

Transcript of Dialogue between Adam R. Martin and Maxi Scherer

Q: Would you mind briefly introducing yourself or tell the readers anything you'd like them to know?

A: Oh, sure I can tell you little bit about my background. I grew up in Germany and then did most of my legal education in France at the Sorbonne Law School where I graduated in 1998 and I did my PhD as well at the Sorbonne. I then went into private practice, first of all in Paris, and then I moved to London about 10 years, a little bit more than 10 years, ago and I joined the firm I'm currently with which is Wilmer Cutler Pickering Hale and Dorr and its dispute resolution practice here in London. I have always kept a certain amount of my time in academia. I was teaching at the Sorbonne and also at other law schools around the world including in the US. For instance, I spent some time at NYU Law School and some time in Melbourne, Pepperdine, Germany, and Switzerland; I won't bore you with the details. I then took up a permanent faculty position at Queen Mary University of London three years ago at him and since then I have split my time quite a bit between academia and private practice. I do only international arbitration; that my daily bread in and out for the past 15 years or so.

Q: Wonderful, that's quite an amazing history. I also noted you have a book coming out soon.

A: Two actually. I have two books that are about to be published so they aren't available yet in paper. You can order them online, I suppose. One is the book on transparency in international investment arbitration and this is a guide to the recently published UNCITRAL standard on transparency in a treaty-based investor state arbitration, and that one is coming out from Cambridge University Press hopefully within the next month or two. Then there is another book and that comes out which I have co-written with two colleagues and that is about arbitrating under the 2014 LCIA rules which you well know have just been published and entered into effect last year. These are the ones that are about to come out, and I'm glad that they are coming to fruition. These have kept me busy quite a bit for the past couple months and years.

Q: I'd like to begin the questions by asking generally about dispute resolution overall. Could you tell me how you got started in dispute resolution?

A: Well, if you include in dispute resolution national court litigation, this is really where I started my practice as a lawyer in Paris. So, I initially went to court then and did some mainly commercial litigation in France and then I started doing some post-award recognition, enforcement, or set aside in front of French courts. That's really where I found my first contact with arbitration. When I was still in Paris, I became co-counsel in the case where the applicable law was Luxembourg law, which is pretty close to French law. That's when I met for the first time and worked with for the first time my current colleagues. That is the team here at Wilmer, and that's Gary Born and others, and that's truly when we started working together. It was after a year or two when Gary suggested that I should come over to London for six months or so, and as I said, this has probably been longer than 10 years now.

Q: When you went to London, is that when you started working with Queen Mary?

A: When I moved to London, I kept my teaching commitments in Paris at the Sorbonne, so I went back and forth and really hadn't planned to stay in London for such a long time; but I like the place, I like the city, I like the people here at Wilmer. I was very happy in that environment both professionally and otherwise. I kept saying 'oh, I'll stay for another year, then another' and now it's been ten years.

The position at Queen Mary, I took up three years ago now and that was when I took it a little bit of a sabbatical and went to NYU and had research time there and it was during that time that I thought of taking up a more serious position in academia and a full-time position in academia. That position at Queen Mary came up and I joined Queen Mary three years ago and it's been a really fantastic experience with Queen Mary opening up their new Paris LLM program and a new LLM in in energy and natural resources, so there are plenty of very interesting projects going on with Queen Mary.

Q: It certainly sounds like you hold a lot of different roles within the dispute resolution field. I know you've just said that you are an academic as well as an international arbitrator. Do you also do any domestic arbitrations, serve as a mediator, or represent clients in arbitrations as well?

A: I don't do any domestic arbitration. I never did. I think this is a field other people are much better at. I always had a very international focus in my career, probably because I trained in two countries and now live in a third country, so the international side of it was always fairly natural to me. I do mainly sit as an arbitrator in my professional activity, but in the past of course, I worked as counsel in international arbitrations and that's really when you learn how arbitrations are conducted and I think this is a very important part before being able to sit as an arbitrator. I've had about 15 years of experience in international arbitration proceedings as counsel before I got my first appointments and significant appointments as arbitrator.

Q: And you've never served as a mediator?

A: No, I have not.

Q: If you had to put a percentage on how much time you spend in each of the different roles, what you say that percentage would be? How much are you serving as an arbitrator, working as counsel, or working in academia?

A: That's a difficult question and hard to answer overall. There are times where an arbitration case takes up a lot of my time, sometimes it seems like 150% of my time, and there are other times where I write and do research and the academic activities are more important. It's more important to say overall what the percentages are. What I can say is that the time spent on counsel cases is getting less and less. That is because I truly enjoy sitting as an arbitrator and seem to be getting more and more appointments. So this is something that is growing from my perspective.

Q: I had another follow-up question regarding your academic background. Do you feel like it is becoming more essential for someone sitting as an arbitrator to have more advanced degrees or doctorates, at least internationally?

A: I wouldn't call it a necessity, but arbitration is a field where arbitration and private practice combine fairly well and it is true both ways. I think it is very difficult to teach arbitration without knowing the latest developments and knowing the hot-and-sexy bits, if you allow me that expression. Very often, only the practitioners who run those cases and know about those developments know this. Conversely, I think arbitration is a fairly academic field. It's not unusual to have submissions that are several hundred pages long, which is very different than what you're probably used to in a US court proceeding. These submissions have lots and lots of footnotes. It's not unusual that you do extensive comparative legal research for submissions in arbitration. So, overall it is a fairly academic field to a certain extent. So, therefore, as both counsel and as an arbitrator, I think it is helpful to have an interest in academics and it is also interesting and helpful to be able to have an in-depth knowledge of different jurisdictions and have that international comparative education.

