

INTERVIEW WITH GARY B. BORN<sup>1</sup>  
PERSPECTIVES AND EXPERIENCES IN INTERNATIONAL ARBITRATION  
Entrevista a Gary B. Born  
Perspectivas y experiencias en arbitraje internacional

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### Abstract

In this interview, Gary B. Born, a highly regarded lawyer in the field of international arbitration and dispute resolution, offers a deeper insight into both his influence in this area as well as his track record in dispute resolution. In addition, he discusses the role of technology in arbitration proceedings, with a particular focus on Artificial Intelligence. Born argues that it is too early to determine and regulate the impact that this emerging technology may have. This interview seeks to share the opinion of a leading arbitration professional on topics of interest, with the aim of reflecting on the use of new technologies and their implications.

### Keywords

International Arbitration, Artificial Intelligence, Disputes.

### Resumen

En esta entrevista, Gary B. Born, abogado altamente reconocido en el área del Arbitraje Internacional y resolución de conflictos, ofrece una visión más profunda de su influencia en el campo y su trayectoria en la resolución de disputas. Además, analiza el papel de la tecnología en los procedimientos arbitrales, con especial atención sobre la Inteligencia Artificial. Born sostiene que es muy pronto para determinar y regular el impacto que puede tener esta tecnología emergente. Esta entrevista busca dar a conocer la opinión de un destacado profesional del arbitraje sobre temas de interés, con el objetivo de reflexionar sobre el uso de nuevas tecnologías y sus implicaciones.

### Palabras clave

Arbitraje internacional, Inteligencia Artificial, Disputas.

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*Steven Vásconez Jácome (S.V.J.) You are widely known in the field of international arbitration, since you have participated in countless cases, written several books, and taught as a professor at important academic institutions. Being one of the most influential figures in the field of international arbitration, could you tell us a little about the path you have taken to reach all these achievements?*

*Gary B. Born (G.B.B.)* I think, like many lawyers, the path that I took was not entirely predetermined, or even planned. I came to arbitration perhaps as much by accident as by calculation. I began my career doing international transactions, large cross border deals of various sorts.

I mean, only when those deals turned out not to be as successful as one or both parties had hoped and disputes arose, did I become involved first in litigation, international litigation, and subsequently, arbitration.

I had a somewhat unusual experience of representing not a business, not an entrepreneur, not even a country in my first international arbitration, but instead, representing GreenPeace, the international environmental protest group, which among other things seeks to keep the world's oceans clean.

They had a very large dispute, namely the Rainbow Warrior dispute, with the Republic of France, arising out of the unfortunate French bombing of the Rainbow Warrior, the main protest vessel of GreenPeace in Auckland Harbor, New Zealand, during the 1980's. After some back and forth, the French government ultimately agreed to arbitrate GreenPeace's claims against it, over damages arising out of the unlawful sinking of the Rainbow Warrior.

My first arbitration, therefore, began as a negotiation of an arbitration agreement and indeed with an arbitration seated in Switzerland with a very distinguished three-person tribunal in which the issue was the amount of compensation that France would pay to GreenPeace.

The result has been publicly reported. GreenPeace won quite a substantial monetary award at the end of the arbitration. I think it was unusual, by standards of most international arbitration lawyers, for this to be my first experience with international arbitration.

But this demonstrated for me, and I think it illustrates for others as well, how international arbitration can be used to resolve the most diverse, the most eclectic variety of different cases. Even cases involving the most unfortunate uses of force as well as, of course, normal commercial disputes.

*(S.V.J.) It is a widely recognized fact that on many occasions states are reluctant to use arbitration mechanisms, both at the international level and in investment matters, for the resolution of their disputes. In the specific context of Latin America, I would like to know your opinion on how this situation has been addressed so far? Also, what is your view on the possible evolution of this trend in the region in the years to come?*

*(G.B.B.)* As you rightly say, there is a complex history of international arbitration in Latin America. There is also a complex history in other parts of the world, but we can focus on Latin America.

Historically, thinking back to Calvo and others with similar thoughts, international arbitration, I think, was regarded with considerable reserve, perhaps even a measure of hostility. It was, and one hears refrains of this even today in other jurisdictions, seen as an affront to national sovereignty, a threat to the ability of states to regulate matters occurring within their borders, on their territory. Especially with respect to natural resources, the Andean Commission's Decision No. 24, which is of course well known, carried that kind of hostility, if one can put it that way, into the 20th century.

At the same time, I think there's always been a desire on the part of Latin American states to encourage investment in Latin America, to resolve international disputes with other Latin American states, or investors from either Latin America or elsewhere in a peaceful and constructive manner, and there have been, certainly, good examples of arbitration being used between Latin American states, but also between foreign investors and Latin American states.

