Interview

Interviewee : Mr. Gary Born
Wilmer Cutler Pickering Hale and Dorr LLP
Interviewer : Korean Commercial Arbitration Board

What major influences in your life led you to a career in international arbitration?

This might come as a surprise, but 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 my studies that it occurred to me that law would be an interesting, worthwhile possibility. Even after focusing on law, I was first attracted to the idea of transactional work and came to international arbitration 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.

Arbitration is a field that is constantly evolving. Do you foresee any radical changes in international arbitration in the near future, in particular, the Asia Pacific region?

Indeed – arbitration has been, and continues to be, widely adopted as a preferred dispute settlement mechanism across the globe, including Asia. Over the past years, there has been a notable increase in international commercial transactions in Asia. As arbitration continues to expand across Asia, local institutional rules and national international arbitration laws are continuously being refined. These efforts have contributed to a significant increase in the selection of arbitration as the method to resolve disputes arising from international commercial transactions.

With respect to the future, Asian states have appeared to be particularly receptive to the concept of Bilateral and Multilateral Arbitration Treaties ("BATs" and "MATs"). If Asia is the first region to adopt, it will position itself as a pioneer on the cutting edge of advancement of the international arbitration system.

Korea is one of many Asian countries that have entered into various investment treaties. Yet, there has been a global debate as to whether investment treaty arbitration will continue to flourish. What are your views regarding the future of investment treaty arbitration in Asia?

Investment treaties generally provide both substantive legal standards protecting foreign investments and specialized dispute resolution mechanisms, and consequently contribute to promoting foreign direct investment. With the involvement of an Asian state-party in around 40% of BITs, and almost a fifth of all investment disputes, Asian states have consistently occupied a central role in investment treaty arbitration.

Despite its advantages, it is true that investment treaty arbitration has come under fire recently, with the withdrawal of three Latin American states from ICSID, coupled with wide questioning of the system's legitimacy, and a number of potential reforms have been proposed to remedy this. Nevertheless, investment arbitration continues to flourish. This is particularly true in Asia, as reflected in recent developments such as the expansion of the ASEAN Investment Agreement, and China's adoption of more expansive investment protection agreements. In my view, there is no reason to believe that investment arbitration will not continue to follow its previous trend in the future.

As a civil law country, do you think Korea could offer advantages to arbitration practitioners that are not available in common law jurisdictions in Asia?

I would not necessarily speak of advantages, but rather characteristics that may suit the preferences of many parties. Since legal rules are generally codified in civil law countries, there may be greater transparency and ease of access to local laws. Secondly, proof and evidence of foreign law follows the applicable rules for proof and evidence of local law in civil law jurisdictions.

What do you see in the future of international arbitration in Seoul along with the establishment of the Seoul International Dispute Resolution Center (SIDRC) in May 2013? Specifically, how can Seoul further develop as an arbitration friendly place?

Over the past few years, efforts have been made to enhance and modernize Korea's arbitration system. The significant changes made to the international arbitral rules of the Korean Commercial Arbitration Board ("KCAB") in 2011 brought them in line with international standards. Furthermore, amendments to the Arbitration Act of Korea are currently under discussion. These changes in the local arbitration framework are aimed at promoting South Korea as a seat for international arbitration.

In addition to updates to the existing arbitration framework, the increased interest in arbitration in Korea, along with the increased number of arbitrations involving South Korean parties, led to the creation of the international arbitration center in Seoul. The center provides a convenient and modernly equipped venue for the conduct of arbitral proceedings, and as such, Korea has augmented its competitiveness as a meeting place for parties and tribunals. Together, the pro-arbitration legal framework and the center in Seoul bring South Korea to the forefront of the international arbitration scene.

As SIAC has adopted new governance structures, what kind of governance structures of arbitration centers would be greatly attractive for arbitral parties or international arbitrators?

Arbitration institutions and centers are service-providers: they provide administration services in exchange for a fee. In institutional arbitrations, arbitration centers play a key role in the administration of the proceedings: they are in charge of overseeing and registering the service of the request for arbitration, fixing and receiving advances on costs of the arbitration, appointment and challenge of arbitrators, in addition to fixing their compensation.

Efficient government structures are essential in order for centers and institutions to provide the best and most attractive service, increasing the institution's

attractiveness as an economical, competent, responsive and active center. Their attractiveness depends on the extent to which the governance structure is adapted to best serve the disputing parties throughout their arbitration.

Notably, the structure must be adapted to the number of cases brought before the institution: the higher the numbers, the greater the need for a more sophisticated governance structure. To that end, arbitration service-providers must continually adapt their internal management regarding division of tasks, and this was notably the case of SIAC, where its heightened popularity and consequent increase in caseload led to the need to revise its internal structure. Now, a Court of Arbitration oversees the case administration arbitral appointment functions of SIAC, while the board of directors remains in charge of managing corporate and business development functions.

