# An International Arbitration Star With NY Roots: A Q&A with Wilmer's Gary Born

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Gary Born of WilmerHale.[/caption] At its best, international arbitration embodies what Wilmer Cutler Pickering Hale and Dorr's Gary Born calls it the five E's—efficiency, expedition, expertise, evenhandedness and enforceability. Many of the disputes involve vast sums of money and take place behind closed doors in places like London, Paris, New York, Geneva and Singapore. But Born, who heads Wilmer's 70-lawyer international arbitration practice and has participated in more than 600 arbitrations, recently shared his thoughts and insights on international arbitration with Lit Daily editor Jenna Greene ***Jenna Greene: For two decades, you've been ranked as a top international arbitration practitioner. How did you get your start?*** Gary Born: It was an accident. Coming out of the University of Pennsylvania Law School, I was fortunate to have the opportunity to clerk for both Judge Henry Friendly, on the Second Circuit, and Justice Rehnquist. When I had finished those clerkships, I spent a year hitchhiking across remote parts of Africa, after which I landed with Wilmer Cutler, as the firm was called back then. Being a junior associate, I was placed in a very small room and given timesheets to fill out every day. After three weeks of that environment, I had rethought my commitment to Big Law and began planning an exit. After

another few weeks, I had secured a position teaching Public International Law and International Litigation at the University of Arizona College of Law. I was about to head out the door for the Southwest when the firm asked me to spend a year in its London office—which I did. Although I did spend a year teaching in Arizona, I returned to the firm and my London stint was—accidentally—the beginning of my international arbitration career. ***JG: What was your first international arbitration?*** GB: I had the good fortune in my first international arbitration to represent Greenpeace against the Republic of France. A team of French agents had blown up Greenpeace's flagship vessel, the Rainbow Warrior, when it was moored in Auckland Harbor on its way to protest nuclear testing in French Polynesia. The agents had the misfortune, for France, of getting apprehended by the New Zealand authorities. Greenpeace came to Lloyd Cutler, and later me, and asked us to represent them against France in seeking compensation for their vessel. We persuaded the French to conclude an international arbitration agreement where the sole question was France's financial responsibility for what they insisted in calling "the incident in Auckland Harbor on the night of 10 July 1985." During the negotiations, Lloyd and I disagreed about where to arbitrate. The French, not surprisingly, argued very hard for Paris. After some hurried research, into then unfamiliar concepts of the arbitral seat and concepts of annulment, I reached the fairly obvious conclusion that Paris wasn't such a good idea. We ended up in Geneva, which turned out very well for our client. My major role at the time was to develop a damages theory for the Rainbow Warrior, which, inconveniently, had been a 35-year-old North Sea trawler with a disturbingly low market value. Nonetheless, after two years or so of arbitration, where we advanced the argument that the Rainbow Warrior had been the living embodiment of Greenpeace's commitment to the environment, we successfully obtained an award of some $6 million for Greenpeace. It seemed like an auspicious start. ***JG: As the chair of Wilmer's 70-lawyer international arbitration group, what are some of your goals for the practice?*** GB: I want our practice to continue to define the market in terms of quality—quality of written and oral submissions and case preparation, as well as quality of life. There are some tremendous practitioners in the field, at other firms both in the U.S. and elsewhere. My goal is for our practice to continue to be recognized as providing the best available representation of our clients, in both their hardest cases and their other disputes, as well as the best experiences and training for our younger lawyers. Diversity is another priority—both in terms of nationalities, ethnicities and gender. International arbitration is necessarily more diverse than many practice areas and I want to see our group become even more representative of the clients we represent, the tribunals we appear before and the places where we practice. ***JG: What do you look for in lawyers who are interested in joining the group?*** GB: We look for lawyers who are passionate about international arbitration as a means of resolving commercial and other disputes and who meet the highest standards of excellence. Obviously, we want lawyers with records of academic achievement and high intellect, since those are attributes Wilmer lawyers are known for. Collegiality is also essential. The international arbitration group is very flat, with a premium on freely sharing ideas and robust discussion and testing of various approaches

