convention and, in principle, honor arbitration awards.

Divergence:

- Germany faces EU constraints that effectively limit its ability to offer consent freely within intra-EU contexts;
- Uzbekistan retains full sovereignty over its BIT commitments and interprets them broadly in favor of investor access.

Another point of divergence is judicial review. In Germany, national and EU courts exercise strong oversight over arbitral jurisdiction, particularly in areas touching EU law. In Uzbekistan, courts are less interventionist and more deferential to arbitration mechanisms, although capacity-building is still ongoing.

For Germany:

- Clarify extra-EU treaty language to avoid ambiguity regarding jurisdictional consent;

- Support multilateral solutions like the proposed UNCITRAL Investment Court as a neutral platform.

For Uzbekistan:

- Enhance judicial training to improve consistency in enforcement of awards;
- Continue to modernize BITs with clearer procedural safeguards and explicit jurisdictional frameworks.

For both:

- Balance legal certainty with regulatory autonomy;
- Ensure that jurisdictional clauses reflect contemporary international law standards while safeguarding party expectations.

Jurisdictional clauses in BITs are pivotal for the legitimacy and functionality of investment arbitration. Germany and Uzbekistan illustrate contrasting approaches shaped by regional obligations and national policy choices. While Germany adapts to EU-imposed constraints, Uzbekistan embraces party autonomy as a strategic legal and economic tool.

For the field of private international law, this comparison underscores the tension between regional legal integration and global arbitration norms. Strengthening the doctrinal and institutional clarity of jurisdictional clauses remains essential for the coherence of investment dispute settlement in a fragmented legal order.

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