The AAA is now providing parties with the option of agreeing to appeal their arbitration award through its Optional Appellate Arbitration Rules. Do you perceive this to be the next trend in the kind of services to be provided by arbitration institutions?

On a preliminary basis, it should be noted that parties have always had the possibility to agree that their award would be subject to review, arbitration being a predominantly consensual dispute resolution process that may be tailored to suit the parties' particular procedural needs. On one hand, there is a substantial advantage in parties having the opportunity to opt for a review mechanism if they see fit: mainly, an anomalous or simply erroneous award may be corrected. This ultimately serves to uphold the legitimacy of the entire arbitral process. On the other hand, the appellate review of arbitral awards goes against the general principles of finality and res judicata. More significantly, it arguably compromises the objectives of speed and efficiency for which arbitration is primarily sought.

Anecdotal evidence and empirical research indicate that international businesses generally prefer efficiency and finality over the opportunity for appellate review. Consequently, their arbitral agreements do not usually provide that the award may be subject to review. Arbitral institutions are service-providers, and to a certain extent at least, the services they provide are demand-based. If there is an increase in parties' trust and demand for existing institutional appellate review mechanisms, it is likely that arbitral institutions will adapt their rules to provide this service. The question is whether institutional appellate arbitration rules can encourage parties to agree on the use of the mechanism and increase its general popularity, thereby kick-starting a trend where more institutions will adopt such rules.

International arbitration practice has shown that there have been some difficulties when parties agree on appellate review. The first arises where parties agree on the concept that the award may be reviewed, but are faced with the wide absence of institutional review mechanisms to assist and frame the process. In this respect, the introduction of optional appellate rules by arbitral institutions may improve and enhance the parties' experience by providing a more standardized practice and a neutral forum. It is therefore conceivable that optional appellate rules would encourage parties to provide for the review of their award. If the few existing institutional mechanisms were to gain parties' trust, this would in turn lead to more demand, making it likely that arbitral institutions would increasingly adopt such provisions to meet the demand.

However, it is not sufficient for institutions to simply adopt a set of optional appellate rules. Firstly, the rules must clearly define and delimit the scope of review. This is a crucial characteristic that must be kept in mind by arbitral institutions to avoid a repeat of the mixed experiences under ICSID's annulment procedures, where ad hoc committees have extensively interpreted and applied the relevant provisions. This interpretation raised questions about the wisdom of such mechanisms. Additionally, the success of the institutional appellate mechanism would largely depend on its overall effect on the efficiency and speed of the arbitral process: the more burdensome the mechanism, the less likely for parties to adopt it.

Some arbitration institutions have adopted an appellate mechanism in their rules. What are your views on such developments? Do you think this will be a rising trend in international arbitration?

The finality of an arbitral award is a cornerstone of the effectiveness of arbitration as a mechanism to resolve disputes. This finality is upheld though the absence of extensive appellate review of awards. While this absence has the advantage of reducing costs and potential delays, it remains crucial for the legitimacy of the arbitral process that parties are able to seek the review of untenable awards.

As an alternative forum for review of the award, an institutional appellate body offers the significant advantage of avoiding at once both review by national courts, and their inevitable divergent positions. The more arbitral institutions that adopt appellate mechanisms, the more parties may plan for their legitimate potential need to have their award reviewed. The creation of an institutional appellate body allows the parties to expressly provide for its exclusive power of review.

However, to maintain their allure and uphold the legitimacy of their decisions, institutional appellate mechanism must strictly restrict the scope of their review to carefully avoid repeating the mistakes previously made by reviewing national courts and the ICSID annulment panels.

Recently, you introduced a very interesting topic - the Bilateral Arbitration Treaty - during your last visit to Seoul. Could you please explain this to our readers?

The Bilateral Arbitration Treaty (BAT) is inspired by the investment arbitration system, where states conclude international agreements providing a mechanism for the resolution of disputes arising out of an investment made by a national of one of the states in the territory of the other state. The basic concept is that international commercial arbitration can, in appropriate circumstances, benefit from the concept of consent to arbitration that has been developed in Bilateral Investment Treaties (BITs).

The fundamental concept of a BAT is that two states, for example Ethiopia and Canada, conclude a treaty providing that all of a particular category of disputes between their respective nationals shall be resolved by international arbitration. Like a BIT, a BAT is an international agreement concluded between two states. The corner-stone of the BAT is that it provides for arbitration as a default mechanism to resolve international commercial disputes between nationals of the contracting states. Since the parties may choose to opt-out of the default dispute resolution mechanism, their autonomy to control the arbitral process remains intact. Therefore, the default mechanism in BATs would only apply where parties have not indicated a choice with respect to resolving potential disputes.

