NEMO IUDEX IN SUA CAUSA AND THE CHALLENGE PROCEDURE UNDER THE UNCITRAL MODEL LAW

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"And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause . . . ."[1]

I. INTRODUCTION

Nemo iudex in sua causa[2]—no one should be judge in his own case—is a widely known principle which captures one of the two pillars of natural justice.[3] Much of the confidence in

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1. THOMAS HOBBES, LEVIATHAN 102 (Michael Oakeshott ed., 1962) (describing "the law of Nature").

2. This principle may also be referred to as *nemo iudex in parte sua*, *nemo iudex in re sua*, *nemo debet esse iudex in propria causa*, *in propria causa nemo iudex* or *nemo iudex idoneus in propria causa est*.

3. Kanda v. Gov't of the Fed'n of Malaya [1962] 1 MLJ 169, 171 (Lord Denning) (stating the second pillar of natural justice is *audi alteram partem*—that everyone has a right to be heard); *see also* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384 (2012); Leng Sun Chan, *Arbitrators' Conflicts of Interest: Bias by Any Name*, 19 SING. ACAD. L.J. 245 (2007).

the judicial as well as the arbitral process rests upon this maxim, which strives to assure impartiality in the decision-making process. The underlying principle is that no person can objectively judge a dispute in which she herself is a party, has a substantial interest, or has a substantial connection to any of the parties to the dispute where the person's interest may influence the outcome, or to be seen to have influenced the outcome of the decision.[4] The doctrine of independence and impartiality of judges and arbitrators alike is an integral feature of the justice system and a recognized fundamental principle in arbitration.[5] In order to ensure adherence to this bedrock principle, the parties in an arbitration generally have the right to challenge an arbitrator if he lacks the aforementioned impartiality.[6] This holds true even in cases where the arbitrator is only perceived to be biased.[7] The procedures for challenging arbitrators are generally governed by the parties' agreement. In the absence of a contractually agreed procedure, the procedures are governed by by the parties' choice of institutional or *ad hoc* arbitration rules, or by the otherwise applicable law, likely the law of the seat of arbitration.[8] This

4. *See* R. v. Sussex Justices *Ex parte* McCarthy [1924] 1 KB 256, 259 (Lord Hewart CJ) ("[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."); *see also* Serjeant v. Dale [1877] 2 QB 558, 567 (Lush J) (stating that the purpose of the no-bias rule was "to promote the feeling of confidence in the administration of justice which is so essential to social order and security.").

5. SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 7 (2009) ("The fear of bias lies at the very heart of [International Commercial Arbitration], so much so that it might not be too much to say that the prevention of partiality is its *raison d'etre*."); *see also* Matthew Gearing, *"A Judge in His Own Cause?" - Actual or Unconscious Bias of Arbitrators*, 3 INT'L ARB. L. REV. 46 (2000).

6. *See, e.g.*, U.N. COMM'N ON INT'L TRADE LAW, UNICTRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Sales No. E.08.V.4 (1985); Rep. of the United Nations Comm'n on Int'l Trade Law on Its Eighteenth Session, U.N. Doc. A/40/17 (June 3–21, 1985) [hereinafter UN Comm'n on Int'l Trade Report].

7. LUTTRELL, *supra* note 5, at 7 (discussing the difference between "objective" and "apparent" bias). In Europe, the term "objective bias" generally refers to situations where the arbitrator only appears to lack impartiality or independence.

8. *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 13-25 (2003); SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE ¶ 6.112 (2011).

raises the following question: who should decide on the challenge of an arbitrator?

II. The Approach Adopted by the UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration provides in Article 13(2) that:

> Failing [an agreement by the parties on a procedure for challenging an arbitrator], a party who intends to challenge an arbitrator shall, within ?fteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of 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 [voluntarily] withdraws from his of?ce or the other party agrees to the challenge, the *arbitral tribunal shall decide on the challenge*.[9]

