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# PRINCIPIA

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# Contenido

# The Arbitration Advocacy

## Interview conducted by CIERC's Director to Professor Gary Born*

### 1. As an expert on both International Commercial Arbitration and Investment Arbitration, which challenges should every practitioner be aware of when involved in them?

Arbitration is an interesting and exciting field of law, but it also requires a tremendous amount of hard work. There are multiple challenges in arbitration, which arise from many of the same things that make arbitration interesting and exciting –the diversity of parties, legal issues, languages, and cultures.

One of the most challenging aspects of arbitration is oral advocacy –there is no reset or replay function in oral hearings. Counsel should bear in mind 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 at what they don't say. Listening to what is it that the arbitrators are interested in and concerned about and tailoring what you say to what they want to hear is, I think the most important lesson.

I also think, as a rule of thumb- and in general one should be wary of rule of thumb, if you cannot explain your case to your six or eight-year-old child over the dinner table without fudging the facts, then you have got a real problem. They

* Professor Gary Born is Chair of the International Arbitration Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP and is one of the world's preeminent authorities on international commercial arbitration and international litigation. He has served as counsel in over 675 arbitrations, including several of the largest arbitrations in ICC and ad hoc history, and has sat as arbitrator in more than 250 institutional and ad hoc arbitrations.

Prof., Born is ranked by peers and clients as one of the leading international arbitration practitioners in the world. Among many accolades, Prof., Born has received the Global Arbitration Review inaugural "Advocate of the Year" award, the Client Choice award for "Best International Arbitration Practitioner" and the Best Lawyers "London Arbitration Lawyer of the Year" award. He is one of only two practitioners globally to achieve "starred" status for international arbitration in the Chambers and Partners guides and the sole practitioner in London. In 2018 Chambers and Partners recognized him for his "Outstanding Contribution to the Legal Profession".

Prof., 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 (Third Edition, Kluwer 2020), the leading treatise in the field, which has received the American Society of International Law's Certificate of Merit for High Technical Craftsmanship and OGEMID's Book of the Year award for 2009. Other recent works include International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Fifth edition, Kluwer 2016). He is an Honorary Professor of Law at the University of St. Gallen, Switzerland and Tsinghua University, Beijing, and teaches regularly at law schools in Europe, Asia and North and South America.

have to be able to understand it, and understand it in language for somebody of that age in a way that will led them, when you are done not having fudged the facts, to say, "yes, Daddy, you are right."

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, instead 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.

2. Do you believe that this Pandemic has had a positive impact on arbitration? Was the arbitration community ready to face the challenge of the Pandemic?

Notwithstanding the tragic effects of the Pandemic, it has forced international arbitration to adopt changes that are improvements – ultimately having a distinctly positive impact. First, international arbitration had been moving on-line for some time before the Pandemic. Many arbitration filings were conducted online well before the Pandemic began. Requests for arbitration were routinely submitted on-line, and arbitral tribunals also routinely received written submissions, provided on-line or on USB sticks, with hyperlinked documents giving immediate access to evidentiary materials and legal authorities. All of these developments have been accelerated by the Pandemic, which has made hard-copy, paper submissions more difficult and less reliable. Second, even before the Pandemic, procedural hearings and, to a lesser extent, evidentiary hearings, were increasingly conducted by telephone or videoconference. Many case management conferences, and shorter hearings on procedural or evidentiary applications were conducted by either conference call or video conference, although longer evidentiary and merits hearings

were almost always in-person. With the Pandemic's restrictions on travel and in-person meetings, the vast majority of international arbitration hearings in most jurisdictions have moved on-line – using Teams, Webex, Zoom, BlueJeans or another video platform. This has provided parties with a means for efficient, expeditious resolution of their disputes, notwithstanding the Pandemic's restrictions. One can anticipate that these developments will continue to be used following a return to pre-Pandemic conditions.

