

Interplay between State Courts and Arbitration: Bless or Curse?

Winter Academy on International Arbitration: Topic 2

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Overview of Topic 2



Court intervention regarding challenges to jurisdiction



Court intervention in the context of procedural irregularities



Jurisdictional Challenges

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The **arbitral tribunal may rule on its own jurisdiction**, including any objections with respect to the existence or validity of the arbitration agreement...

Tribunal power
to decide

(2) A plea that the **arbitral tribunal does not have jurisdiction** shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the **arbitral tribunal is exceeding the scope of its authority** shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Grounds for
challenge &
Timing



(3) 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.

Form of
decision

Court power to
finally decide

Parallel
proceedings



- Allows for judicial review of rulings by tribunals on their jurisdiction (whether determined as a preliminary question or final award)
 - Allows tribunals discretion to cast ruling in the form either of an **award** (subject to instant court control), or a **procedural decision** (may be contested only in an action for setting aside the later award on the merits)
 - Does not address the scenario where the tribunal rules it has **no jurisdiction** (but no reason why it could not be subject of court proceeding per Born)
- Possibility of **interlocutory judicial resolution** of jurisdictional disputes, prior to any decision by an arbitral tribunal on such issues
 - Does not codify a negative competence-competence doctrine (cf French approach) but allows courts of Model Law States to read the negative competence-competence principle into Article 16, or conduct a more complete review of the validity of the arbitration agreement.
- No appeals of court decision

Section 30. Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) **Any such ruling may be challenged by any available arbitral process of appeal or review** or in accordance with the provisions of this Part.

Tribunal power
to decide

Section 67. Challenging the award: substantive jurisdiction

(1) A party to arbitral proceedings may... **apply to the court**—

(a) **challenging any award** of the arbitral tribunal as to its **substantive jurisdiction**; or

(b) for an **order declaring an award** made by the tribunal on the **merits to be of no effect**, in whole or in part, because the tribunal did not have **substantive jurisdiction**.

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

Court power to
decide

Parallel
proceedings

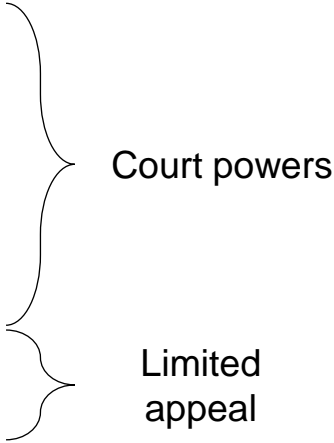


England (Arbitration Act)

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

- (a) **confirm** the award,
- (b) **vary** the award, or
- (c) **set aside** the award in whole or in part.

(4) The **leave of the court** is required for **any appeal** from a decision of the court under this section.





England: Key Features

- Tribunal's rulings as to substantive jurisdiction are reviewable by courts, provided the aggrieved party exhausts any arbitration procedure by way of appeal, review, correction or additional award
- Court may also, on the application of a party, decide the question of the tribunal's jurisdiction as a preliminary matter
 - However, cf Model Law, this is only if all parties agree or if the tribunal gives permission and the Court is satisfied of certain matters
- Limited appeals of court decisions
- *NB English Law Commission has considered amending s 67 so that challenges to the tribunal's jurisdiction are heard by way of appeal rather than rehearing/amending the challenge process, including s 67 remedies and costs (see <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>)

Article 1465

- The arbitral tribunal has **exclusive jurisdiction to rule on objections to its jurisdiction.**

} Tribunal power
to decide

Article 1520

- An award may only be set aside where:
- (1) the arbitral tribunal **wrongly upheld or declined jurisdiction;**
or...

} Court power to
decide

[Remember] *Article 1448*

- When a dispute subject to an arbitration agreement is brought before a court, such **court shall decline jurisdiction**, except if an **arbitral tribunal has not yet been seized of the dispute** and if the **arbitration agreement is manifestly void or manifestly not applicable.**
- A court **may not decline jurisdiction on its own motion.**



France: Key Features

- Arbitrator's ruling on jurisdiction (whether affirmative or negative) open to recourse where the arbitral tribunal 'wrongly upheld or declined jurisdiction'
- French law exhibits *negative effect* of competence-competence – courts do not have jurisdiction over the arbitrator's jurisdiction, except where the arbitral tribunal has not yet been seized of the dispute and the arbitration agreement is manifestly void or manifestly not applicable
 - Extremely limited scope of court intervention

Article 186

- **1. The arbitral tribunal shall itself decide on its jurisdiction.**
- 1bis. It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a State Court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.
- 2. A plea of lack of jurisdiction must be raised prior to any defence on the merits.
- 3. The arbitral tribunal shall, as a rule, decide on its jurisdiction by **preliminary award.**

Tribunal power
to decide

Article 190

2. The **award may only be annulled**:

(a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

(b) if the **arbitral tribunal wrongly accepted or declined jurisdiction**;

3. **Preliminary awards** can be annulled on the grounds of the above paras. 2(a) and **2(b)** only; the time limit runs from the notification of the preliminary award.

