

Modern Arbitration: Live – An Interview With Gary Born

(March 19, 2019)

Gary Born was interviewed by Andrey Gorlenko, Executive Administrator of the Russian Arbitration Center at the Russian Institute of Modern Arbitration, as part of the Center's Modern Arbitration: Live project. Below is the edited transcript.



Gary Born

Andrey Gorlenko: In your opinion, what are the most appealing advantages of arbitration comparing to litigation of domestic and international disputes?

Gary Born: I think there are two main sets of reasons. One of them you might describe as pragmatic or practical. I think of those reasons as “5 E’s”. Arbitration is more efficient, more expeditious, more expert, more even-handed and more enforceable. These are five reasons why commercial parties and states increasingly prefer to use arbitration to resolve both domestic and also, very importantly, international commercial and other disputes.

Arbitration is more efficient in most of the cases, but not all cases, as no method of dispute resolution is perfect. It is more efficient in most cases, because the procedure can be designed by the parties and arbitral tribunal based upon the specific needs of two parties or various parties to a dispute based on specific characteristics of that dispute, instead of taking one set of procedures from the shelf and imposing them on an individual case. One designs and tailors carefully procedures in an individual case. That means that proceedings are not just more efficient and cheaper for commercial parties, but also more expeditious. It can also be quicker because arbitration does not involve all multiple layers of appellate review always with a possibility that you will be returned back to the first instance court only to begin the entire process once more. Arbitration is in a sense one-step shorter: you have your dispute resolved in a single proceeding and that decision is final and binding. One realizes arbitration's efficiency, because one does not have layers of appellate review. Arbitration is particularly

efficient and expeditious in international cases because, in contrast to domestic disputes, international disputes can be and very frequently (if the parties haven't agreed to arbitration) litigated not just in one country's courts but in two or three or four or five different countries' courts, that parties pay for the privilege not just of one set of lawyers in one country but multiple sets of lawyers in different countries.

Arbitration is more expert not only because of design of procedures for an individual case, but also because of choice of arbitrators: that is the essence of arbitration that the parties choose the decision-makers, they choose a non-governmental decision-maker to resolve their dispute and they choose the decision-maker based upon his or her expertise in the subject matter. The parties know better than anyone else what their dispute concerns, what characteristic, capabilities are required to resolve it expertly and they, therefore, have a strong incentive to choose someone, who is truly expert or a panel of decision-makers who are truly experts. In contrast, the state court judge, in addition to being overworked, must decide cases involving administrative law, environmental regulations, tax disputes, employment disputes, everything in the world, perhaps, except the particular type of joint venture dispute or construction dispute that the parties' case in an individual arbitration actually involves. In addition, that is especially important in international context: if the parties have, let us say, infrastructure project in the Middle East, they can choose an expert in both Middle Eastern law and infrastructure projects in that part of the world. That type of expertise is invaluable for commercial parties, but also for states, when it comes to the resolution of their disputes.

Arbitration is more even-handed, particularly in the international context, because instead of having a dispute resolved on one party's home turf (a dispute against a French company resolved before a French judge), one can have a dispute resolved in an independent, neutral third country before an independent and impartial arbitral tribunal. In that, sense arbitration is more even-handed, more neutral and independent than litigation in each party's own home courts. Finally, arbitration is more enforceable, arbitration, especially in the international context produces a final and binding award, just like a national court judgement.

Andrey Gorlenko: Some people say that currently international arbitration is undergoing through challenging times, some even say about the lost promise of international arbitration, criticizing that it fails to provide parties with quick and efficient procedure and that arbitration and arbitration rules are becoming more complex. In your opinion, are these concerns justified, and what can be done to address these concerns from the prospective of the arbitral institution?

Gary Born: They are in a sense not new questions or new concerns; they are perennial concerns about arbitration, to some extent, perennial hostility by some national courts to the arbitral process, criticism of arbitration that it is a kind second class or rough justice, suggestions that arbitration is not quicker and cheaper, but in fact slower and more expensive. In my view, many of these criticisms arise from misconceptions and misunderstandings of international arbitration today.

