gar
The international journal of commercial and treaty arbitration
NEWS

When GAR met Gary

Sebastian Perry

Wednesday, 26 November 2014

Michael Moser interviews Gary Born at GAR Live

Leading advocate, arbitrator and academic Gary Born sat down at *GAR* Live Hong Kong to discuss the future of international arbitration, including attempts to regulate counsel conduct and recent public attacks on the investment treaty system.
Michael Moser interviews Gary Born at GAR Live

Born, who has practised at Wilmer Cutler Pickering Hale and Dorr for nearly three decades, also reflected on his childhood in Germany, his work for Greenpeace on the landmark *Rainbow Warrior* case and how he became a world authority on international arbitration.

The interview was conducted by Hong Kong-based arbitrator Michael J Moser, who introduced the session with some video footage of a less well-known episode in Born's career: his appearance before the US Senate judiciary committee in 1987 to defend the civil liberties record of Judge Robert Bork.

Bork had been nominated by President Ronald Reagan to sit on the US Supreme Court but his nomination was opposed by civil rights groups and politicans including Senator Ted Kennedy, who argued that "Bork's America is a land in which… rogue police could break down citizens' doors in midnight raids." The Senate eventually rejected Bork's nomination in October 1987.

A young Gary Born was asked to testify on behalf of Judge Bork and was caught on camera clashing with the then chair of the judiciary committee, Senator Joe Biden. Sparks flew as Biden pressed Born on whether his views may have been influenced by his colleague Lloyd Cutler (a prominent Democrat and former White House counsel who had publicly backed Bork) – a suggestion that Born rejected.

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

gar
The international journal of commercial and treaty arbitration
NEWS

How did you get from there to here? I suppose it's a long story.

It's actually a short story. That was dispute resolution of a particular sort in a forum that you need to learn the rules of. Aged 32, I tragically didn't have any idea of the rules in that forum, which were a bit like a knife fight in a telephone booth.

There was minimal consideration of substance; it was all political theatre. But I transitioned from figuring out how to advocate particular positions in that forum to international arbitration. Figuring out your audience is part of what it takes to be counsel and, to some extent, arbitrator.

Tell us about your childhood.

I'm what some would call an "army brat". My father was a civilian with the Department of Defense. He worked in what was then West Germany, so I grew up next to a US military base. That had a lot to do with what I ended up doing. It was a peculiar kind of international environment. I learned things like teamwork and discipline, which are pretty important to what we do as advocates. Often an advocate is put up on a pedestal but anybody who does that stands on the shoulders of a lot of other people. That is certainly the case at WilmerHale, where I have been privileged to practise with truly gifted colleagues for many years.

I lived for 10 years in Berlin. I raised my children in Germany. They are more German than American in many ways. I have an enduring love for that part of the world.

How did you end up in law school in the US?

It was an awkward transition. I went to high school in Germany. Most students on US overseas military bases became career military officers. Instead, I went to a small liberal arts college on the East Coast. In fact, I hadn't ever met a lawyer until I went to law school.

I'm not sure what persuaded me to go to law school. Had I foreseen the encounter with Senator Biden, perhaps I would have gone off and become a chef or a scuba diving instructor.

What happened after law school?

I clerked for two judges. One, Henry Friendly, was a Federal Court of Appeals judge in New York and in many ways the pre-eminent judge of his generation. It was a spectacular year for me. I then clerked a second year on the US Supreme Court for then Associate Justice Rehnquist. That too was an exceptional experience. You participate in the decision-making of all of the cases that come before the court. Obviously you don't have any role in how the case is decided, but you are at the right hand of the justice involved with cases of huge public import.

I was lucky because all the other justices on the US Supreme Court required their clerks to prepare bench memos about the legal issues in their cases. Secretaries on arbitral tribunals aren't meant to do this sort of thing because it goes too much into the substance. The other eight justices required bench memos of 200 pages

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

per case, and there were 150 cases in a nine-month term, so you can get a sense of the workload.

Justice Rehnquist took a different view of the world. He would come in and say, "Gary, do you feel like walking around the block?" And we'd walk around the block and he would talk about *Roe v Wade or INS v Chadha* [landmark Supreme Court decisions on abortion and Congress's legislative veto] or what have you. It was extraordinarily stimulating.

How did you become Wilmer Cutler's resident in London and part of the international arbitration community?