The decision by the arbitral tribunal is the first step of the two-stage challenge process provided for in Article 13 of the UNCITRAL Model Law.[10] At this stage, and in light of the *nemo iudex* maxim, a procedural question arises as to whether the arbitral tribunal includes or excludes the challenged arbitrator(s). Given the clause's inconclusive wording, to find an answer one must first look to the rules themselves. In that regard, Article 2(b) of the UNCITRAL Model Law only provides that "arbitral tribunal means a sole arbitrator or a panel of arbitrators . . . ."[11] This seems to imply that the challenged arbitrator herself is part of the decision on her own challenge and effectively gets to decide her own fate. In order to answer the question conclusively, one must also consider the legislative intent—established through the *travaux préparatoires* of Article 13 of the UNCITRAL Model Law. In this respect, the UNCITRAL Working Group, in its Report of March 6, 1984, agreed that:

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9. U.N. Comm'n on Int'l Trade Law, UNICTRAL Model Law on International Commercial Arbitration, art. 13(2), U.N. Sales No. E.08.V.4 (1985) (emphasis added).

10. The second step provides that, in case the challenge is not successful, the challenging party may request the court at the seat of arbitration to decide on the challenge. *See id.* art. 13(3).

11. *Id.* art. 2(b).

> [T]he decision entrusted to the arbitral tribunal by paragraph (2) of [Article 13] was not to be considered as a decision on a question of procedure in the terms of article 29[12] and that the decision was entrusted to all members of the tribunal, *including the challenged arbitrator*. In an arbitration with more than one arbitrator, that decision may be made by a majority of all its members . . . .[13]

The Commission later confirmed the Working Group's decision not to exclude the challenged arbitrator from the deliberations and the decision of the arbitral tribunal on the challenge.[14] This position was heavily criticized by the delegation of the German Federal Republic,[15] the International Criminal Court (ICC)[16] and the delegation of Yugoslavia.[17]

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12. This clarification seems unnecessary since the decision on the challenge of an arbitrator involves an examination of the existence of material grounds for the challenge against him and, thus, is unlikely to be procedural.

13. Comm'n on Int'l Trade Law, Rep. of the Working Group on Int'l Contract Practices on the Work of Its Seventh Session, ¶ 38, U.N. Doc. A/CN.9/246 (1984) (emphasis added); *see also* HOWARD M. HOLTZMANN ET AL., A GUIDE TO THE 2006 AMENDMENTS TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 421 (2015).

14. *See* 1985 Y.B. Comm'n on Int'l Trade Law 436, U.N. Doc. A/CN.9/SER.A/1985, art. 13, ¶ 45–46 ("there was a general feeling that the challenged arbitrator should remain and thus rule on the challenge."). *See also* UN Comm'n on Int'l Trade Report, *supra* note 6, art. 13, ¶ 128; Aron Broches, *Commentary on the UNCITRAL Model Law (1990), in* ICCA HANDBOOK ON COMMERCIAL ARBITRATION 1, 62 (Jan Paulsson & Lisa Bosman eds., 1990).

15. *See* 1985 Y.B. Comm'n on Int'l Trade Law 436, U.N. Doc. A/CN.9/SER.A/1985, art. 13, ¶ 55 (the German delegate Schumacher stating that Germany would have problems implementing that provision "because its national law embodied that principle," referring to the principle of *nemo iudex*). Japan, however, was of the view that it is desirable to explicitly state "that the arbitral tribunal, which has the power to decide on the challenge, includes the challenged arbitrator." U.N. Secretary-General, *Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration*, art. 13, ¶ 2, U.N. Doc. A/CN.9/263 (1985) [hereinafter *Analytical Compilation*].

16. *See* U.N. Secretary-General, *Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration: Addendum*, art. 13, ¶ 2, U.N. Doc. A/CN.9/263/Add.1 (1985) [hereinafter *Analytical Compliation Addendum*] (the "ICC is of the view that arbitrators should not be their own judge in matters of challenge.").

