# *In Principle*
# INTERVIEW
# Prof. Dr. Alexander J. Bělohlávek
# February 27th, 2020

## QUESTION 1.)
## Do you note any current trend in international arbitration, e.g., types of cases or issues connected therewith?

There are indeed various statistics which indicate that a great number of disputes in arbitration are disputes arising from the building industry, development projects, etc. But it is not possible to conclude that any particular type of cases or issues is traditionally connected with arbitration as a method of resolving disputes arising from these relationships. It also depends on the concept of objective arbitrability, not only in the place or seat of arbitration (i.e. in the place where the arbitration is *legally domiciled*), but also in the state where enforcement would be sought and where unenforceability could be alleged due to the absence of objective arbitrability in that state. But one may generally conclude that arbitration has been increasingly employed primarily and preferentially for disputes arising from complicated legal (especially commercial and investment) relationships.

However, I consider it highly alarming that arbitration is less and less common on the opposite end of the spectrum, i.e. in the resolution of very simple disputes. After all, arbitration was originally created as a very expeditious, inexpensive and informal method of resolving these types of civil-law disputes. I often take the liberty of quoting *Professor Jerner Sekolec* who, as the keynote speaker at a seminar in Salzburg held in January 2010, offered an example from the very beginnings of his professional career when arbitration served for the resolution of disputes from the marketplaces and the port of Maribor. The traders appeared before the arbitrator with their dispute over defective goods and received their arbitral award the very next day. There are essentially no such arbitrations conducted today, perhaps with the exception of disputes resolved by (stock) exchange arbitral tribunals. These developments are linked to the increasing complexity of procedures that, logically, also reflect the increasing requirements of the courts for formalising procedural standards in arbitration as well as, unfortunately, the requirements of the parties and their legal counsel. The increasing voluminousness of the parties' submissions and requirements for rigorously formal procedures are alarming. Despite the fact that arbitral tribunals, primarily permanent arbitral institutions, endeavour to adopt various measures to expedite the proceedings and lower the costs, the formality of procedures and the complexity of arbitration are on the rise. The true reason is not (always) the lawyers' endeavour to maximize their costs and, consequently, their fees. They are often forced to comply with these procedures for fear of their own potential liability if they fail to avail themselves of any and all measures to a sufficient extent or fail to make use of any and all procedural opportunities. It is a vicious circle, or rather a spiral rotating at a constantly increasing speed. Admittedly, similar trends can also be observed in judicial proceedings, but they are a clearly apparent phenomenon especially in arbitration. I

fear that unless a radical change reverses the current trends in this regard, we may indeed end up with the result that an originally very simple and cheap dispute resolution method becomes an exceptional and exclusive procedure. But the parties actually want the exact opposite, they wish to *return to the origins*. However, this is something that everybody must come to understand – the parties in dispute, their legal counsel and the arbitrators but also, to a significant extent, the judges who are seised of actions to set aside arbitral awards. The countries of *Eastern and Central Europe* still retain a certain advantage in this regard. Many disputes still exhibit the elements of informality and simplicity that were typical for arbitration some thirty, or even fifty years ago. I fear, however, that we might quickly lose this advantage.

I find it somewhat ludicrous to claim, today, that the parties in their arbitration agreement express their will to voluntarily submit to arbitration and immediately fulfil whatever the arbitral award orders. It is now common practice that immediately after the arbitral award is delivered, the unsuccessful party seeks any and all opportunities to avoid fulfilment of the arbitral award. They have no respect for the fact that the award is a decision of an *authority* that they themselves appointed or the formation of which they themselves could *influence*. Actions to set aside arbitral awards or complicated proceedings in which the parties contest the enforcement of awards have become commonplace. These factors also significantly delay *administration* of the law by arbitrators. In this connection, I believe that the procedure already implemented by some European states is very interesting, namely proceedings to set aside arbitral awards or proceedings for the recognition and enforcement of arbitral awards where no appeal or any other remedy is allowed (Switzerland implemented this solution 35 years ago. Bulgaria, Austria and other countries have also done so in the meantime. Some other states are currently considering implementation of this solution as well.) Additional elements, such as fixed deadlines for such decisions or a limitation of the costs of such proceedings, would certainly help. But it is essential that any and all *components* participating in the entire process take part in the search for the proper solutions to these problems.