After I finished clerking for Justice Rehnquist, I took a year off to hitchhike around Africa, spending 12 months wandering around the Congo and Uganda and similar places.

I then returned to the United States and joined Wilmer Cutler, as the law firm then was, and they put me into a room and gave me timesheets to fill out. After three weeks, I was on the market interviewing for a teaching position. I accepted a position at the University of Arizona College of Law and was about to head off there when the firm said that I really ought to go to their London office.

I came to London as a young associate entirely naïve and ill-equipped to do very much. But I had the enormous good fortune as my first international arbitration to represent Greenpeace, a little different from what a corporate law firm usually does, against the Republic of France.

A team of French DGSE [security services] agents had blown up Greenpeace's flagship, the *Rainbow Warrior*, when it was on its way to protest nuclear testing at Mururoa [in French Polynesia]. They had the bad fortune to get caught. And Greenpeace came to Lloyd Cutler and asked him to represent them against France in seeking compensation for their vessel. Fortunately, I was in London, which seemed to be a neutral place to approach the dispute.

After some to-ing and fro-ing in which I began to understand concepts like "arbitral seat" and "annulment", we persuaded the French to conclude an international arbitration agreement in which the sole question was France's financial responsibility for what they called "the incident in Auckland Harbour on the night of 10 July 1985". We then proceeded with a two-and-a-half year arbitration.

One of my first disputes with Lloyd Cutler was where the arbitral seat would be, and the French seemed to think that Paris was the ideal place. After some frenzied research, I concluded perhaps that wasn't such a good idea and we ended up in Geneva. It turned out to be an excellent idea. We successfully obtained an award of some US$6 million for Greenpeace. It was a good start in international arbitration.

Let's turn to your book *International Commercial Arbitration*, which now stands at three volumes. How much further will you go with this? Are we going to have an encyclopaedia?

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

It's already an encyclopaedia in some ways. I don't think it can or should go much further in terms of size. One could imagine adding, for example, investment arbitration, but at least thus far its focus has been international commercial arbitration.

My aim has not been to create a practitioner's manual but to present the constitutional structure of international commercial arbitration. The parts of the book that are most exciting to me are the "future directions" sections, which talk about where our profession should go.

My plan is to revise it every four or five years; I don't want people to look at it and say, "It's fine, but it's out of date". It takes a huge amount of work to revise it, because our field continually reinvents and improves itself, for good reason. But it requires a lot of care to comprehensively describe the field but also critique where it should go. It's a little bit like painting the Golden Gate Bridge: once you're done, you have to start again.

There are a lot of thick books on arbitration around; do people now look to yours as the authoritative guide that has blown the competition out of the water?

The important thing is not to look at me but at the book. Competition is a wonderful thing for arbitral institutions and it's equally healthy in the academic field. I am enormously pleased that arbitral tribunals and national courts look to the book in some of their most important decisions on international arbitration. The UK Supreme Court and courts in Hong Kong and Singapore have cited it a number of times. The same is true of courts in Australia, Ireland, Canada and elsewhere. In the US Supreme Court, the book was cited by both the majority and the dissenting justices in *BG Group v Argentina* for opposing sides of the same proposition. I'm not sure that's necessarily a good thing.

Have you ever been "Borned", where somebody cites your own work to contradict your arguments in a case?

I suspect there is no case that I have been involved in where the book hasn't been cited against me or one of my partners, who are quick to let me know how I've let down the side. The reality is it's dangerous to play that game, because I know what's in there. On a number of occasions, what looks like a juicy soundbite is surrounded by more mature reflection that can turn the tables.

You have a long history as a professor, advocate and increasingly an arbitrator. You're also an occasional mountaineer. How do you juggle it all?

I don't sleep enough. The various parts of my professional life – advocate (which is my true love), arbitrator, writer, head of the practice – all overlap and complement one another. One is a better academic by virtue of having practised. I know that in some academic institutions the idea of getting your hands dirty is not a badge of honour. But especially in our field, you can't be a serious academic without being closely involved in practice developments. Conversely, it's hard to be a great advocate or arbitrator unless you're abreast of academic developments in your field that tell you where things are going.

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

gar
The international journal of commercial and treaty arbitration
NEWS

Where do you stand on the "two hat" debate over whether arbitrators should also act as counsel? Is it not increasingly difficult to combine the two roles in investor-state arbitration?