International arbitrations are like snowflakes, like people, everyone is unique, everyone is different. There are international arbitrations that involve huge amounts of money, extraordinary complex factual, technical, legal disputes, for instance, arbitration that involve 30 or 50 billion dollars, long-term construction project that would take literally decades to complete and goes horribly wrong. Resolving that type of dispute, on which each company's future depends and which could take national courts literally again decades to resolve, would not be resolved cheaply and quickly. Those kind of disputes takes a careful study by experts, by lawyers, by arbitrators as well. Those types of disputes take a long time to be resolved by any means of dispute resolution, including arbitration. Importantly, in the last 20 years one has seen commercial parties submit those types of disputes, not small disputes, not routine, day-to-day disputes, but the biggest disputes that the companies face, and sometimes states face, to international arbitration. They have trusted the arbitral process to resolve those disputes expertly and even-handedly. In order for a dispute of that complexity to be resolved fairly and expertly, time is required, time and investment in people, in expertise. In my view, international arbitration is preferred by companies for those types of disputes, because, although it is expensive, it is less expensive than the alternatives and that is the real question.

Many disputes, however, are not that kind of headline, eye-catching disputes, involving 30 or 50 billion US dollars. Many international commercial disputes are more like traffic accidents, they involve a hundred thousand dollars or millions of dollars, not the types of disputes for most companies that determine their future, determine whether they will survive or not, but instead the day-to-day flow of the international commerce. Those disputes need to be resolved efficiently and quickly, and I believe that international arbitration does that. It does it in part through innovations in procedural rules that various arbitral institutions have adopted.

At the SIAC, for example, we have introduced 3 procedural innovations. One – we have introduced an emergency arbitration which allows an emergency arbitrator to be appointed before an arbitration even begins, within the space of one calendar day, who is required within the space of 2 weeks to issue emergency interim measures, freezing the status quo, assuming that the claimant, the party, requesting such measures, has demonstrated the appropriate need for that. That provides a mechanism for ensuring that the party's rights are safeguarded, while the dispute resolution process proceeds.

Second – we have introduced expedited procedure - Rule 5 in our SIAC Arbitration Rules allows the arbitration to be resolved through expedited procedure, provided that the claim is at relatively small value, beneath an amount of around 4, 5 million dollars or, alternatively, that it is the case of exceptional urgency, or if the parties mutually consent after the dispute arises. In all those situations, if the cases are expedited by SIAC, then, an award must be made by the arbitral tribunal within 6 months. Typically, the arbitral tribunal will be a sole arbitrator, again to ensure that the proceedings will be expeditious and that they will be cheap. Award can be in a summary form, it can be made without any in-person hearing before the arbitral tribunal.

All of that ensures that the arbitral process for these types of small disputes will be expeditious and efficient. In the last 8 years, since the introduction of these rules, we have had 480 or so applications for expedited procedure and have granted 275 or 60 %. In my view, it demonstrates how the arbitral process can be efficient and expeditious for appropriate types of disputes. We would not use that type of procedure, of course, for the 30 billion dollars construction project that goes badly wrong. However, for small cases, we would use that type of procedure. In our

consultation process in 2016, when we revised our rules, we asked the parties around the world, business around the world: “Do you like expedited procedure? Should we expand it? Should we enhance it?” In response, they uniformly and enthusiastically said that we should. Other arbitral institutions have adopted similar mechanisms, for instance, the ICC very recently has adopted similar set of procedures. I expect other arbitral institutions to do so as well.

Finally, like ICSID, the International Center for Settlement of Investment Disputes, our third innovation has involved early dismissal. We have affirmed the authority of an arbitral tribunal to dismiss on an early basis claims that manifestly lack legal merit, as well as defenses that manifestly lack legal merit. We have also affirmed the arbitral tribunal’s authority to dismiss on jurisdictional grounds at an early stage. All of these is meant to ensure that arbitration will not go for a great length on claims that either frivolous or lack any serious basis. I think, these are important steps that both we and other arbitral institutions have already taken, and we should explore other types of procedural innovations that will allow arbitration to be understood to have realized its promise.