## QUESTION 2.)
## Is it better for clients to litigate in common courts or in arbitration over disputes?

It is impossible to give any general recommendation as to which dispute resolution method is more advantageous, whether litigation or arbitration. I myself am generally more fond of arbitration. But it must be a simple arbitral procedure. One may generally say that lawyers are now relatively knowledgeable about arbitration clauses. Indeed, arbitration clauses are commonly used in practice, although most practicing lawyers have no idea how to actually use arbitration clauses and tend to forget many principal aspects. As I have mentioned above, arbitration should represent a simple, cheap and flexible dispute resolution method. But it often ultimately turns out to be a very complicated, protracted and frequently expensive proceeding.

Practicing lawyers who have experience with arbitration in their daily practice will certainly confirm that erroneous, or even pathological, arbitration clauses are increasingly common – for instance, the parties err in the designation of the arbitral institution, refer to rules the use of which is incompatible with the place of arbitration or the arbitral institution that should

administer the arbitration, etc. The parties very commonly agree on such terms in their arbitration clauses which are most inconvenient and themselves give rise to many problems in the future. For instance, a great number of arbitration clauses stipulate as follows (cit.) *"the arbitrator must be a person with an excellent reputation among professionals and in his or her professional community*" etc. Who is a *person with an excellent reputation among professionals and in his or her professional community*? Such language is begging for an arbitrator's challenge for failing to meet the stipulated requirements. Conversely, when formulating their arbitration clauses, the parties entirely ignore issues that they should provide for and that significantly simplify certain procedures in case of a dispute. An example would be an agreement that documents submitted by the parties will not be translated to the language of arbitration and will be read in evidence in their original version. In such case, it is only the parties' responsibility to influence the composition of the arbitral tribunal by a suitable appointment of their arbitrator, and thereby make sure that the arbitral tribunal will be able to work with the documents in the given language. And, indeed, a limitless number of such examples exist. Some examples are: *document production*, limitation of the extent and the number of rounds of the parties' submissions, limitation concerning expert witnesses (for instance, if some circumstances need to be proven by an expert witness, he or she will be appointed exclusively by the arbitral tribunal), as well as an agreement on the possibility of questioning witnesses using means of remote communication. An agreement of the parties to limit the costs of arbitration may also be very important, as the increasing expensiveness of arbitration has been subject to more and more criticism. But it is primarily the parties' liability to consider these issues and incorporate the corresponding mechanisms in their arbitration agreements. Admittedly, the rules of permanent arbitral institutions strive to implement the corresponding mechanisms to an ever-increasing extent. But these rules are and will remain only a general standard and cannot factor in the specifics of individual disputes (potential disputes, situations resulting from particular contracts) and are unable to reflect such important aspects as, for instance, whether the dispute will be significantly oriented towards a particular region with certain customs, or whether the dispute may involve a collision of legal cultures and, consequently, principal conflicts as to the parties' expectations regarding the applicable procedures.

I would, as a general conclusion, argue that arbitration is frequently more suitable than litigation. As concerns disputes with an international (cross-border) dimension, whenever the parties have doubts as to the alternative they should opt for, i.e. enter into an arbitration agreement or submit to courts of general jurisdiction, arbitration should probably be the preferred option. The enforcement of arbitral awards is still significantly less complicated than the enforcement of judgments. This general postulate stands despite the strengthened and sophisticated judicial cooperation within the EU or the simplification of procedures by modern international legal assistance treaties. It still holds true that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) is probably one of the most important pillars of international commerce, and any intentions to change, revise or replace the New York Convention with another instrument are very risky. Primarily, however, any deliberations as to whether or not an arbitration agreement should be entered into must be supported by a professional drafting of the arbitration agreement that reflects the specifics of the particular legal relationships (contracts).

## QUESTION 3.)
## From your perspective, is knowledge of more than one legal system useful for lawyers and advantageous for their clients?