There are those – often those who just want to do one or the other – who say you shouldn't do both. I think that's nonsense. One is a much better counsel for also being an arbitrator. One is much better as an arbitrator if one is also counsel.

It's not unusual in many national legal systems for practitioners also to sit as judges. The benefits that are gained from double-hatting are manifest.

There can be situations where what one does in one capacity prevents one from doing something else. That's why one has conflicts rules. But these situations should be examined on a case-by-case basis. An arbitrary black-and-white rule doesn't serve the interests of the profession. I would hope that the double-hatting discussion goes out of fashion.

There are those such as Sundaresh Menon who argue that the whole architecture of international arbitration needs significant change, and others such as Charlie Brower who say we shouldn't depart too far from the basic model. Where do you stand in that debate?

It's an important debate but a little simplistic. The reality is international arbitration has always reinvented itself. But the basic architecture of an adjudicative process in which the parties play a central role has remained similar. It's extraordinary: as far back as classical antiquity, you can find three-person tribunals with one arbitrator selected by each party; counsel and agents representing parties; time limits; and requirements for reasoned awards. If Sundaresh, who is a good friend and a great leader in our field, is challenging the basic architecture, then he's wrong. But I don't think he really is challenging that. What he is suggesting and what Charlie, who's also a great friend, would ultimately acknowledge is that the field must always evolve and sometimes bigger pillars than others need to be rethought.

When you have classical arbitration with privity of contract between two commercial partners of roughly equal bargaining power, one basic architecture is appropriate. When you move that model to, for example, investor-state arbitration with different forms of consent to arbitration or, as you see in some jurisdictions in the United States, to consumer arbitration, one needs to re-examine important aspects of the architecture. And to some extent that has happened. That's why one sees things like transparency in investment arbitration and different approaches to consumer arbitration and the challenges of small claims. But none of that alters the fundamental character of arbitration, which has always been flexible and suited to the circumstances of particular cases.

What do you think of Jan Paulsson's proposal to do away with party-appointed arbitrators in favour of institutional appointments?

That's nonsense. And Jan must recognise the force of the criticisms of his proposal – not just by me but by most of those in the field. One of the defining attributes of international arbitration has been the parties' intimate involvement in that process.

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

A key characteristic of that is the parties' ability to choose one of the members of the tribunal. That gives them buy-in to the process and is one of the distinguishing features between arbitration and national court litigation. Taking that away would do grievous harm to the institution of arbitration. Although I love them dearly, it would ask too much of arbitral institutions to expect them to appoint all the members of a tribunal. Allowing parties to choose both co-arbitrators and the presiding arbitrator, win or lose, gives parties enormous confidence in the process. So Jan is just plain wrong on this.

What about the idea of a midstream case management conference? So rather than spend months on pleadings and evidence before a hearing, you sit down midway through the case and exchange views with the parties on what the real issues are.

It's not 1,000 miles apart from Neil Kaplan's suggestion of opening statements in the arbitral process. Each is, albeit at different stages of the process, an effort to frontload some of the issues. And this reflects an historic tension between the civil law and common law approaches. Civil law tended to have a kind of managerial judge who would attend to the process throughout, often being responsible for much of the evidence-taking and deciding the issues along the way. The common law approach is to have party exchanges without much involvement of the judge until a concentrated trial or hearing at the end.

One of the fundamental characteristics of arbitration is that it is able to combine the best of all worlds. There are certainly cases where Neil's opening statement or the suggestion for a mid-case procedural conference make perfect sense. There are other cases where it may not make much sense and it's important for both counsel and arbitrators to be alive to these possibilities throughout the case.

At the end of the hearing, if the parties consent, would it be a good idea for the arbitrators to give an initial view as to where they see the case going – perhaps to spur a settlement?

Again, there's to some extent a civil law/common law history to these kinds of proposals. Swiss arbitrators have no difficulty being mandated to present some views to the parties and actively encourage settlement. The common law approach in some jurisdictions is different and tribunals try to stay out of anything that might smack of mediation or settlement facilitation. The consent of the parties is critically important.

Interestingly, though, common-law arbitrators may do something not too far apart from the civil-law model, although a little more subtly. Common-law tribunals can be quite interventionist in their questioning. One of the most important aspects of advocacy isn't talking but listening to what the questions are. From an active tribunal's questions, one can often deduce why those questions are being asked and what it suggests about the arbitrators' perspective. One can always read tea leaves incorrectly, but one can also misread an outright encouragement to settle.