I think there's an inevitable tension between, on the one hand, the desire of states everywhere in the world, perhaps specifically Latin America, to resolve their disputes in the most efficient, constructive, and least damaging way. And, on the other, to ensure that they have maximum scope for local regulatory authority or satisfying local political constituents. One can certainly imagine that such a debate will never be resolved. I meant, and as one may have seen, certainly in Ecuador, Bolivia, Venezuela, manifestations of reservations, if one can put it that way, about investment arbitration.

My own view, and perhaps it's because I am always optimistic, is that at the end of the day, the desire of populations for better living standards and the desire of local politicians for more popular approval, will push towards increased use of international arbitration. I think, when disputes are resolved peacefully, when investment is encouraged and promoted, it's better for all concerned but especially for ordinary people. And I think, when cool heads prevail, when political passions, whether on the extreme left or the extreme right are not incited and provoked, the desire for peaceful and constructive resolution of disputes, and building of bridges and roads and dams and other things for the future, will prevail.

*(S.V.J.) The world is changing by leaps and bounds, both. In the use of technology and how it modifies human relations, facts that are not alien to arbitration. In your opinion and experience, what are some of the most important challenges facing international arbitration today regarding the use of technology?*

*(G.B.B.)* I think you are right that technology has dramatically affected the practice of international arbitration. And I think, generally, keeping with my optimistic viewpoints, in a positive way, if one remembers back to the pre-Covid world, to date just the most recent set of technological innovations which have truly bedded down, there virtually never were meaningful remote hearings.

Sometimes, one might have a procedural conference by conference call, or by telephone call. Sometimes one might have a witness at a hearing, an in-person hearing, testify remotely, but the notion of a week-long, even a one day long, or a two or three day-long hearing by Zoom or Teams, or some other remote provider, was unheard of and even in some sense, unimageable.

The ICC rules when they talk about hearings, for example, spoke of in person hearings and I think most arbitration practitioners, if you cast your mind back to 2018, 2019, would have seen in person hearings, all participants being physically present in the same venue as both typical, uniformly followed and indeed necessary.

Obviously, Covid introduced us to new ways of thinking and today, virtual hearings, remote hearings in which the participants all—a little bit like this interview—participate from different locations using some sort of remote technology, has become standard. Of course, if in-person hearings can be conducted with efficiency, as in many cases they can, especially for longer and more complex hearings, parties, and certainly tribunals, may prefer that.

On the other hand, the notion that case management conferences would be held in person today is almost unthinkable. Almost all half day or even one day procedural meetings, conferences to fix future procedures would occur by Teams or Zoom, or some other

remote platform. One or two days hearings for things like interim measures or some sort of partial award on just a discrete issue, particularly if there are no witness examinations planned, would also very often be conducted remotely. Longer hearings can also be conducted as such. Over the last two and a half, three years, I've conducted, I am trying to think, four or five—and now that I think about it seven or eight—hearings of multiple days with multiple witnesses being examined and although there are obvious concerns about improper witness coaching, or time zone alignment, or the connectivity of some participants, in my experience none of those sorts of logistical issues have prevented the use of virtual technology to have quite significant hearings, three, four, five days. I did one that was ten days long.

I think that has huge benefits in terms of efficiency for the parties. It means you don't have to travel away from your place of business, you don't have to pay for the cost of travel accommodations, and similar expenses. And it contributes to one of the basic purposes of international arbitration, the efficient resolution of disputes.

Now, of course, other technological developments that have been important we sometimes forget, but the use of providers like Opus and others who can provide seamless access to the exhibits in a hearing, whether it's remote or in person. The use of real time transcription services, that facilitates cross examination and other kinds of witness examination have all made the dispute resolution process, I think, more expert and more efficient.

The big elephant in the room that I haven't mentioned thus far, because I think he's still or she's still figuring out her place, is AI. My own sense, and this is probably a little inconsistent with what you hear from many people, is that AI will not have as substantial an impact on dispute resolution as is sometimes predicted in other fields. I have law professor friends who tell me that ChatGPT has performed better on their exams than at least some of their students. I can't verify whether that's correct or not, but I think the kinds of problems that one faces in international business, investment disputes are somewhat more complex than many law school exams and I am rather skeptical that ChatGPT or other forms of AI are going to significantly alter international arbitration or international litigation or other forms of dispute resolution.

One area where I do think computer assisted technology has made a difference, will continue to make a difference, is in document disclosure. The ability to electronically search using search terms and the like, which is in some ways more reliable than human intervention, has streamlined the disclosure process, at least in my view, and, again, made it more effective.