In that sense, a BAT, like a BIT, does not rest on explicit party consent to arbitration, or on a negotiated arbitration agreement in a commercial contract, but rather on a constructed notion of consent, similar to that in BITs. Indeed, BITs contain an open offer from the state for investors of a defined nationality to arbitrate their disputes. The consent to arbitration is perfected when the investor accepts the state's standing offer to arbitrate.

The adoption and proliferation of BATs would bring a number of benefits. Firstly, the BAT effectively facilitates parties' access to arbitration, the preferred mechanism for resolution of international commercial disputes due to its neutrality, efficiency, expertise and enforceability. Secondly, the BAT would also show a state's commitment to international arbitration, thereby promoting international transactions. Furthermore, the BAT will reinforce the recognition and enforcement of arbitral awards between the contracting states. Finally, since states are free to limit the general scope of the BAT's applicability, as well as the scope of dispute to which it applies, these limitations would provide welcome answers to any future questions of arbitrability.

As we know, the new edition of your *magnum opus,* International Commercial Arbitration in April 2014 has just been published. Could you tell us more about this new treatise and what updates you have made which are especially valuable for international arbitration practitioners and commentators?

There are two main reasons for the second edition of the treatise. First, there have been a number of important legislative, judicial, institutional and other developments since 2009 – including significant legislative reforms in France, revisions of the UNCITRAL and ICC Rules and important judicial decisions in the UK, US, Switzerland, France, India, Singapore and elsewhere; it is important to stay abreast of these developments. Second, my own thinking on various issues has developed – on issues of recognition and enforcement of arbitral awards, annulment of awards, choice of law governing international arbitration agreements, arbitrator independence, conduct of counsel and other issues.

There have been both positive and negative developments in international arbitration, all of which are important. On the positive side, decisions like *BG Group* in the US and *Bharat Aluminium* in India, and the revised French arbitration statute, strengthen the international arbitral process. On the negative side, decisions like *Dallah* in the UK have the opposite effect and are difficult to reconcile with the New York Convention. My second edition attempts to describe and synthesize all these disparate developments, as well as to expand coverage of recognition and enforcement of awards, annulment of awards, choice of law governing international arbitration agreements, arbitrator independence, and conduct of counsel, all of which are important recurrent issues both in practice and in theory of international arbitration.

You have participated in many arbitration cases as both counsel and arbitrator, could you please tell us briefly about the most unforgettable case you have participated in

All my cases are special and unforgettable, but two cases are worth mentioning.

My first arbitration was *Greenpeace v. Republic of France* (also known as the "Rainbow Warrior" case). The "Rainbow Warrior" was a protest vessel belonging to Greenpeace (an environmental advocacy group),

which had been scheduled to sail to Mururoa Atoll, in French Polynesia, to protest French nuclear testing. However, that voyage was prevented by the actions of the French Directorate General of External Security ("DGSE") agents, resulting in the vessel's sinking (and the death of one Greenpeace member). Criminal investigations by New Zealand police resulted in the arrests of two French DGSE agents (and their subsequent criminal convictions). France initially denied responsibility for the attack on the Rainbow Warrior and imposed economic sanctions on New Zealand in retaliation for the DGSE agents' arrest. Subsequently France acknowledged responsibility for sinking of the Rainbow Warrior and offered to pay reparations to both France and Greenpeace. However, France, New Zealand and Greenpeace were unable to reach an agreement on reparations, so they concluded an arbitration agreement, submitting disputes about reparations and treatment of the DGSE agents to the Secretary General of the United Nations for resolution. The Secretary General rendered an award requiring France to formally apologize to New Zealand and to pay New Zealand $7 million (including for moral damage); he also ordered the transfer of the two DGSE agents to "an isolated island outside of Europe for a period of three years."

In parallel, France and Greenpeace concluded a separate arbitration agreement, submitting the question of France's financial liability for the sinking to an arbitral tribunal seated in Geneva, Switzerland. The tribunal decided that France was to pay Greenpeace $5 million in damages, $1.2 million for "aggravated damages," and expenses, interest and legal fees; this decision was marked as "a great victory for those who support the right of peaceful protest and abhor the use of violence."

It goes without saying that the Rainbow Warrior case involved very sensitive questions of public international law. This case had extremely important implications on the issue of state responsibility for breach of the doctrine of non-intervention in international law. Other interesting questions involved individual responsibility, use of force and reparations. This case strengthened my determination to pursue a career in international arbitration as I became aware of its practical importance and the impact it can have on establishing the rule of law in international arena.