3. How do you deal with a situation when opposing counsel uses your publications against you?

There is an old saying that, when a man or woman writes a book, he or she gives a gift to his or her greatest enemies. I think that's true. Writing a book on international arbitration or any aspect of international law is a gift to others because, although you can't credibly cite it, other people are free to cite your writing against you in proceedings.

My own view is that my books (I don't know about other people's books) are first drafts. Even if the book is the second or the third edition of "International Commercial Arbitration." In the introduction to my book, I admit that there may be mistakes in it; I am right that there are mistakes there. When I see my books cited to me and treated as someone else's work, it is not as if I wrote it, but as if someone else wrote it, and I do not treat it any differently from any other authority.

If I am an arbitrator, it does not either offend me or impress me or disturb me if Counsel cites my book; there is no difference between citing it or someone else's work. If I am counsel, 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 the book. On a number of occasions, what looks like a juicy soundbite is surrounded by more mature reflection that can turn the tables on counsel that cite the Treatise against me.

4. Are there any significant differences in practicing as a counsel and as an arbitrator? In your perspective, which is more gratifying?

I find both acting as a counsel and as an arbitrator extraordinarily gratifying; it is difficult to choose, on a personal level, between the two. I like to have a foot on both the arbitrator and counsel side because I think doing both complements and benefits the exercise of each role. I view double hatting—sometimes acting as counsel, other times serving as an arbitrator—as an important strength of the international arbitration system. It makes you better in each of those roles. You are a better counsel if you have seen how tribunals react to (sometimes overexcited) arguments and you are a better

arbitrator if you have recently been in the counsel seat.

However, even though both roles are enormously gratifying, if I have to choose only one, I would choose the role of counsel. The stimulus of standing or seating in front of a tribunal and persuading them of one point or the other, the kind of stimulus that comes from representing a party, a company or a State, in a dispute that is fundamentally important to them and getting to a good result is very difficult to equal. Being a professor, an academic or an arbitrator is wonderful, but those roles don't really quite match the immediacy and personal impact of actually getting a good result for someone in real-time proceedings against a skilled adversary.

5. As a well-known professor in international arbitration in many countries, which are the difficulties you have faced when teaching students from different nationalities and backgrounds?

The world has become increasingly international over the past decade. Although some countries, or generations, may appear to have turned inward, there is an increasingly global legal and commercial community. Teaching the new generations of that community has become easier, not harder, in recent years. That said, cultural and language differences always present challenges – to ensure that you communicate well with students and understand their observations and questions fully. Conversely, however, teaching to different nationalities and backgrounds offers huge benefits to professors: it enables them to learn more, as well as teach. I have always believed that the best way to learn something is to teach it; teaching to a diverse audience allows even broader and more satisfying learning.

6. Other than experience, what do you think are the challenges that young practitioners and arbitrators face in modern times?

Building a career in international arbitration in modern times, with the field being a highly competitive market, is not a one- shot-effort task. Building an international arbitration career is more like building a snowman, there are several efforts as well as characteristics and set of skills required, which need to be pursued patiently over time, recognizing that each step will be small.

First, international arbitration requires its practitioners to speak a variety of languages. While English is a prerequisite, speaking other languages represents a potential advantage. For example, Spanish is becoming increasingly important as Latin America enjoys enduring strength as a source of disputes. Portuguese may present an opportunity to stand out, as Brazilian arbitrations have been increasing in number over the past years. Other languages, such as Russian, are important for the critical client relationship aspects of work as counsel.

Second, there is value in participating in extracurricular activities such as moot courts, since there is a natural affinity between the characteristics required for successful participation in moot courts and those characteristics which law firms seek. Moreover, other activities such as taking other law courses, attending international events, undertaking internships at law firms, and writing articles are a good way to demonstrate ambition and ability, while, more importantly, developing your substantive abilities.