Even the Chairman of the Working Group stated that "[a] matter particularly to be borne in mind was the difficulty of the sole arbitrator who would have to decide upon his own impartiality"—confirming the clear conflict of interest and discrepancy with the *nemo iudex* principle.[18] In light of the legislative history and the explicit considerations of the Working Group, however, there is no doubt that in case of the default challenge procedure under Article 13(2), it is the sole arbitrator—respectively the entire arbitral tribunal, including the challenged arbitrator—deciding on the challenge.[19] This result seems rather surprising given the fact that both civil as well as common law countries generally follow the *nemo iudex* principle. A look at the implementations of this Article in some countries following the Model Law is necessary—particularly those countries which have criticized the UNCITRAL Model Law's solution.[20]

III. Approaches Adopted in Various Model Law Countries

Upon a closer look at the relevant provisions on the challenge procedure, it is apparent that various Model Law countries simply follow the approach of the UNCITRAL Model Law.[21] Some even explicitly provide for the challenged arbitra-

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17. *See id.* ("Yugoslavia observes that it is hard to expect an arbitral tribunal to be objective if the arbitrator whose challenge is requested participates in the decision–making; this is particularly so where a sole arbitrator is challenged."); *see also* Broches, *supra* note 14, at 63.

18. *See* 1985 Y.B. Comm'n on Int'l Trade Law 436, U.N. Doc. A/CN.9/SER.A/1985, art. 13, ¶ 32 (comment of the Chairman Loewe (Austria)). For a critical view of the approach taken by the UNCITRAL Model Law; *see generally* Constantin Calavros, Das UNCITRAL-Modellgesetz über die Internationale Handelsschiedsgerichtsbarkeit 71–72 (1988); Gabriele Huβlein-Stich, Das UNCITRAL-Modellgesetz über die Internationale Handelsschiedsgerichtsbarkeit 75-76 (1990).

19. *See* Stavros L. Brekoulakis, John Ribeiro & Laurence Shore, *UNCITRAL Model Law, Chapter III, Article 13 [Challenge Procedure], in* Concise International Arbitration 864, 864 (Loukas A. Mistelis ed., 2d ed. 2015).

20. With the Exception of Yugoslavia, which later experienced a breakup during the early 1990s.

21. *See, e.g.*, Lag om Skiljeförfarande [Swedish Arbitration Act] 1999:116; Canadian Commercial Arbitral Act, R.S.C. 1985, c 17, art 13(2); *Commerical Arbitration Act 2017* (Cth) s 13(3) (Austl.); An Ordinance to Reform the Law Relating to Arbitration, and to Provide for Related and Consequential Matters, (2011) Cap. 609, § 26 (H.K.); Arbitration Act, Act. No.

tor to decide on his own challenge.[22] Nevertheless, at least a few Model Law countries decided against the adoption of the proposed solution and instead expressly exclude the challenged arbitrator from the decision.[23] Against this background, and in light of Germany's expressed critique during the 313th meeting of UNCITRAL, it seems only appropriate to take a closer look at the German implementation of the relevant provisions of the UNCITRAL Model Law.

Some thirteen years after the adoption of the UNCITRAL Model Law, Germany finally implemented its provisions in the tenth book of its Code of Civil Procedure, Sections 1025–1066. Surprisingly, however, the provision corresponding to Article 13 of the UNCITRAL Model Law shows no relevant deviation. On the contrary, Section 1037(2) of the German Code of Civil Procedure[24] simply provides in its second sentence that "[s]hould the arbitral judge so recused refuse to resign from

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6083, Dec. 31, 1999, *amended by* Act. No. 14176, May 29, 2016, art. 14(2); Arbitration Act 2005 (Act No. 646) § 15(2) (Malay.); International Arbitration Act (Chapter 143A) § 15(3) (Sing.).

22. *See* AUSTRIAN ARBITRATION ACT 2013 [BGBL I] No. 118/2013, as amended, § 598(2); Arbitration Act, R.S.A. 2000, c A-43, art 13(5) (Can. Alta.); Arbitration Act, S.O. 1991, c 17, art 13(5) (Can. Ont.); The Arbitration Act, C.C.S.M. 1997, c. A120, art. 13(5) (Can.); Arbitration Act, S.N.B. 1992, c. A-10.1, art 13(5) (Can.); The Arbitration Act, 1992, S.S. 1992, c A-24.1, art 14(5); LAW ON ARBITRATION OF SLOVENIA art. 16(2) (Slovn.); Arbitration and Conciliation (Amendment) Act, 2015, Acts of Parliament, 2016 (India); see also VOLUNTARY ARBITRATION 2011 No. 31/86, art. 14(2) (Port.) which – albeit Portugal not being a Model Law country – is based on the UNCITRAL Model Law.