Procedure for
challenge

Switzerland: Key Features



- Where tribunal has ruled on its own jurisdiction (as a preliminary award), parties may apply to have this decision set aside
 - Arbitral tribunal must decide on its jurisdiction as a preliminary award (cf Model Law, which leaves option open)
- *Negative effect* of competence-competence for arbitral tribunals seated in Switzerland → where the court is seized first of the dispute, it will only conduct a prima facie examination of the validity of the arbitration agreement
 - For tribunals seated abroad, Article II(3) New York Convention applies and a Swiss court uses its full powers to review the validity of the arbitration agreement
 - Limited court intervention

Article 16. The right of the arbitral tribunal to rule on its jurisdiction

- 1. The **arbitral tribunal may rule on its own jurisdiction**, including any objections with respect to the existence or validity of the arbitration agreement...

Tribunal power
to decide

- 2. A **plea that the arbitral tribunal does not have jurisdiction shall be raised by the relevant party to arbitration not later than when making its first submission on the merits of the dispute**. A party is not precluded from raising such a plea by the fact that he has selected (appointed), or participated in the selection (appointment) of, an arbitrator. A **plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.**

Grounds for
challenge &
Timing

- 3. The arbitral tribunal may rule on a plea referred to in clause (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 file, within one month after the date of receiving the notice of that order, an application with the competent court to rule that the arbitral tribunal lacks jurisdiction**. If an arbitration agreement of the parties provides for administration of a dispute by a **permanent arbitration institution**, the parties may by their **direct agreement exclude this possibility**. The filing with the court of an application to rule on the arbitral tribunal's lack of jurisdiction does not prevent the arbitral tribunal from continuing the arbitration and making an award.

Form of decision

Court power to decide

Waiver

Parallel proceedings



- Largely mirrors Model Law
- Wording that pending the court's decision on the tribunal's jurisdiction the arbitral proceedings may continue was removed (although Art. 235(4) Arbitrazh Code implicitly confirms this)
- Parties whose arbitration agreement provides for administration of the arbitration by a permanent arbitration institution, may by their direct agreement exclude the option for the court to decide that the arbitral tribunal does not have jurisdiction
 - This deals with arbitrations seated in Russia, and cannot exclude the court's authority to decide whether the arbitration agreement is null and void, inoperative or incapable of being performed

Comparative Table



| | Model Law | England | France | Switzerland | Russia |
|---|---|---|----------------------------|-------------------|--|
| Positive competence-competence? | Yes | Yes | Yes | Yes | Yes |
| Negative competence-competence codified? | No | No (Court may determine jurisdiction as a preliminary question if all parties agree or if the tribunal gives permission, and the Court is satisfied of certain matters) | Yes | Yes | No |
| Form of decision | Procedural decision or award (interim or final) | Procedural decision or award (interim or final) | Preliminary or final award | Preliminary award | Procedural decision or award (interim or final) |
| Court decision subject to appeal? | No | Yes (limited) | No | No | No |
| Other unique features? | | | | | - Parties who agreed that the arbitration will be administered by a permanent arbitration institution, may by direct agreement exclude the option for the court to decide the tribunal does not have jurisdiction in certain circumstances |



Discussion

Court intervention in the context of challenges to jurisdiction: Bless or Curse?