Third, instead of enrolling in specific law programs such as specialized LL.M, consider choosing more general graduate programs. The reason for that is twofold; firstly, many firms operate firm-wide hiring, which considers things other than specialized arbitration courses and which evaluates the general legal knowledge of graduates; secondly, international arbitration requires knowledge in other substantive legal areas, often including corporate and commercial law and a general graduate program can be very advantageous in that regard.

Fourth, experience in a quality institution – including strong domestic firms and regardless of the practice – is a plus. However, that experience does not need to be necessarily in arbitration, when someone moves to arbitration from a strong litigation or corporate practice in a high-quality domestic firm, he or she brings with them valuable new experience in a distinctive area of practice.

Fifth, authoring articles and speaking at conferences is a necessary task to stand out in the international arbitration community. In my opinion, writing is a more valuable exercise, as written papers last forever, while conferences have a one-day impact and attention is divided across all the other speakers at the conference.

Finally, I believe that young practitioners, as well as more senior ones, need to step out of their comfort zones in order to excel when the opportunity is presented. Firms should delegate the examination of less important witnesses to their younger associates and deliberately take on smaller cases on which they can assign substantive roles, including presenting opening statements, to more junior lawyers.

7. If you could meet your younger self, what advice would you give younger Gary Born regarding the study and practice of arbitration? Are there any things you wish you had known before beginning your practice of arbitration?

I always say that one should never look in the rear-view mirror in life; one should never second-guess one's self, so I hesitate to do that with myself. Still, the advice would be fairly simple, and maybe a little too abstract or general. Treat every moment, every opportunity, every hearing and meeting, as if it is your last

chance, your only chance. Professional life is a series of opportunities, which may very well never be repeated; a series of contests, which won't ever be re-run. Treat every single one of these opportunities as if it were the first and last one that you will ever get and make the very most of it.

8. What motivated, and what keeps motivating you, to practice arbitration?

Perhaps I have followed my own advice. I am motivated by the excitement and learning that comes with every case, of every type. The excitement of helping a good cause prevail, or of resolving a dispute fairly and efficiently. Every case is an opportunity to do that, to the best of one's ability, while also learning new things.

This kind of motivation came when I did my first international arbitration. There was no international arbitration course on offer when I went to law school (even though most law schools now have a good international arbitration programme), and thus I had very little idea what international arbitration was. My first arbitration came when, early in my career I had the opportunity to represent Greenpeace, the environmental protest group. Greenpeace had a potential claim against the Republic of France for having attached and sunk their protest ship, the "Rainbow Warrior", at the Port of Auckland in New Zealand.

The client did not know where exactly they should look for relief. The New Zealand courts were far away, the issues of state immunity were formidable, and the French courts were not particularly attractive for obvious reasons. As a consequence, Greenpeace decided to try to resolve its dispute in international arbitration, and the French Republic was eager to do so as well. We negotiated an international arbitration agreement, the principal issue of which was the responsibility of France for, what they called, the incident in the Auckland Harbour in June 1986. During those negotiations and the proceedings in my first arbitration case, I fell in love with international arbitration. It was love at first sight; the attraction was in the use of neutral means of dispute resolution to solve the most complicated, even the most sensitive type of, dispute between bitterly adverse parties.

9. Lastly, what are your expectations from the new generations in the development of arbitration?

There is an increasing trend in law firms and arbitral institutions to hire young lawyers from different backgrounds and jurisdictions to increase its diversity. The international arbitration community strives to be diverse because, among others, it adds a unique way to understanding and solving international disputes, which undoubtedly benefits the parties.

As we see the arbitration caseload increase (both in commercial and investment arbitration), we also see more hard working, talented and diverse lawyers working in the field; these lawyers should be welcomed not only by law firms, but also arbitral centres and clients alike. The inclusion of more diverse and talented young lawyers will contribute to continue enrichening, improving and developing the international arbitration practice. At the same time, it is essential that both younger and older lawyers strive always for excellence, pushing themselves to the limits of their abilities: international dispute resolution is increasingly competitive and demanding, and I expect the new generation to be both hardworking and creative in meeting these challenges.