23. DECRETO LEGISLATIVO 2008 No. 1017, art. 29(2)(d)(ii) (Peru); LEY DE ARBITRAJE [ARBITRATION LAW] 2011 Cong. Decree 67–95, art. 17(2) (Guat.); *see also* the former Code of Civil Procedure, c 73, s 2, art. 942.3 (1986) (Can. Que.) ("the other arbitrators shall come to a decision on the matter," replaced by the Code of Civil Procedure updated in 2017, which now provides that "[t]he arbitrator or arbitrators are required to rule on the recusation"; *see also* Law No. 27/1994 of 1994 (Promulgating the Law Concerning Arbitration in Civil and Commercial Matters), *al-Jaridah al-Rasmiyah*, vol. 16, 21 Apr. 1994, art. 19(1) (Egypt), which was amended in 2000 to accommodate a decision of the Supreme Constitutional Court. Case No. 84/19 (6 November 1999) The new law provides for direct submission of challenges to the competent court; the Supreme Court held that a provision that allows a person to be a judge in his own cause "violates the principles of justice, principles of Islamic Law, and principles of equality before law."

24. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended October 10, 2013, § 1037, para. 2, sentence 2, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

office, or should the other party not consent to the recusal, the arbitral tribunal shall rule on the recusal." While the government draft at first explicitly provided for the exclusion of the challenged arbitrator,[25] the German legislature later decided to drop the respective limitation[26] in order to keep pace with the international standard set by the UNCITRAL Model Law.[27] Thus, although the German legislature recognized the problem that the arbitrator was bound to become a judge in his own fate, it nevertheless decided to include him in the decision.[28]

It was later argued that the challenging party might have too much leverage if the challenge were to be decided upon by a neutral decision-maker.[29] Challenges could effectively become a "device" to torpedo arbitral proceedings.[30] In the case of a sole arbitrator in particular, a challenge could render the arbitral proceedings "virtually impossible."[31] In addition, it was asserted that there is a risk that the opposing party could be over-represented in cases with a two or three person arbitration panel.[32] All of these attempts to justify a violation of the

25. *See* Gesetzentwurf [Bill], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/5274, § 1037(2), http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf (Ger.). *See also* Peter Mankowski, *Die Ablehnung von Schiedsrichtern*, 2004 SCHIEDSVZ 304, 305; Mark C. Hilgard, *Zur Ablehnung eines Richters im Schiedsverfahren*, 2015 BETRIEBS-BERATER 456, 459 n. 30.

26. *See* Beschlußempfehlung und Bericht des Rechtausschusses [Recommended Resolution and Report of the Committee on Legal Affairs,] DEUTSCHER BUNDESTAG: DRUCHSACHEN [BT] 13/9124 [Ger.]

27. *Id.*; *See also* Mankowski, *supra* note 25.

28. Gesetzentwurf [Bill], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/5274, at 41, n. 22, http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf (Ger.) *See also* Mankowski, *supra* note 25.

29. Mankowski, *supra* note 25.

30. *See id. See also* Christopher Koch, *Standards and Procedures for Disqualifying Arbitrators*, 20 J. INT'L ARB. 325, 325 (2003) ("Although the [challenged] disqualification procedure is a necessary escape valve to guarantee the integrity of the arbitral process, at the same time it is also a device which in the hands of unscrupulous parties can be used to sabotage or impede an arbitration.").

31. Mankowski, *supra* note 25.

32. DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/5274, at 41, n. 22; DEUTSCHER BUNDESTAG: DRUCHSACHEN [BT] 13/9124, at 46, n. 23. *See also* Mankowski, *supra* note 25; for a discussion of Taiwan's Arbitration Law, see Winnie Jo-Mei Ma, *Procedures for Challenging Arbitrators: Lessons for and from Taiwan*, 5 CONTEMP. ASIA ARB. J. 293, 301–02 (2012), who speaks of an "im-

nemo iudex principle seem hardly convincing,[33] particularly when comparing this practice to the one in German state court proceedings. According to Section 45(1) of the German Code of Civil Procedure, state court judges are denied the right to rule on a motion to recuse themselves.[34] It seems doubtful that such a notable discrepancy is warranted or can be justified by simply referring to the specific characteristics of arbitration proceedings[35]—particularly given that "[t]he standards to which arbitrators are held in their adjudicatory capacity are similar to those required of judges"[36] and the fact that arbitral awards generally have "the same [binding] force as court judgments."[37] Moreover, it is doubtful that said discrepancy can *per se* be tolerated because the unsuccessful challenger has the option to ultimately go to court.[38]