Second would be the Abyei Arbitration – a case where Wilmer Cutler Pickering Hale and Dorr's International Arbitration Group represented the Sudan People's Liberation Movement/Army (SPLM/A) in a dispute over the definition and delimitation of the Abyei Area against the Government of Sudan (GoS) and under the auspices of the Permanent Court of Arbitration in the Hague.

Since Sudan's independence in 1954, the country was engulfed by almost continuous civil war, generally pitting the largely Muslim, Arabic-speaking north against the primarily Christian and other non-Muslim south. In 2004, the GoS and the SPLM/A, the principal Sudanese resistance group, negotiated and signed a Comprehensive Peace Agreement (CPA). The CPA was concluded under United Nations auspices and aimed at ending the civil war and permitting a referendum in which southern Sudan could decide whether or not to form an independent state. A central issue addressed by the CPA was the status of a territory located in south-central Sudan, called the Abyei Area, which lay on the border between southern and northern Sudan. Among other disputes, the GoS and SPLM/A disagreed about the territorial boundaries of the Abyei Area. Ultimately, the parties decided to arbitrate their disagreements.

This case was unique in many ways – first, arbitration was used as a means of resolving a dispute with its

roots in what has been described as the "world's most destructive civil conflict." Given the politically volatile nature of the dispute, resolution of which was of historical importance, involvement in this arbitration was a great privilege but also a great professional challenge. Additionally, the arbitration was conducted on expedited schedule, rising the adrenalin levels and not leaving any space for mistakes.

Another unique feature of the case is that the oral hearings were open to the public and web-cast live around the world, bringing a revolutionary approach to transparency in public international law arbitrations.

Is there anything you have not tried but would like to do in the future?

No...

What advice do you have for young attorneys in the Asian Region who are interested in the field of arbitration?

The first piece of advice is to develop that interest and take it to the next level. Arbitration is an interesting and exciting field of law, but it is also complex and quite different from national litigation.

Inexperienced counsel can sometimes forget that one of the most valuable arts of advocacy isn't speaking but listening. A solid understanding of the particulars is crucial for anyone who aspires to practice seriously. 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. As for attorneys who practice arbitration, both young and old, I would encourage them to always keep an open mind about the factual and legal aspects of their case, and in this respect, I emphasize the deep interplay between the two. 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. Even the slightest nuance in a case's factual elements can open a series of new legal questions and make it appropriate to change a previously-defined strategy. In such circumstances, attorneys always need to be flexible and ready to adapt.

Another piece of advice would be to always strive to be civilized and polite when dealing with opposing counsel, in stead of 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 usually beside the point as far as the tribunal is concerned. Focusing on those clashes takes time and energy away from the important issues, and in the eyes of the tribunal, can weaken the case of counsels that focus on stirring up trouble on issues that are irrelevant or clearly weak.

If you could travel to anywhere at this very moment, where would it be?

Home.

Gary Born

Gary Born is the chair of the International Arbitration Practice Group at law firm Wilmer Cutler Pickering Hale and Dorr LLP and is one of the world's leading authorities in the fields of international arbitration and litigation.

Mr. Born has been involved as counsel in more than 550 arbitrations, under all leading arbitral regimes, including several of the largest arbitrations in both ICC and ad hoc history. He has been ranked for the past 15 years as one of the world's leading international arbitration practitioners. He received the Global Arbitration Re view's inaugural "Advocate of the Year" award in 2011 and was recently voted the "World's Best International Litigator" He sits as arbitrator, having served in some 150 institutional and ad hoc arbitrations.

Mr. Born is a graduate of Haverford College (BA 1978, summa cum laude) and the University of Pennsylvania (JD 1981, summa cum laude). He clerked for Judge Henry J. Friendly on the US Court of Appeals for the Second Circuit and Justice William H. Rhenquist on the U.S. Supreme Court.

Mr. Born has published a number of leading works on international arbitration, international litigation and other forms of dispute resolution. He is the author of International Commercial Arbitration (Kluwer 2009), the preeminent treatise in the field and recipient of the American Society of International Law's Certificate of Merit in 2010. He is also the author of International Arbitration: Law and Practice (Kluwer2012), International Forum Selection and Arbitration Agreements: Drafting and Enforcing (Kluwer 2010), International Arbitration: Cases and Materials (Aspen 2011), and International Civil Litigation in United States Courts (Aspen 5th ed. 2011).

Mr. Born is an Honorary Professor of Law at St. Gallen University. He has taught law at Harvard Law School, Stanford Law School, St. Gallen University, Georgetown University Law Center, National University of Singapore, University of Virginia College of Law, University College London and the University of Arizona College of Law.