Andrey Gorlenko: As you said, arbitral institutions are step by step dealing with them and it also leads to changes in international arbitration. Two of your books “International Commercial Arbitration” and “International Arbitration: Law and Practice” have undergone through second editions not long ago. Can you point one or two most interesting trends that you noticed in comparison with the first edition of these books?

Gary Born: I will be delighted to, let me first underscore the point that you made, that I think really does need an emphasis. International commercial and economic relationships, international legal relationships have become vastly more complicated in the past 10-20 years. Many relationships involve types of technologies that one never envisaged 20 years ago. They involve legal rules that developed rapidly, whether intellectual property or competition law or types of contractual relationships, which are relatively new. In the past, 30-40 years ago, those disputes often would not have been arbitrated, they often are huge disputes involving multiple parties, involving vast amounts of money, involving huge long-term investments, one thinks of investments in energy sector, which require commitments. These disputes today are resolved

by arbitration, because business and states have confidence in arbitration process to resolve those disputes. One of the aspects of arbitration, which makes it so attractive, is that you can tailor the dispute resolution process to different kinds of disputes. Arbitration has responded to those new types of highly complex, very large disputes by using complex intensive procedures: that is appropriate, that is what the parties want. Because those cases attract substantial attention, one tends to think “that’s international arbitration”. However, the reality is that there exists another, much larger set of cases that are very small and much less exciting, much less interesting: they are routine, traffic accident type of cases and that reflects a very important reality of international arbitration as well. It is less exciting, but it is more realistic in another way.

As for my books: I think there are two principle differences between the first and the second editions. One trend, that I noticed, was a trend among national courts in different jurisdictions to look to one another interpretations of, for example, New York Convention, UNCITRAL Model Law, to adopt reasoning that have been used in other courts, whether it is the House of Lords or the UK Supreme Court now looking to either US or German or French authorities, whether it is the US Supreme Court looking to international arbitral awards, whether it is courts in other countries (India, Singapore, elsewhere) looking to either civil law or common law decisions. And out of these different national court decisions looking to essentially international instruments (the New York Convention, the UNCITRAL Model Law) and to other national courts interpretations of these instruments has, in my view, developed a type of international arbitration law, a common law of international arbitration, that gives effect to these international instruments. I think that is an exciting set of development that offers further promise in the development of international arbitration.

Second, I have also seen national courts and arbitral tribunals as well develop new and robust legal theories about giving effect to the arbitral process, whether it is the validation principle in the context of the validity of international arbitration agreements or choice of law, governing the substantive validity of arbitration agreements or pro-arbitration rule of interpretation of the scope of arbitration agreements, or recognition of the arbitral institution’s responsibility for providing an efficient and expeditious means of dispute resolution. All of these different types

of developments have reinforced the “5 E’s” that lead parties to arbitrate. And I think national courts, working in tandem with arbitral tribunals, have played a very important role in this public-private partnership that makes international arbitration successful.

Andrey Gorlenko: In your book, you have used the list of the 19 leading arbitral institutions, to which some refer as “Born’s Finest”. Are there any specific features to make our institution qualify as the “Born’s Finest” and what is your advice to the young institutions, such as the Russian Arbitration Center, to come closer to this list?

Gary Born: That is a list that continually evolves and changes over time, just as international arbitration and arbitral institutions change over time. I had compiled that list in 1992, it would not have SIAC on it and some of the institutions that would have been on the list at that point are no longer on the list. I think it is important to see that this is a snapshot in a particular period in time and the door is not closed. Indeed, I think it is inevitable that other institutions will be added and some institutions will unfortunately be dropped. That is a part of the nature of the competitive process creative destruction, as I think some famous economists remarked.