In most commercial cases, the first 90 pages of an award tend to be a summary of the parties' submissions. Does this make sense in terms of cost? Why not

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

go back to the old American Arbitration Association model: "this party wins, the other party loses; here's five pages as to why."

I'll begin to sound like a broken record but both extremes are simplistic. I do deplore a 400-page award of which 350 pages are a regurgitation of what the parties have stated, usually paraphrasing not quite as well as the parties put it. I don't see how that contributes very much.

On the other hand, that is not in fact the source of most of the costs in international arbitration, which are counsel costs and arbitrator costs. The arbitrator spends somewhat more time and money by restating the pleadings, but the main critique of this practice is that it distracts from the arbitrator's real function – which is not, in the classic AAA model, just to say who won and who lost but rather (and this is key to the adjudicative process) to explain why. The reasons don't have to be 350 pages of recitation of what the parties argued, but 15 or 50 well-thought pages on why one party lost and the other won. Naturally there are reasons why tribunals write 350 pages that have to do with the structure of some tribunals. There are also good reasons like trying to protect the award against annulment or non-recognition. I would imagine that most national courts would not be moved by 350 pages of useless procedural history.

Where do you come out on the attempts by the LCIA and the International Bar Association to regulate ethical conduct of counsel?

It's an important debate and another example of international arbitration re-examining and trying to improve itself – responding, in part, to some of the criticisms of investor-state arbitration. That said, both the IBA guidelines on party representation and the code of conduct in the annex to the new LCIA rules may raise more questions than they answer.

It's not clear to me that the IBA guidelines can improve matters in an area so imbued with mandatory national requirements. For the same reason, although it's a little better because it's at least quasi-contractual, the LCIA's code of conduct may well add another voice to what I've described as looking and sounding like a teenager's bedroom. The problem with ethics and international arbitration is that there are so many potentially discordant sources of authority. There's the law of the seat, the laws of the parties' and counsel's respective homes, and the law of the underlying contract. Which one of these sources of ethical rules do you give effect to? The IBA guidelines and the LCIA annex just add more voices to a very discordant choir. Although ethics are of high importance and there certainly are instances in arbitration in other fields of unethical conduct, it's important that if something's not broken, you don't try to fix it. And if you do try and fix it, it's important that the cure isn't worse than the disease.

So you wouldn't be in favour of the recent proposal by the Swiss Arbitration Association (ASA) to set up a new transnational body to deal with ethical complaints?

Oddly, I think the ASA proposal goes in a positive direction. The real way to achieve harmonisation in this field – which is most needed – would be to have specialised

committees from important national bars confer about ethics. There's a long history in Europe and elsewhere of national bars attempting to agree on transnational ethical rules; that's difficult, because different countries have different ethical norms. However, in a specialised field such as international arbitration, I can well imagine there being a greater common ground in which civil law, common law, Asian, North American and European institutions might actually be able to come up with a common code of conduct and a common means of enforcement. A transnational committee would take a while, but taking time for reflection rather than just issuing guidelines might be a good thing.

What's your favourite place to arbitrate?

It would be undiplomatic to pick one. I have so many favourite places. There are a few places I wouldn't like to arbitrate in but, much more important than where you arbitrate is who you arbitrate with. Finding the right tribunal and the right counsel is more important to me than finding the right hotel.

What about your old home, the US? There are complaints that it has outmoded legislation, visa requirements and withholding tax for foreign arbitrators, and most recently, this funny little New York case *[Bauer v Bauer]* where an award was set aside because the tribunal held a hearing on a Sunday. Can the US ever become a serious venue?

When you look at the statistics of the AAA and its international arm, the ICDR, they actually report larger numbers of international arbitrations than some institutions that are frequently referred to as the leading international institutions. So the reputation doesn't necessarily match the reality. That said, it is a matter of substantial concern that the United States has the oldest arbitration statute, the Federal Arbitration Act, dating to 1925 and not meaningfully altered since then. And the last thing many counsel would want is to open that law up for revision by Congress because of the risks of politicisation. That reflects a more fundamental problem of political gridlock.