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balance of voting power." This argument seems particularly unpersuasive, given the presumed neutrality of the other arbitrators.

33. See the solution provided for below which allows, in case of an evenly divided tribunal (resulting in a deadlock), or in cases where the challenge relates to a sole arbitrator or to the majority of an arbitral tribunal (resulting in a "*lack of quorum*"), for outside authority (the arbitral institution, appointing authority, or possibly the national courts at the seat of arbitration) to step in to make the decision on the challenge. For a discussion of the situation in Taiwan, see Ma, *supra* note 32, at 300–04.

34. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended October 10, 2013, § 45, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html ("That court of which the judge is a member shall rule on a motion to recuse him, without that judge being involved in the decision.").

35. *See* Hilgard, *supra* note 25, at 459.

36. Koch, *supra* note 30, at 342.

37. *See* Ma, *supra* note 32, at 301, with particular reference to Taiwan's Arbitration Law.

38. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended October 10, 2013, § 1037, para. 3, sentence 1, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. See also Hilgard, *supra* note 25, at 459, who seems to share the articulated concerns; *Reichold*, *in Thomas/Putzo*, ZPO, § 1037, ¶ 4 (26th ed. 2004). *But see Schneider*, *in Prütting/Gehrlein*, ZPO, § 1037, ¶ 3 (5th ed. 2013); *Schwab/Walter*, Schiedsgerichtsbarkeit, Ch. 14, ¶ 22 (7th ed. 2005); *Saenger*, *in Saenger*, ZPO, § 1037, ¶ 4 (7th ed. 2017); *Voit*, in *Musielak/Voit*, ZPO, § 1037, ¶ 4 (14th ed. 2017); *OLG München*, MDR 2006, 946; *Münch*, *in Rauscher/Krüger*, Münchener Kommentar ZPO, § 1037, ¶ 8 (2nd ed. 2001), who incorrectly refers to the decision by the tribunal as a "harmless preliminary proceeding."

IV. Approaches Adopted in Various Arbitration Rules

When one looks into the relevant provisions of the various institutional and *ad hoc* arbitration rules, this problem appears to be virtually non-existent. Most institutional rules trust the relevant arbitration institution or appointing authority to decide on the arbitrator challenge instead of the arbitral tribunal.[39] One of the reasons mentioned is that if the arbitral tribunal includes the challenged arbitrator, or if the challenged arbitrator is a sole arbitrator, a challenge decided by that tribunal would contravene the notion that "justice must be seen to be done and that a judge should not sit in his or her own cause."[40] This, however, incorrectly assumes that the challenged arbitrator must necessarily be involved in the tribunal's decision. The experience of International Centre for Settlement of Investment Disputes (ICSID) illustrates that the "unfortunate solution" of the UNCITRAL Model Law can easily be avoided "by leaving the decision . . . with the arbitral tribunal