to solving clients' problems. That makes it vital that anyone joining our group be a great collaborator. Again, in addition to excellence, we also look for diversity—both in terms of language, nationality, gender and otherwise. ***JG: You're the author of several books including 'International Commercial Arbitration,' which is often called the leading treatise in the field. Given your caseload, how do you find the time to write? Why do it?*** GB: Unfortunately, it usually means not sleeping quite as much as I would like—much less hitchhiking again across Africa. But it's a choice I wouldn't second-guess for a moment. I have a passion for the scholarship, and for contributing to the development of international arbitration and international law more generally. If you have that passion, the time that you put into researching and writing does more to lighten your load than to add to the burdens. When I spend time working on my treatise, or a casebook, it's a breath of fresh air. This also something that the other partners in our group do as well, with Steve Finizio, John Trenor, Franz Schwarz having recently published books in the field. ***JG: In recent weeks, we've seen law firms and other companies like Microsoft do away with arbitration of sexual harassment claims. Has there been any movement away from arbitrating commercial disputes?*** GB: No. Not at all. The opposite. The motivation behind international arbitration couldn't have been more different than what inspired arbitration's use in resolving domestic sexual harassment or employment disputes. International arbitration has been, and still is, regarded as the best available means of resolving transnational commercial disputes because of the Five E's—efficiency, expedition, expertise, evenhandedness and enforceability. These attributes are particularly significant in international settings—where the quality, integrity and enforceability of many national court decisions are, at best, uncertain. I am not quite sure of all the reasons domestic U.S. companies use arbitration to resolve sexual harassment claims. I know enough to understand that international commercial and investment arbitration is a different animal. That is why there has been support from both claimants and respondents for international arbitration, with the number of such arbitrations, and their size, increasing significantly, year-on-year, for the past 30 years. It's also why most states around the world still look to investment arbitration to resolve disputes with foreign investors. Although it can always be improved, arbitration provides the most satisfactory example of international law really working in practice. ***JG: What are some of the biggest ongoing disputes that you're working on or watching?*** GB: We have been involved as counsel in several of the largest reported international arbitrations in the past few years. Although some of our matters are confidential, we successfully represented the Kurdistan Regional Government in a very substantial dispute with an international energy company, with proceedings in several arbitrations and national court proceedings. We also represent Merck Sharp & Dohme in an investor state dispute with Ecuador, involving important questions of international due process protections for foreign investors. ***JG: One thing that's unusual about the international arbitration bar is that top practitioners may also at times work as arbitrators. How does knowing that opposing counsel in one dispute might be your arbitrator in the next affect the way members of the bar interact and litigate cases?*** GB: 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 over-excited) arguments and you are a better arbitrator if you have recently been in the counsel seat. While in the U.S. practitioners don't sit as judges, that frequently happens in other national legal systems. And, of course, there is a sense of collegiality and cooperation that develops when practitioners work together in different capacities. That said, I think most counsel are motivated by getting the best result for their clients. And arbitrators are motivated by the goal of reaching an independent decision that properly applies the law and gives the parties confidence in the process. To paraphrase Professor [Louis] Henkin, almost all of the participants in international arbitration comply with almost all of their obligations almost all of the time —regardless what their role at the time may be. ***JG: In terms of presentation and strategy, what are some of the key differences between litigating in court and litigating before an arbitration tribunal?*** GB: There a several differences. Most judicial proceedings are public. In contrast, many international commercial arbitrations are confidential. Different approaches and styles are often appropriate as a consequence—although there are also a number of international arbitrations which are public. (The Abyei Arbitration, where I was counsel, was webcast live around the world and can still be viewed here.) At least as important, arbitral tribunals are almost always composed of individuals from several different legal (and national) backgrounds. Presenting to a multinational tribunal, hand-picked for a particular case, is very different from presenting to a local jury or judge. It requires sensitivity to the composition and characteristics of the tribunal, which can differ significantly from case to case. ***JG: Arbitrations tend to happen in New York, London, Paris, Geneva, Singapore—all over the world. What are your most and least favorite things about travelling? Top five travel tips?*** GB: Least favorite is jet-lag and airport lines. Most favorite is planes without wifi, which is one of the world's few remaining refuges. Top five travel tips? That is a tough one. Do a good job, and win your case, so coming home is like a victory lap. Plus taking time to actually see where you have been, once the hearing is done ... Bose headphones and Global Entry are up there too.

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