*(S.V.J.) With the increasing use of technology, economic inequalities are also growing as the process is costly and highly beneficial to the party that can afford it. How would you recommend guaranteeing fairness and transparency in an arbitration process?*

*(G.B.B.)* I am not sure, to be honest, that many of these technological developments that we've just discussed can in fact enhance or magnify economic inequalities. In some ways they may do the opposite and may level the playing field between parties with different economic resources.

A small investor arbitrating against a sovereign state with effectively unlimited taxing power may not be at a disadvantage or at the same disadvantage if the hearings are remote. As I mentioned previously, a remote hearing typically costs less than in-person hearings and thus, the technological advances of remote hearings, virtual hearings, remote testimony, may make the economically weaker party more able to present its case, whether their claims or defenses.

I think that's probably true of AI. I think artificial intelligence, for the most part, is something you can pluck off the internet and therefore I am not at all sure that these technological advances put the wealthier party in a better position. I think in a fair number of

cases, most cases that I can think of, to be honest, they make it easier for parties with limited resources to present their cases.

*(S.V.J.) In some way you answer this question, but I want to go deeper a little bit more. Do you think there is any concern about the use of technological tools such as AI within the arbitration process? Will it have some impact in the arbitration process or not?*

*(G.B.B.)* As you rightly say, we touched on that briefly already. I think AI is sufficiently young and evolving that it's difficult to say for certain. It may go in directions that certainly I can't anticipate. My own sense is that it will be a technological tool a little bit like LexisNexis or other internationally used search engines that some parties use, some parties use better, and some parties use less well. I don't think it will dramatically change, particularly in the world of larger disputes, how international arbitration is conducted.

I guess in quite small disputes, perhaps consumer disputes, perhaps one could imagine. But I do think this is just imagination. I think one could imagine Artificial Intelligence playing some role in dispute resolution. But I do think we need to let this elephant in the room grow a little bit more and turn from the newborn infant into at least a teenager before we make too many predictions.

*(S.V.J.) Your answer is interesting because some arbitration centers, such as Silicon Valley Mediation and Arbitration Center, started to make regulations about the use of Artificial Intelligence. What advice would you give to arbitration institutions that are considering incorporating technology into their proceedings and regulate Artificial Intelligence?*

*(G.B.B.)* So many institutions are going online with many aspects of their case management: online file systems, online submissions of request for arbitration and other significant written submissions. I think arbitral institutions would be well-advised to wait for Artificial Intelligence to develop more fully before leaping to incorporate it in any meaningful way in institutional rules, or even practice.

I think, one quite honestly doesn't know exactly how useful, or destructive, it might be in different respects. And I do think users of international arbitration, like other forms of international dispute resolution, benefit from predictable and reliable procedures. Introducing something which is quite young, quite untested, and quite certain to evolve in the future probably, quite certain to evolve in unexpected ways, I think would run counter to what it is that many businesses, and many countries, prefer with respect to dispute resolution procedures. So, while being fully open to exploring future possibilities, I think one should let that exploration happen before leaping to embrace, in one way the other, some aspect of AI.

*(S.V.J.) To close and thank you for your valuable answers, I would like to explore in detail the creative process behind your novel entitled *The File*. Was there any influence from your career in arbitration or a case that inspired you to write this work? What was your inspiration?*

*(G.B.B.)* Thank you so much for mentioning my novel, my spy thriller, *The File*. For readers who are interested you can read reviews and a description of it on Amazon or Goodreads or another online book publisher. If you like spy thrillers, if you like action, if you like female heroes, I encourage you to look at *The File* on whatever online resource is more available to you.

The inspiration came not so much, and I recognize it's unusual, I think, for a lawyer to write a spy thriller that has nothing at all to do with law. There's no reference to arbitration, there's no reference to any courts. The book *The File* has only to do with action and excitement and complicated personal relationships.

The inspiration didn't come from arbitration or international transactions. It came from other experiences in my life. My international arbitration practice nonetheless provided, in the sense, the opportunity for me to write this spy thriller because on very long trips around the world whether to Santiago, Chile or Sao Paulo, Brazil or Singapore, I had dozens of hours sitting on airplanes to devote to something and I decided at some point that I should devote it to trying to write a spy thriller, which I'd always toyed with. I never quite believed, as I was sitting there in those planes writing out in long hand the manuscript, I never quite believed that it would ever be accepted by any publisher, and be published. I was delighted when it was. I hope if anyone who is reading this ends up reading it and I hope you are as excited about it as I am.