
Gary Born's BITs, BATs and Buts in the News

2014-01-14

A proposal for a new form of international arbitration by [Gary Born](#), chair of Wilmer Cutler Pickering Hale and Dorr LLP's [International Arbitration Group](#), has provoked wide public interest. A recent report in *Commercial Dispute Resolution* ("[Born's BAT gets set to fly](#)," published January 6, 2014) describes Born's proposal as inaugurating what could be a "profound shake-up of commercial law, with states abandoning sovereign rights to commercial dispute litigation in favor of resolution by arbitration." The article discusses this, made in Born's widely-cited "[BITs, BATs, and Buts](#)" speech.

Born proposes the adoption of "bilateral arbitration agreements" (or "BATs"), modeled on bilateral investment treaties ("BITs"). As he explains:

"We all know, of course, that investment arbitration has learned a good deal from international commercial arbitration. The basic procedural rules in many investment arbitrations, whether conducted under the UNCITRAL rules or the ICSID rules, draw substantially on earlier experiences in international commercial arbitration. Many of the pleading techniques, the advocacy techniques that are used in investment arbitration parallel those previously developed in the commercial setting. Many of the arbitrators and many of the counsel that appear in investment arbitrations have substantial overlaps with those in commercial arbitration. And I would suggest that international commercial arbitration can learn equally from investment arbitration. In particular, I think where international commercial arbitration can learn is through what I referred to a few moments ago, is the concept of a bilateral arbitration treaty, a BAT, rather than a BIT."

The focus of Born's proposal is on bilateral treaties which would provide for international arbitration, under the UNCITRAL Rules, as a default mechanism for resolution of international commercial disputes between corporate parties. The proposal would leave parties free to contract out of the BATs arbitration regime, including by agreeing to forum selection clauses or alternative arbitration provisions; absent such agreement, however, the proposed BATs would provide for the resolution of international commercial disputes, between nationals of contracting states, by binding arbitration, producing a binding arbitral award.

Born's proposal has provoked substantial debate with some traditional jurists questioning the need for improvements in existing means of international dispute resolution (see *Global Arbitration Review's* related coverage [here](#)).

As explained to *CDR* by former appellate judge and Brick Court arbitrator, Lord Hoffmann: "Parties are always at liberty to agree on a post-dispute arbitration. A court with a power or a duty to send the case to arbitration even though there was no arbitration clause is objectionable in principle because arbitration derives its legitimacy from the consent of the parties."

Other commentators, and some states, have expressed interest in Born's BATs proposal:

"Since it is so common that one party involved in an international contract does not trust the courts due home court advantage, there should be an assumed default provision in favour of arbitration [over litigation] even if there isn't an arbitration clause," former head of international arbitration at Freshfields, Jan Paulsson, told *CDR*. "It is difficult to understand why parties to an international transaction would not have assumed that it would be resolved by arbitration."

Preparations for the release of a draft model treaty for public comment are underway. A draft is expected to be concluded during the course of the year.