Despite this, US courts have done a reasonably good job in making sense of a 90-year old statute. There is also a tremendous, deep world of arbitral talent in New York, Miami, Washington, DC and California. The *Bauer* case, a domestic decision by a lower court, does not have any real impact for international arbitration. More generally, there are many US judges – Judith Kaye and Diane Wood, to name just two – who are very experienced in the field.

You have proposed the idea of a bilateral arbitration treaty (BAT), in which states could agree that commercial disputes between their respective nationals will go to international arbitration by default rather than local courts. Do you think this has legs?

I would hope so. There is a completed draft of the BAT that a few states are looking at, and that at least two states have an active interest in. In the event that anyone wants to go home to their respective jurisdictions with something to float, it's floatable.

It is a big political ask to persuade states to agree that the whole category of private

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

disputes, commercial disputes between businesses, will be taken out of national courts. It is ambitious. On the other hand, think back 40 years: the idea that one could take claims against states, often involving the most sensitive aspects of their regulatory authority, and put those before private tribunals for final and enforceable resolution was an even bigger ask.

There is a huge controversy about investor-state arbitration today. That controversy doesn't really apply to private commercial disputes that would fall under BATs. Think back to the way international commercial disputes were traditionally resolved through trade deals and the like, for example maritime courts that had a peculiar kind of transnational status. This isn't a new invention, it's a re-finding of the past. The same motivations that led states to conclude BITs and the New York Convention supports this concept just as much. If one could put aside the fact that it's new and scary and look at it on the merits, it has genuine appeal and substantial possibilities for the region.

Is part of the negative reaction to investor-state arbitration a result of the fact that a lot of states didn't know what they were getting into when they signed their BITs?

That's right, but that's true of any new legislation. Frequently when an Act is adopted there are a number of surprises in its subsequent implementation. It's not surprising that when, in the space of 30 years, some 3,000 treaties are concluded, there would be unforeseen developments in their implementation and substantial concerns about those changes. And it shouldn't be surprising that substantial steps were taken in response to that, such as transparency, allowing amici curiae, narrowing some of the protections. All of that is an appropriate reaction to a new regime.

Less appropriate are the fundamental attacks on that regime. Many of the attacks on the investor-state arbitration framework are in fact attacks on the fundamental concept of investor protection. These are not genuine disagreements with things like lack of transparency or public involvement, like biased selection of arbitrators; but are instead fundamental disagreements with the notion that foreign investors ought to enjoy protections. These attacks are motivated by desire on the part of some states to simply take what they want. And standing up to those criticisms when they're put in the guise of procedural complaints is something that we all should do.

Investor-state arbitration is a new generation of international adjudication. It is the most concrete and effective implementation of international law that we have seen in the last 20 years. It's something that we as international lawyers want to be proud of, and like any new generation, those children, those 3,000 treaties, need protection and nurturing, not the sort of criticism that one sometimes encounters. Some of that criticism is surprisingly ill-informed. When one reads, for example, The Economist's recent piece criticising investor-state arbitration, much of that is ill-informed and it is incumbent on us to respond.

It's been said that Asia hasn't warmed to investor-state arbitration and it's not going to. For example, Indonesia wants to get out of all of its BITs and China has so many investment treaties but very few cases. Why aren't we seeing more investor-state cases in the region?

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com

Part of it is because governments – and I don't want to single any out – have been attentive to trying to nip these disputes in the bud, either in a constructive or sometimes a more heavy-handed way, and that has been, to some extent, successful. And there's nothing wrong with that. It's a good thing to resolve disputes before you go to formal legal proceedings.

I'm less certain as to what will happen in the future. Perhaps Indonesia will withdraw from the investment treaty regime. Other countries have threatened to do so. Perhaps there will be a paucity of disputes in the future, though one certainly hears about more disputes these days, not fewer. People have been predicting the demise of investor-state arbitration for some 45 years. I predicted it 20 years ago; I was wrong. I've given up on that prediction.

Is there another Gary Born apart from the public persona that we know?

I have two wonderful children who are extraordinary in every way. They are better versions of me – to damn them with faint praise. That's my other persona.

Another question that everyone's very anxious to know: is it true that you went to George Clooney's wedding?

I don't know where that rumour came from. Would've loved to have gone, but I didn't get invited, tragically.

Is there a word "retirement" in your vocabulary?

I'm sorry?

Gary, thanks so much.

Thank you, Michael.

This article was first published in the Global Arbitration Review online news, 26 November 2014
www.globalarbitrationreview.com