

ADVOCATE OF THE YEAR: GARY BORN

by Tom Toulson
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GAR speaks to Gary Born, a partner at Wilmer Cutler Pickering Hale and Dorr in London and winner of the 'Advocate of the Year' category at the GAR Awards earlier this month.



GARY BORN

Born in Germany and educated both there and in the US, Gary Born was an uncontroversial choice for GAR's 'Advocate of the Year'. The chair of in the international arbitration practice group at WilmerHale has acted as counsel in over 550 international arbitrations over the past 25 years. Having built his reputation on landmark cases such as *Rainbow Warrior v Greenpeace*, *Eritrea v Yemen*, the *Abyei* arbitration, and more recently, several multibillion-euro disputes on behalf of Deutsche Telekom, he is one of the most prominent advocates in the field.

But advocacy is not the only string to his bow. As an arbitrator, Born has heard more than 100 institutional and ad hoc cases, and has also found the time to produce several books, including his landmark 3,500-page treatise, *International Commercial Arbitration*, recently singled out for awards by both the American Society of International Law and OGEMID. "I don't know if he ever sleeps," said one of his peers commenting on the shortlist for the award. He is "meticulously prepared", "passionate without being overbearing" and "never shaken by high-stakes", said others. Presenting the award at the GAR Awards ceremony in Seoul, Canadian arbitrator J William Rowley QC called him 'simply stellar,' while a recent review termed Born 'a force of nature.'

If you haven't had the chance to see Born in action, you can watch online footage of his advocacy on behalf of the Sudan's People's Liberation Movement/Army in the *Abyei* arbitration at the Permanent Court of Arbitration in The Hague (see either the 9 to 11am session on 22 April or the closing session on 23 April 2009).

Was advocacy something you always wanted to do?

If you mean, did I watch lawyers on TV and think, one day that will be me? No, absolutely not. In fact, I didn't even consider becoming a lawyer until I was finished with my US undergraduate studies. As a student I was interested in history and religion and it was only relatively late in the day that it occurred to me that those disciplines might be useful to the study of law. Even after focusing on law, I was first attracted to the idea of transactional work and came to advocacy relatively late via the classroom, when teaching law during the 1980s; I taught international dispute resolution for a year and fell in love with the subject, putting my classroom and scholarly work together with practical experiences.

What are the most important skills young advocates should learn, and what are the most common mistakes?

Inexperienced counsel can sometimes forget that one of the most valuable arts of advocacy isn't speaking but listening. The advocate's first function is to understand what issues concern the arbitrators, which means listening both to what the arbitrators say and sometimes to what they don't say and being able to adjust accordingly, which requires a degree of humility. It's important to have your own vision of where the case should go, but it's also vital to understand how others see the case and to respond to that. Equally, it is always essential to keep an open mind about your case – both factual and legal – considering and responding to new materials as a case develops, instead of being wedded to one's early visions of the case.

The second obvious mistake of advocates, both younger and older, is being unnecessarily aggressive. One thing that one learns very quickly from sitting as an arbitrator is that petty squabbles and disagreements between counsel, which are sometimes understandable in the heat of the battle, are beside the point as far as the tribunal is concerned. If counsel focuses on those skirmishes it can weaken their case.

Can you remember making mistakes as an inexperienced advocate?

I try to repress all those. I guess one mistake - and it's another common one - was sometimes forgetting sufficiently to address the wider context of a case. In complex disputes, it's vital to place your arguments within the wider commercial and legal setting so as to give the arbitrators a proper context. But obviously it's also important to focus on the specific legal issues. A strong advocate must play at both levels, and I think I probably had a tendency to concentrate more on the specific provisions of a contract or legal provision, without taking a step back and thinking how a tribunal, which hadn't necessarily lived with a case as long as I had, would be seeing it.

Are there still obvious differences between the styles of advocacy of common law and civil lawyers, or does international arbitration have its own hybrid style?

I think there is an emerging international style of advocacy, both in written and in oral submissions, but not everyone uses it. You do see some counsel in international arbitrations

that approach things from their domestic perspectives and - regardless of whether a lawyer is from a civil or common law jurisdiction - local litigation styles will always seem distinctive to an international tribunal.

The more experience lawyers have of international arbitration, the easier it is to leave their domestic litigation habits at home and the more internationalised their style becomes.

Have you ever had an advocacy mentor?

Lloyd Cutler, one of the founding partners of my firm, was an early mentor whose style of advocacy, both written and oral, made a lasting impression on me. He exemplified all the essential skills I've already mentioned.

Is there such a thing as the arbitration mafia? Does the knowledge that your arbitrator may be your opposing counsel in the next case have an effect on advocacy styles?

I think reports of the arbitration mafia are both a little bit overdone and a good example of wishful thinking on the part of those who would like to count themselves among the mafia members. In the last 10 years, one has seen a healthy expansion of counsel and arbitrators from regions that historically were not so involved in international arbitration. It may be true that for the largest cases there's a smaller group of individuals who tend to receive appointments as counsel and arbitrators, but I'm not sure how different that is from national court proceedings - the higher up the judicial hierarchy you go, the smaller the universe of judges and law firms. Although arbitration practitioners sometimes like to characterise their practices as belonging to some select occult priesthood, that is often exaggerated.