

**Reflections  
by an International Arbitrator  
on the Conduct of International Arbitration Proceedings  
Axel Heck, Esq.**

According to conventional wisdom, resolution of disputes, in the end, is all about facts.<sup>1</sup> – Correct, I say, but only half the truth; for, I submit, it is equally about people: The parties and their respective representatives and lawyers; and, in particular, in an arbitration, the arbitrator(s).

You want your arbitrator to be competent not only as a professional, but also as a human being.<sup>2</sup> He<sup>3</sup> must be passionate about resolving the dispute before him fairly and as speedily and cost efficiently as possible.<sup>4</sup> You want a solid jurist, not a mechanical lawyer;<sup>5</sup> someone who, in an international arbitration, is sensitive to the different cultures and knowledgeable about the different legal systems involved.<sup>6</sup>

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<sup>1</sup> Arbitration is consensual justice; and, in my view, it is the function of an arbitral tribunal to ascertain and decide facts in dispute between the parties who employ them. (I use the term “employ” advisedly: Arbitrators, in my view, are agents of the joint will and purpose of those who appoint them.) Those facts, I argue, include the fact of the law that applies to the merits and its effects upon the disputed issues. Arbitrators have powers only insofar, and for as long, as these are necessary to make the decisions they need to reach.

<sup>2</sup> As is often the case, just figuring out who decides can be as important as what is decided.

<sup>3</sup> To avoid the cumbersome „he or she“ and „his or hers“, and the ungrammatical „they“ when used in the singular, I have stuck to saying „he“ or „his“. (I hope that this will be understood in an un-chauvinistic, gender-neutral, way.)

<sup>4</sup> Ferdinand Pecora (who ushered in Wall Street Regulation after the 1929 Crash) was meticulous in preparation and legendary in stamina, mastering reams of material and staying up half the night before interrogations, aided by John T. Flynn, a journalist, and Max Lowenthal, a lawyer. As Flynn wrote, “I looked with astonishment at this man who, through the intricate mazes of banking, syndicates, market deals, chicanery of all sorts, and in a field new to him, never forgot a name, never made an error in a figure, and never lost his temper.”

<sup>5</sup> Rigid adherence to a rule, I submit, is no substitute for careful thought; remembering an insight from John F. Kennedy: *Too often we enjoy the comfort of opinion, without the discomfort of thought.*

<sup>6</sup> Justice Robert H. Jackson once wrote: *procedural fairness and regularity are of the indispensable essence of liberty.* And, as a British judge said in 1923: „Justice should not only be done, but should manifestly and undoubtedly be seen to be done“.

Here are some situations the arbitrator needs to be able to cope with:

- At the timetable conference, the lawyers inform the arbitrator that they have agreed on a timetable already. The arbitrator, however, sees the proposed timing as being way too long. -- What are his options?
- One of the arbitrators feels that his colleague(s) on the tribunal is / are likely going to favor one of the parties. -- What are his options?
- At the hearing, one of the parties asks the arbitrator to make a proposal for how the case might be settled; the other party concurs / objects. – What are his options?
- In the course of the proceedings, the arbitrator arrives at the conclusion that one or more of the parties committed a criminal offence (e.g., money laundering; corruption<sup>7</sup>). -- What are his options?
- Neither of the parties invoked the antitrust / competition laws in their pleadings. Yet, the arbitrator has concluded that the underlying agreement violates section 1 of the (U.S.) Sherman Act / article 81 of the (EU) Treaty of Rome. -- What are his options?
- There are three agreements that are relevant to the outcome of the arbitration. One drafted in the English language and governed by English law; another in the Russian language and governed by Russian law; the third in the French language and governed by Swiss law. -- Would it be useful if the arbitrator were to ask the parties to grant him the powers of an *amiable compositeur* or to decide the case ex aequo et bono?
- In the course of the proceedings, one party has a “truck load” of documents (allegedly relevant to the case) delivered to the other party and to the arbitral tribunal. – What are the other party’s / the tribunal’s options?
- Prior to the constitution of the arbitral tribunal, the complaint and the answer having been exchanged between the parties, the defendant files a court action

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<sup>7</sup> Corruption, I submit, clearly is a major obstacle to the establishment of the rule of law. A true system under the rule of law can exist only in a democracy in which international human rights standards are respected. Which requires an earnest effort to root out corruption, this despicable phenomenon that affects everyone in a society; in particular, the poor. --Just as the 20th century was characterized by the ideological struggles between democracy, fascism and communism, corruption has become the defining issue of the present century. --Perhaps in light of renewed efforts to legislate against offences of corruption, there has been increasing discussion about the duty of arbitral tribunals to investigate such allegations. In my experience, allegations of corruption sometimes go hand in hand with attempts to distract from legitimate issues in dispute, thereby derailing the arbitral process. I have also seen allegations of corruption being raised as a tactic aimed at evading enforcement of an award. Both are trends, I submit, we need to guard against.

for declaratory judgment that the matter is not for arbitration and so advises the arbitration institution, requesting that it stay the proceedings; specifically, not constitute the arbitral tribunal. – What are the parties’ / the arbitral institution’s options?