Procedural Irregularities during the Arbitration

Article 12. Grounds for challenge

(2) An arbitrator may be challenged only if circumstances exist that give rise to **justifiable doubts as to his impartiality or independence**, or if he **does not possess qualifications agreed to by the parties**. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Grounds for
challenge

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within **fifteen days** after becoming aware of the constitution of the arbitral tribunal or... any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. **Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.**

Default
challenge
procedure -
tribunal



(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party **may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal**; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Default
challenge
procedure -
court



- Limited grounds for challenge set out in art 12(2) – courts should not decide on the challenge applying rules governing the removal of national judges by analogy
 - Circumstances giving rise to justifiable doubts as to impartiality or independence
 - Does not possess qualifications agreed by the parties
- Final decision on challenge rests with the court but tribunal may continue with proceedings pending court decision
 - Court intervention only triggered once tribunal has itself decided on and rejected the challenge
 - *Compulsory* court supervision – parties cannot derogate as this ensures basic fairness of arbitral process
- 30-day time limit for challenging party to request court intervention after notice of rejection by tribunal
- *No specified time limit* for court to decide challenge (generally understood to be expeditiously and without delay)
 - Left to local laws and court rules
- No appeal of court decision

Section 24. Power of court to remove arbitrator

(1) A party to arbitral proceedings may... **apply to the court to remove an arbitrator** on any of the following grounds—

(a) that circumstances exist that give rise to **justifiable doubts as to his impartiality**;

(b) that he **does not possess the qualifications required** by the arbitration agreement;

(c) that he is **physically or mentally incapable of conducting the proceedings** or there are **justifiable doubts as to his capacity to do so**;

(d) that he has **refused or failed**—

(i) **properly to conduct the proceedings**, or

(ii) to **use all reasonable despatch in conducting the proceedings or making an award**,

and that **substantial injustice** has been or will be caused to the applicant.

Grounds for
challenge

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has **first exhausted any available recourse to that institution or person.**

Precondition
to challenge

(3) The arbitral tribunal may **continue the arbitral proceedings and make an award** while an application to the court under this section is pending.

Parallel
proceedings

(4) Where the court removes an arbitrator, it **may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses,** or the repayment of any fees or expenses already paid.

Court
powers

(5) The arbitrator concerned is **entitled to appear and be heard by the court before it makes any order under this section.**

Arbitrator's
right to be
heard

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Limited
appeal

Section 41. Powers of tribunal in case of party's default

(5) If without showing sufficient cause a party **fails to comply with any order or directions of the tribunal**, the tribunal may **make a peremptory order to the same effect**, prescribing such **time for compliance** with it as the tribunal considers appropriate.

Tribunal power
to make
peremptory
order

(6) If a claimant **fails to comply** with a peremptory order of the tribunal to provide **security for costs**, the tribunal may make an **award dismissing his claim**.

(7) If a party **fails to comply with any other kind of peremptory order**, then, without prejudice to s 42... the tribunal may do any of the following—

(a) direct that the party in default **shall not be entitled to rely upon any allegation or material which was the subject matter of the order**;

(b) draw such **adverse inferences** from the act of non-compliance as the circumstances justify;

(c) **proceed to an award** on the basis of such materials as have been properly provided to it;

Consequences
of breach

(d) make such **order** as it thinks fit as to the **payment of costs of the arbitration** incurred in consequence of the non-compliance.

Consequences
of breach

Section 42. Enforcement of preemptory orders of tribunal

(1) **Unless otherwise agreed** by the parties, the court **may make an order requiring a party to comply with a preemptory order made by the tribunal.**

Court power
to enforce

(2) An application for an order under this section may be made—

(a) by the **tribunal** (upon notice to the parties),

(b) by a **party to the arbitral proceedings with the permission of the tribunal** (and upon notice to the other parties), or

(c) where the **parties have agreed** that the powers of the court under this section shall be available.

Who can
apply

(3) The court shall not act unless it is **satisfied that the applicant has exhausted any available arbitral process** in respect of failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the **court is satisfied** that the person to whom the tribunal's order was directed has **failed to comply with it within the time prescribed in the order** or, if no time was prescribed, within a **reasonable time**.

(5) The **leave of the court is required for any appeal** from a decision of the court under this section.

Preconditions
to enforcement

Limited
appeal



- Exhaustive grounds for removal – wider than Model Law/most national frameworks
 - ‘Impartiality’ (cf impartiality and independence – as this is intended to *include* independence)
 - Does not possess the qualifications agreed by the parties
 - Physical or mental incapacity – similar to art 14 Model Law (failure/impossibility to act)
 - Failure to properly conduct the proceedings or use reasonable despatch causing substantial injustice (having reference to arbitrators’ duties under s 33)
 - Intended to capture rare cases where procedure is frustrating the object of arbitration – not the court substituting its view of the conduct of proceedings
- No requirement that the tribunal first decide the challenge
 - If an arbitral institution is vested with the power to remove an arbitrator, the court must first be satisfied that the parties have had recourse to that institution
 - Parties should object to the conduct of proceedings promptly, or risk losing the right to object (see s 73)
- Final decision on challenge rests with court but tribunal may proceed and make award
- Arbitrator right to be heard in challenge as defendant in proceedings
- Court power to adjust removed arbitrator’s remuneration
- Limited appeals of court decision – leave required