Knowledge of more than one law (legal system of a particular country) is certainly not harmful. But it cannot be automatically considered an advantage. Disputes with an international dimension require that the lawyer has a *sense* of understanding various aspects of foreign legal systems and foreign legal cultures. The lawyer should be able to take account of the fact that the legal relationship exhibits a cross-border dimension, regardless of the intensity of that dimension. However, this faculty, this *sense*, is something completely different from the knowledge of another legal system.

One must realise that, despite an identical designation, a particular concept may have different contents under foreign law and may even mean something completely different. There are so many examples where one and the same concept is governed by substantive law in a particular legal culture, but it is the exclusive domain of procedural law in another. There are indeed numerous such examples, for instance limitation of actions, jurisdiction, etc. But this *sense* of an international dimension also encompasses the ability to factor in the fact that a particular concept under one and the same legal system may be perceived differently by judges or arbitrators from different countries, despite the fact that the law must be principally applied in a uniform fashion while having due regard for the case-law concerning such law in its state of origin. Consequently, it is different from the knowledge of two or more legal systems. It indeed means *sense* for an international dimension and the ability to factor in the international dimension in the drafting of a particular contract or when representing a party in a particular dispute. I might be fully qualified in two, or five or more legal systems but, if I have no *sense* in the above-mentioned meaning, the knowledge of so many legal systems will still be of no help to me, let alone my client.

But every lawyer must primarily be able to determine the limits of their expertise and abilities, which is not at all restricted to the limits of a particular legal system.

## QUESTION 4.)
## Does an academic perspective in practicing law fiving any advantage to a client?

Having an academic view of a case is definitely an advantage for clients. But clients, or even practicing lawyers, are not always able to appreciate and accept this advantage. From a different point of view, I may say, for myself, that a significant number of my professional colleagues are, in fact, unable to understand this advantage. Many of my colleagues (attorneys) view other attorneys with an academic background with a certain degree of reproach, saying that “academics complicate things too much”. On the other hand, many of my colleagues from the academic sector tend to reject me as a “renegade” who has “betrayed” the pure academic line. It is an interesting, yet a very sad paradox. Academic activities can be well combined with practicing law and *vice versa*, and both branches can be pursued with sufficient intensity and excellence.

In some vocations, for instance healthcare, such an approach is considered a *sine qua non* for the performance of those activities. But the necessity of connecting theory and practice in law is not fully supported. Naturally, nobody will openly claim that such a combination is undesirable. Nobody has the courage to formulate and express that idea. But the reality is often different, even though one may not generalise. Unfortunately, however, the separation of legal theory from practice is relatively frequent – at least in our region, Central Europe. Practicing lawyers reach out for legal theory as their imaginary *prop or crutch* only after they run out of other arguments. But the procedure should be reversed. Practical reasoning should be based on a theoretical foundation. Law is a very complicated specialisation, in fact, increasingly complicated. Interconnecting theory and practice is indispensable. I, myself, consider the combination of academic activities and practice a major advantage, especially for the client. The question is whether the client is able to appreciate this.

It is entirely unimportant whether an opinion or pleading is signed by a person who has *more titles before and after their name*. This is, indeed, carrying less and less weight in practice. The problem inheres in the fact that a person with an academic background is often unwilling to tell the client what the client actually wants to hear, i.e. that the client's claim is legitimate or, simply speaking, that the client is right and can succeed. Unfortunately, attorneys with no academic background are often more willing to support clients in their beliefs. Conversely, people with an academic background tend to be more cautious and are able to see the case from different perspectives. They are better at opening the client's eyes. Law and justice are sometimes totally different categories. This is the harsh truth. The question is whether the client is actually ready to have their eyes opened. I believe that practicing lawyers who have a major academic background are more open to such an approach. But this is, naturally, only one of many possible views of the problem. "Academics" need not necessarily have better qualifications. Their advantage rather inheres in a significantly broader perspective of the case itself, the essence of the dispute. This is easy to see in publications, for instance. Publications, whether monographs or legal articles, drafted by a practicing lawyer without any academic background are very often only one-sided views of the issues analysed. Practicing lawyers with a major academic background are better at identifying the *pros* and *cons* and recommending (or not) a particular strategy based on that evaluation. I have had the opportunity to see this happen many times, both in practice and in the academic arena, and also as the editor or reviewer of a number of publications.