What are the attributes that lead an institution not necessarily to be on my list, but lead an institution to be recognized by international businesses, international lawyers around the world as a credible international arbitration institution? I think there are variety of factors. One I think needs to be a relative degree of experience. The arbitral institution must have demonstrated the administration of a sufficient number of cases and not only that they have a credible set of rules. One needs a credible set of rules, a set of institutional arbitration rules that are in accordance with the best international practices whether one takes those as the UNCITRAL arbitration rules or the ICC, the SIAC rules, but a set of procedural rules that make sense and that are consistent with the international best practices. One also though needs, in addition to these rules, experience administrating them. One needs to have conducted a number of arbitrations, chosen arbitral tribunals resolved challenges, scrutinized awards, made decisions about tribunal’s compensation in a way that has resulted effectively in the award, the final resolution of the parties’ dispute. One does not go to a doctor based just on where she went to medical school. One goes to a doctor because of those types of diseases she cured in the past,

the types of patient she dealt with. Once a doctor with experience - and exactly the same thing is true for arbitral institutions.

I think one looks to various indicium to ensure oneself that the five “E’s” are met by those arbitral institutions. In particular, that they are even-handed, that they are independent from government involvement, that they will independently and impartially select arbitrators, that they will independently and impartially resolve challenges to arbitrators, that they will conduct arbitration in a professional and independent manner and scrutinize the award both professionally in the sense of making sure that the arbitral tribunal has done its job, but also independently in the sense of not interfering with the arbitral tribunal’s ultimate responsibility for the decision. I think acquiring the reputation, the expertise, the experience, that gives international parties confidence, takes time inevitably and, in some senses, it is a little unfair, because reputation always lags the reality in a way that one can be administering arbitrations very effectively, with an excellent set of rules, behaving in a professional and independent manner. The world has not realized it yet, it takes a little bit of time for people to actually catch up with the realities of institutions’ practice, just like with the realities of young arbitrators’ practice.

Andrey Gorlenko: Do you think that new technologies can help in cooperation between arbitral institutions? For example, blockchain technologies? Whether there should be some kind of joint reaction from arbitral institutions to cybersecurity challenges?

Gary Born: I think that the notion of joint reaction on cybersecurity issues and IT security is a very good one. I think that arbitral institutions should cooperate as I think new technology offers both exciting opportunity and to some extent frightening challenges to international arbitration, like to other types of international commerce and other types of dispute resolution. I think that one can well envisage a time in the not too distant future, when we will not need paper and arbitral proceedings, and actually be able to complete the proceedings using electronic data and laptops. In fact, one will not need a physical hearing that technology will allow witnesses to be questioned and lawyers to make their submissions, just as effectively by video conferencing and other means of technical virtual reality that we use today in-person

hearings. I am not sure that will happen as quickly as paperless arbitration, but I suspect that in the space of both our careers we will see arbitrations conducted by hearings in virtual space instead of a real physical space.

Andrey Gorlenko: This year marks the 60th anniversary of one of the most important and successful multilateral treaties in the field of arbitration, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. How do you see the future of the Convention and whether any changes are needed because 60 years have passed?

Gary Born: Indeed, the 60th birthday of the Convention, it has been fairly extraordinary 60 years in a sense the Convention started out to some extent inauspiciously, it wasn't signed by about half of various states that in the spring-early summer of 1958 negotiated and finalized the text of the Convention. It took many years for many leading economies around the world actually to ratify the Convention. However, today, the Convention is global, universal, it has 159 contracting states. There are few countries, North Korea, some Pacific Island states that are not parties to the Convention, also a few African states, but for the most part, the Convention is a truly global Constitution for international commercial arbitration.

One could write books, some people have written books about the Convention. In my view though, the former President of the International Court of Justice, Steven Schwebel, summed up the Convention in that 60-year history very well in just two words: "It works". In my view, if something works, then you do not need to fix it, "if it is not broken, don't fix it", as an old English saying goes. Therefore, I have very considerable skepticism about the wisdom of efforts to suggest the New York Convention version 2.0, efforts to treat the existing Convention as a beta version.