- Unique court power to enforce peremptory orders – effectively converts breach of tribunal’s order into a contempt of court
 - Tribunal may apply certain types of sanction
 - Addresses perennial problem of non-compliance with tribunal’s procedural orders
- Limits on court power to enforce peremptory orders
 - Where the parties have ‘otherwise agreed’
 - Application must be made by the tribunal, one party with the permission of the tribunal or by party agreement
 - Court must be satisfied that the applicant has exhausted available arbitral processes and that the person the subject of the order failed to comply with it in time

Article 1456

- Before accepting a mandate, an arbitrator shall disclose any **circumstance that may affect his or her independence or impartiality**. He or she also shall disclose promptly any such circumstance that may arise after accepting the mandate.
- If the parties **cannot agree on the removal of an arbitrator**, the issue shall be resolved by the [arbitral institution] or, where there is no such person, by the **judge acting in support of the arbitration** to whom **application must be made within one month** following the disclosure or the discovery of the fact at issue.

Court power
to decide

Time limit

Article 1458

- An arbitrator may only be removed with the **unanimous consent of the parties**. Where there is no unanimous consent, the provisions of the final paragraph of Article 1456 shall apply.

Grounds for
removal

Article 1460

- Application to the judge acting in support of the arbitration shall be made either by a party or by the arbitral tribunal or one of its members.
- The judge acting in support of the arbitration shall rule by way of an order against which no recourse can be had.

Who can
apply

No appeal

- Limited and exhaustive grounds for challenging arbitrators (not explicitly identified in the CPC)
 - Lack of qualities expected from any judge, including independence and impartiality (*Cour d'appel de Paris, 12 December 1996, Commercial Agraria Hermanos Lucena v. Transgrain France, Rev Arb, 1998, p 699*)
 - Lack of qualities or skills required by the parties in their arbitration agreement (*Fouchard Gaillard Goldman on International Commercial Arbitration (1999) p 575*)
- Default challenge procedure (unless parties agree otherwise)
 - Unanimous agreement by the parties for removal of the arbitrator
 - If parties cannot agree, decision shall be made by administering institution; failing that, application may be made within 1mth to the judge acting in support of the arbitration
 - Tribunal, tribunal member or party may apply
 - Arbitrator is not party to the proceedings, even if the judge may be interested in hearing his comments (*Civ. 1ère, Paris, 04.05.2012, RG no. 12/53139*)
- Applicant can only challenge on grounds which became known after appointment, which must be raised promptly
- No appeal of court decision

Article 180

1. An arbitrator may be challenged:

(a) if he does not meet the **qualifications agreed upon by the parties**;

(b) if a ground for challenge exists under the **rules of arbitration** agreed upon by the parties;

(c) if circumstances exist that give rise to **justifiable doubts as to his independence**.

Grounds for
challenge

2. No party may challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which **came to that party's attention after such appointment**. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.

Precondition
to challenge

3. To the extent that the parties have not made provisions for this challenge procedure, the **judge at the seat of the arbitral tribunal shall make the final decision**.

Court power
to decide

Article 369 Challenge procedure

2. Absent such agreement, the **challenge application shall be sent to the challenged arbitrator and the other arbitrators within thirty days of the date on which the challenging party had knowledge of the grounds for challenge**; such application shall be made in writing and shall set out reasons.

3. If the challenged arbitrator disputes the challenge, the **challenging party may within thirty days seek a decision from the authority designated by the parties** or, absent such agreement, from the **court of competent jurisdiction** referred to in Art. 356(2) of this Code.

4. Unless the parties have agreed otherwise, the arbitral tribunal may continue the arbitral proceedings and make an award in its original composition while the challenge application is pending.

5. The decision on the challenge may be sought to be **set aside only in setting aside proceedings against the first award made by the arbitral tribunal**.