39. *See* Int'l Commercial Court [ICC] *Rules of Arbitration*, art. 14(2); London Court of Int'l Arbitration [LCIA] *Arbitration Rules*, art. 10.1 (Oct. 1, 2014); Stockholm Chamber of Commerce [SCC] *Rules*, art. 19(5) (Jan. 1, 2017); China Int'l Econ & Trade Arbitration Comm'n [CIETAC], art. 32(6) (Nov. 4, 2014); H.K. Int'l Arbitration Ctr. [HKIAC] *Administered Arbitration Rules*, art. 11.9 (Nov. 1, 2013); Korean Commercial Arbitration Bd. [KCAB] *Int'l Arbitration Rules*, art. 14(5) (June 1, 2016); Japan Commercial Arbitration Assoc. [JCAA] *Rules & Regualtions*, art. 31(5) (Dec. 10, 2015); Am. Arbitration Association, *Commercial Arbitration Rules*, art. 18(c); Int'l Ctr. for Dispute Resolution [ICDR] *Rules*, art. 14(3); Sing. Int'l Arbitration Ctr. [SIAC] *Rules*, art. 16.1 (2016); Vienna Int'l Arbitral Ctr. [VIAC], *Vienna Rules of Arbitration and Mediation*, art. 20(3) (Jan. 1, 2018); Asian Int'l Arbitration Ctr. [AIAC] *Arbitration Rules*, art. 5(7) (Mar. 9, 2018); World Intellectual Prop. Assoc. [WIPO] *Arbitration Rules*, art. 20 (June 1, 2014); Australian Ctr. for Int'l Commercial Arbitration [ACICA] *ACICA Rules 2016*, art. 18(4) (Jan. 1, 2016); German Arbitration Inst. [DIS] *Arbitration Rules*, art. 15.4 (2018). *But see* German Arbitration Inst. [DIS] *Arbitration Rules*, art. 18.2 (1998) which still provided for a decision by the arbitral tribunal; nevertheless, it seems to have been common practice that the challenged arbitrator refrained from participating in the decision. *See Nedden/Herzberg*, Praxiskommentar ICC-Schieds-O/DIS-SchiedsO, § 18 DIS-SchiedsO, ¶ 20 (2014); *OLG München*, SchiedsVZ 2008, 102, 103; Hilgard, *supra* note 25, 459. See also with regard to a sole arbitrator *Aden*, Internationale Handelsschiedsgerichtsbarkeit,§ 18 DIS-SchiedsO,¶ 10; with regard to *ad hoc* arbitration rules, *see* United Nations Comm'n on Int'l Trade Law [UNCITRAL], *Arbitration Rules*, 13(4) which provides that "[the party making the challenge] shall seek a decision on the challenge by the appointing authority."

40. Koch, *supra* note 30, at 337.

for as long as it is consistent with [the principle of *nemo iudex* and] the notion of justice being seen to be done."[41] Rule 9(4) of the ICSID Arbitration Rules[42] provides that, if the challenge is only directed at one or at a minority of arbitrators, it will be decided by the majority "[of] the other members [of the Tribunal]".[43] Only in the cases where those members are equally divided, resulting in a deadlock, or the challenge relates to a sole arbitrator or to a "majority of the arbitral tribunal," resulting in a "lack of quorum,"[44] will an outside authority step in. At that point, the Chairman of the ICSID Administrative Council, who *ipso iure* is the President of the World Bank,[45] will make the decision.[46] In this author's opinion, the approach taken by the ICSID Rules is not only "thought-provoking"[47] but also strikes the ideal balance between impartiality and expediency,[48] thereby "promoting the utility and desirability of

41. *Id.* at 337–38.

42. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *Arbitration Rules*, 9.4 (Apr. 10, 2006) [hereinafter ICSID *Arbitration Rules*].

43. Koch, *supra* note 30, at 347; *see also* Convention on the Settlement of Investment Disputes between States and Nationals of other States art. 58, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

44. Ma, *supra* note 32, at 302.

45. ICSID Convention, *supra* note 42, art. 58.

46. *See id.*; ICSID *Arbitration Rules*, *supra* note 42, 9(4); *See also* Koch, *supra* note 30, at 337–38. Such "outside authority" can be (in case of an institutional arbitration) the institution itself, or (in case of an *ad hoc* arbitration) the appointing authority, or possibly the national courts at the seat of arbitration. For cases in which the *ad hoc* arbitration is not conducted under rules such as those of UNCITRAL, *see* United Nations Comm'n on Int'l Trade Law [UNCITRAL], *Arbitration Rules*, 13(4).