The existing Convention, although being drafted quickly and in reality a page and a half long, when you just look at the important articles 1 through 7, I think, has a genius in its simplicity and to some extent flexibility. It combines extraordinary set of international rules that make private contracts, agreements to arbitrate mandatorily enforceable, as a matter of binding international law. 159 states have chosen to treat international commercial arbitration agreements in that unique fashion and also to treat arbitral awards and in that same fashion to

undertake as a binding matter of international law to recognize those awards in each case, subject only to fairly limited international exceptions, quite limited and exhaustively defined international exceptions.

In the same time, the Convention has escape valves. It has escape valves for national public policy and so-called arbitrability, for cases that are not capable of settlement by arbitration under national law. Those escape valves give nations, the contracting parties, the possibility of avoiding their obligations under the Convention in a limited set of cases, where important national public policies are thought to demand. Importantly, countries around the world, courts around the world have not made expansive use of those exceptions, they have used that power to have an escape valve from the Convention in a very guarded, in a very modest way, in fact, they have developed international limitations on those exceptions. I think that it is a very delicate, much nuanced, very sophisticated blend of international obligations and national flexibility that has been cared for in a very sensitive way by national courts. I would not disturb that very delicate constitutional balance that continues to evolve and which, going back to your question about the second editions of my book, which I have tried to capture in the successive volumes of my books. I think that is an important continuing development and I would not interfere with it.

Andrey Gorlenko: In your view, what else can be done to promote pro-arbitration approach among state courts and judges in any jurisdiction?

Gary Born: I think events like this, discussions about international arbitration, law and policy, discussion about the NY Convention.

Andrey Gorlenko: And translations of your book.

Gary Born: Yes, the book has been translated into Mandarin in China. “International arbitration: Law and Practice” has been translated into Mandarin, and Spanish translation is underway. I think that the “Law and Practice” in Russian would be a very interesting idea. I think events in which members of the judiciary are given opportunities to learn more about the international arbitral process and the New York Convention are important. I think in every

country, I cannot speak for Russia, but I can speak for other countries, busy trial court judges, who have very broad dockets of general jurisdiction, understandably find not just the New York Convention, but also any international treaty to be an alien instrument. They are not things that they frequently encounter. They, in a sense, push the judges out of the comfort zone, they worry about if they apply them in the wrong way or they will not understand them properly. International law is not always the thing that trial court judges in many countries or even appellate judges spend most of their time doing. I think there is, therefore, a hesitation, a reluctance to dive into those international waters. Doing things to overcome that reluctance and instead to inspire the judges to participate in the public-private partnership, that the New York Convention contemplates, is very important.

Andrey Gorlenko: You have more than 650 arbitrations as a counsel and 125 arbitrations as an arbitrator. So much arbitration, except being a great pleasure and training for mind, is also sometimes stressful and complex. So how to avoid stress and how to get rid of it? Hobbies? Do you have some recommendations?

Gary Born: That is a good question. Arbitration is in a sense stressful. One can debate whether it is more or less stressful than national court litigation, but any type of adjudicative process is stressful. It is probably especially stressful for parties and for lawyers, counsels representing parties. It can also be stressful for arbitral tribunals themselves. I think it is important not to let that stress to undermine the basic five “E’s”, the basic purpose of the arbitral process.

In addition, to be honest, the basic purpose of life is having a productive and generous approach towards other people. Finding time away from cases, whether as counsel or arbitrator, is important. I have chosen a peculiar path, a path of using that time to write books about arbitration. For some, that was even more stressful than being counsel, but for me it is less stressful. When I sit down and write about some aspect of arbitration, when I discover some new secret about the Moscow Convention of 1972 that dealt with international arbitration, it revitalizes me; it takes away the stress and let me go forward feeling unstressed and willing to face new challenges.