- The “place of the arbitration” is so remote from where everybody in the proceedings resides that nobody wants to go there. – What are the options; and, why does the choice of the “place of the arbitration” matter?<sup>8</sup>
- Two parties from one and the same country agree on a foreign city as the place of the arbitration. Is this possible/valid; and, if so, does this make the arbitration award an international award, i.e., one that benefits from the NY Convention?
- Confidentiality of the arbitration process!? ... What about it? ... And, what about transparency in international arbitration ...?<sup>9</sup>

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<sup>8</sup> The place of the arbitration, or seat, is an important legal concept, as its law provides the supporting legal framework for the arbitration and its courts effectively supervise the arbitration. Further, the seat usually determines the nationality of the award, which is relevant to enforcement. The seat can therefore have a material impact on the course and outcome of the arbitration. (It is not to be confused with the factual venue where arbitration meetings and hearings are conducted.) --Moreover, absent any agreement to the contrary, the law of the seat, which is often not the same as the substantive law of the contract, usually also governs the arbitration clause. It is important to understand that the substantive law of the contract does not normally extend to the arbitration clause because the arbitration clause exists independently and is separable from the other contract terms. Matters governed by the law of the arbitration clause include the formation, validity, and interpretation of the arbitration clause. For example, an arbitration clause is not valid under PRC law, if it does not designate an arbitral institution or provide for arbitral rules through which the institution can be determined.

<sup>9</sup> For example, publishing the names of arbitrators serving in institutional proceedings is, I submit, a giant step in the right direction, for the good not only of the reputation of the arbitration process, but also of civil society at large, the progress and the well-being of both depending on honest transparency. --What is more, I submit, the perspective and experience, and the urgent and long-term need for far more true diversity in international arbitrators, arbitration panels and organizations, and the process itself, are truly deserving of respect, appreciation and being put into effective action. --There are, it seems to me, opportunities for that in the development of international arbitration in India, and there are people in organizations like INBA and its Germany-based recent cooperation partner, the Court of Innovative Arbitration (COIA), who are qualified, and ready, for that.



**AXEL HECK**, has been a member of the New York and German Bars since 1978, and from 1992 to 2006 served also a member of the Paris Bar. An alumnus also of Lausanne University School of Law, he holds a JD degree from Albertus Magnus (Cologne) University School of Law, and a Master of Law degree from Columbia University School of Law, New York City.

Co-Chair of its Int'l Section, the Indian National Bar Association recently appointed him "Ambassador-at-Large".

Mr. Heck's early legal experience included a clerkship with the Directorate General for Competition of the EU Commission, Brussels, and service (1977-86) as a member of Donovan Leisure Newton & Irvine, New York City.

Practicing from New York City, Paris, and currently Berlin, he specializes in complex transnational transactions & corporate practice, international private dispute resolution & its alternatives, strategic legal counseling & crisis management.

Mr. Heck is a member of the Court of Arbitration for Sport (CAS), Lausanne, of the Commission on Arbitration and ADR of the International Chamber of Commerce (ICC), Paris, of the International Panel of the International Dispute Resolution Center of the American Arbitration Association (AAA-ICDR), New York City & Dublin, and of the Hong Kong Int'l Arbitration Centre (HKIAC). He is a frequent speaker on international topics at legal conferences around the world as well as an author of articles on international dispute resolution topics cited before and by the U.S. Supreme Court and the Hague Conference on Private International Law.

His more recent activities included serving as a plaintiff-appointed legal expert witness in financial-crisis-fraud cases currently pending before the supreme court of New York; running a workshop on „corruption“ at Dauphine University, Paris; assisting Shri Ram Jethmalani in his quest, under the authority of the Supreme Court of India, to procure information on Indian black-money-account holders from foreign governments; advising investors from China and Hong Kong on a proposed urban re-development project of a city in Germany; initiating, and helping to conceive, a joint venture between the Germany-based Court of Innovative Arbitration (COIA) and the Indian National Bar Association; sitting as the sole arbitrator in an international commercial arbitration case in the pharmaceutical field; and, assisting the plaintiff in an investor-state arbitration case.

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