47. Ma, *supra* note 32, at 303.

48. *But see* Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3(2) CONTEMP. ASIA ARB. J. 237, 274 (2010), according to whom "establishing a balance between uninterrupted and efficient arbitral proceedings and independent and impartial decision making remains difficult." Markert suggests that "it might be favorable for the legitimacy of the challenge process [under ICSID] if the body deciding on a challenge were entirely detached from the arbitral tribunal." *Id.* at 249. See also *Ma*, *supra* note 32, at 305, who suggests engaging "another person detached from the arbitral tribunal . . . from the outset if such alternative decision-makers may be involved later in the challenge process," referring to the situation in cases of "split decisions and deadlocks arising from inadequate or even number of the unchallenged arbitrators."

arbitration" as well as "instill[ing] and sustain[ing] public confidence" in the arbitral process.[49]

V. Conclusion

In conclusion, including the challenged arbitrator in the decision on his own challenge raises serious concerns regarding the impartiality and independence of the proceedings. Adjudicators, both judges and arbitrators, are expected by the respective parties to be independent and impartial at all times.[50] Moreover, "[p]ublic confidence is [vital] for the utility and longevity of the arbitration system."[51] It seems, however, quite simply impossible, or at least improbable, to expect an arbitral tribunal to be objective if its challenged arbitrator(s) participate in the decision on their own challenge. Since judges are generally prohibited from ruling on challenges to themselves, arbitrators should be treated the same way. The differences between litigation and arbitration do not warrant different treatment of this issue. This view is further supported by the fact that arbitral awards generally have "the same [legally binding] force as court judgments."[52] Given the assumed neutrality of arbitrators, the argument that the exclusion of the challenged arbitrator creates an "imbalance of voting power" to the detriment of one party fails to convince.[53] Therefore, "[t]he self-policing feature of the arbitral process [under the UNCITRAL Model Law] should be qualified by the principle that only the non-challenged arbitrators can decide on the

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49. Ma, *supra* note 32, at 313–14 (suggesting that, at least for Taiwan, "the decision-maker at the first stage of the challenge process [should] be the arbitral institution . . . or another entity detached from the arbitral tribunal" while "[r]etaining the second stage" for the judiciary.)

50. *See* Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, *in* Investment and Commercial Arbitration—Similarities and Divergences 153, 201 (Christina Knahr et al. eds., 2010).

51. Ma, *supra* note 32, at 301.

52. *Id.* (referring specifically to Taiwan's Arbitration Law).

53. This is particularly true in cases where the non-party elected chairperson/president of the arbitral tribunal is challenged. For a rather artificial illustration of the alleged "imbalance of voting power" see *id.* at 301–2.

challenge"[54] in order to be in harmony with an integral feature of our justice system—*nemo iudex in sua causa*.

Moreover, and more generally, in this author's opinion and for the foregoing reasons, it is recommended that the decision on the challenge stays with the arbitral tribunal[55]—excluding the challenged arbitrator(s). There should only be an exception to this in cases where the non-challenged members of the arbitral tribunal are deadlocked, or where the challenge relates to a sole arbitrator or to a majority of the members of the arbitral tribunal, creating the need for a separate and neutral authority—such as the arbitral institution, the appointing authority, or possibly the national courts at the seat of arbitration—to step in and make the decision. This approach strikes the right balance between ensuring impartial and independent decision-making on the one hand and expeditious proceedings, particularly by "avoid[ing] unmeritorious challenge[s] . . . directed at the obstruction of the proceedings,"[56] on the other.

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54. Ma, *supra* note 32, at 301 (citation omitted); KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, 4-003 (2012).

55. Although "this procedure is sometimes criticized . . . [since] it put[s] the co-arbitrators in the uncomfortable position of having to decide in respect of their colleagues and peers," with regard to investment arbitration. *See* Markert, *supra* note 48, at 248–49. *See also* Christopher Harris, *Arbitrator Challenges in International Investment Arbitration*, 5 TRANSNAT'L DISP. MGMT. (2008), *available at* https://www.transnational-dispute-management.com/article.asp?key=1269; DAELE, *supra* note 54, 4-003 and 4-005. *See also* Ma, *supra* note 32, at 299 (citation omitted) who suggests that "the peer review system itself raises serious questions as to the impartiality and independence of the co-arbitrators themselves" since the "non-challenged arbitrators may be unduly lenient towards their challenged co-arbitrators, as they inevitably set standards that one day may be invoked against themselves." *Id.* at 303 (citation omitted).

56. Markert, *supra* note 48, at 251.