Challenge
procedure

Parallel
proceedings

No appeal

- Limited and exhaustive grounds for challenging arbitrators
 - Circumstances giving rise to justifiable doubts as to independence (cf impartiality and independence – but interpreted to encompass same scope)
 - Failure to meet qualifications agreed by the parties
 - Ground for challenge under agreed rules of arbitration (similar to failure to meet agreed qualifications)
- Court may decide challenge *to the extent* parties have not agreed on a challenge procedure which does not include court intervention
 - E.g. where arbitration agreement incorporates institutional rules which provide challenge procedure, this will deprive Swiss courts of jurisdiction
- Where parties have not agreed on a challenge procedure, default procedure under art 369 applies
 - 30-day time limit for filing challenge application; if the arbitrator contests the challenge, they may apply to the court (or other agreed party) requesting a ruling on the challenge
 - Tribunal may continue with proceedings and make an award (unless parties agree otherwise)
 - No appeal of court decision
- Applicant can only challenge on grounds which became known after appointment, which must be raised promptly

Article 12. Grounds for challenge of arbitrator

2. An arbitrator may be challenged **only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not comply with requirements established by law or agreement of the parties.** A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, **only for reasons of which he becomes aware after the appointment has been made.**

Grounds for
challenge

Article 13. Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph 3 of [this] Article.

2. Failing such agreement, a party who intends to challenge an arbitrator shall, within **15 days** after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Article 12(2), **communicate the reasons for the challenge in writing to the arbitral tribunal**. Unless the challenged arbitrator withdraws from his office or the **other party agrees to the challenge**, the **arbitral tribunal shall decide on the challenge**.

Tribunal
power to
decide

3. If a challenge under any [agreed] procedure or under the procedure of paragraph 2 of [this] Article is not successful, the challenging party may, within **one month** after having received notice of the decision rejecting the challenge, **request the competent court to grant the challenge**. The parties whose arbitration agreement provides for administration of the arbitration by a permanent arbitration institution, **may exclude the possibility of resolution of this matter by court by their direct agreement**. The filing of a corresponding request with the court does not obstruct the arbitral tribunal, including the challenged arbitrator, from continuing the arbitral proceedings and making an award.

Court power
to decide

Waiver

Parallel
proceedings



- Limited and exhaustive grounds to challenge
 - Circumstances giving rise to justifiable doubts as to impartiality or independence
 - Failure to *comply with requirements* established *by law* or agreement of the parties (but unclear which law)
- Court has final review
 - Court intervention only triggered once tribunal has itself decided on and rejected the challenge
 - 30-day time limit for challenging party to apply to court
 - Tribunal may continue proceedings and make an award
- Court jurisdiction may be excluded by party agreement where the proceedings are administered by a 'permanent arbitral institution'
- Grounds may only be raised if they become known after appointment and must be raised promptly
- Separate Arbitrazh Code provides for no appeal of court decision (art 240.5(3))

Comparative Table



| | Model Law | England | France | Switzerland | Russia |
|--|--|--|---|--|--|
| Grounds to challenge arbitrator | 1. Circumstances that give rise to justifiable doubts as to impartiality or independence 2. Lack of qualifications agreed to by parties | 1. Circumstances giving rise to justifiable doubts as to impartiality 2. Lack of qualifications required by the arbitration agreement 3. Physically or mentally incapable of conducting the proceedings or justifiable doubts as to capacity 4. Refusal or failure to properly conduct the proceedings or use reasonable despatch in conducting proceedings/making an award causing substantial injustice | 1. Circumstances that may affect independence or impartiality 2. Lack of qualities or skills required in the arbitration agreement | 1. Circumstances giving rise to justifiable doubts as to independence 2. Failure to meet qualifications agreed by the parties 3. Grounds under agreed rules of arbitration | 1. Circumstances giving rise to justifiable doubts as to impartiality or independence 2. Failure to comply with requirements established by law or agreement of parties |
| Does tribunal need to decide first? | Yes | No | No | No | Yes |
| Is court supervision compulsory? | Yes | Yes | Yes | No | No |
| Appeal? | No | Yes | No | No | No |
| Other unique features | | <ul style="list-style-type: none"> - Other available recourse must first be exhausted - Court power to adjust arbitrator remuneration where removed - Arbitrator right to be heard in challenge proceedings - Court ability to enforce peremptory orders | <ul style="list-style-type: none"> - Court intervention only available where no administering institution - Arbitrator may be removed with unanimous consent of parties - Application can be made by party, tribunal, or tribunal member | - Arbitrator may apply to the court to contest the challenge | - Court jurisdiction may be excluded by direct agreement where proceedings administered by a permanent arbitral institution |



Discussion

Court intervention in alleged procedural irregularities during the arbitration: Bless or Curse?



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