Q: I definitely see the connections there. I was also wondering if there was any factor that binds all these roles together and makes them all part of the same dispute resolution field.

A: I guess if you look at skills; what are the types of skill or the types of experiences that one looks for in an arbitration practitioner, there is probably one thing that I, personally, think stands out. That is a certain flexibility and an ability to listen and adapt to other legal cultures. I have had the experience and the pleasure of working both as counsel and as arbitrator where the applicable law was Polish law, Kazakh law, or Algerian law, or Hong Kong law, or whatever legal system that I'm not qualified in. So, you need to work with counsel, you need to work with co-arbitrators who will help you understand all these legal cultures. It is important to come to the table to listen and to ask the right questions, but not to take things for granted, not to think 'because, I know this is the way it is in my jurisdiction, I suppose that's the same way in other jurisdictions as well.' This ability and flexibility is really something that is something that is a major theme in arbitration. I don't know if that answers your question, but that's certainly one thing I look at if I'm looking to recruit junior lawyers on our team and one thing I teach students in my classes.

Q: That was a wonderful answer, thank you so much for that. I would like to move now to focus more on your role as an arbitrator. You mentioned earlier that you don't do domestic arbitration, but was there something in particular that made you decide not to go into domestic arbitration and focus solely internationally?

A: No, I guess it just happened. I guess because of different languages and being educated in different countries, it becomes more of an international thing. I never had an opportunity to do domestic arbitration, so it was just always naturally internationally focused, from my side.

Q: In your opinion, what would be the essential knowledge, experience, and skills to enter into the international arbitration field?

A: Other than the one I've mentioned, the ability to listen and to be flexible, and to understand different legal cultures, as an arbitrator in particular I think the most important is to be extremely precise and careful because at the end of the day, the responsibility of the arbitrator is to render an enforceable award and, therefore, the responsibility of the arbitrator is to make sure the

procedure is absolutely 100 percent water-tight and the award cannot be challenged in the future. I must say, my first appointments as an arbitrator were extremely challenging on those points because very often your first cases are cases with not such a huge amount in dispute and therefore, the parties aren't often represented by sophisticated legal counsel or aren't represented at all.

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Q: Should law schools incorporate arbitration into their curricula? If yes, how?

A: It's important to see where the differences are and how it is important for a client and they have all these mature reactions that maybe someone in the second or third year of law school is still gaining in the basic foundation courses and in and knowledge, a little more generally.

Q: In addition to your first law degree and your experiences in law school, do you think its important to those entering the field of arbitration today to be involved in ADR organizations, groups, etc.?

A: There are a lot of really interesting things that young lawyers can do. Those who are more interested in international arbitration are in young lawyers in international arbitration groups, basically all around the world. In the US for instance, there is the ICDRY, which is a youth association of the ICDR, which in itself is the international arm of the AAA. That is just one example, there are many, many others around the world that are similar. Under-40 groups, for example the London Court of International Arbitration or ICC in Paris or the IBA International Bar Association and other groups, do two things; they do training and educational programs for young lawyers, but frankly, they also have a very important aspect of networking and social activities. That is actually an important part for a young lawyer starting in international arbitration is to get that network of people around the world who might think of him or her in a future referral of a case or the future appointment of an arbitrator. Now again, one thing I do tell my younger colleagues is that that it requires a bit of patience; it's not that you go to one conference that you come home and initially you all of a sudden have a client, but give it five years, 10 years and then the people that you have been to these conferences with, maybe a drink with after those conferences, have also progressed in a law firm in a different part of the world or in-house or on any of those areas and they will think of you as a potential co-counsel or potential arbitrator, or potential referral for a case. I can give you a couple of examples where former students of mine or former younger lawyers I've worked with at Wilmer called me years later and said: 'you know, I have this LCIA arbitration, can you help me with that or they have appointed me as arbitrator without telling me, can you help?' It is very important, these young networking events, and maybe I could just add one final thought on the above networking events and that is very often I see young people going to conferences and trying to speak to the gray-haired and very seasoned arbitration practitioners and, of course, there is a lot to be learned and gained by speaking to experienced arbitration practitioners, but at the end of the day, those people are not the ones that will give you business in 10 or 20 years time. It is, rather, the people, the peers at the level that will be able to do so. So I always encourage my students or younger colleagues to actually bond with their peers at social events. That is very much part of networking in international arbitration. I am not sure I can be quoted on that one, but I think that's a usually tell my younger colleagues.

Q: I'd like now to talk more generally about the relationships between generations in Dispute Resolution. Do you think that there are significant differences in practice, expectations, values, between your generation and the institutionalizing generation?

A: There are quite a few differences. Maybe one I've already alluded to is that, in the younger generation, very often people now have the possibility to get a specialized degree in arbitration and in interviews already say that they would like to do international arbitration. That is a huge difference in the way my generation and all previous generations where we all ended up in arbitration, frankly, by coincidence or because we didn't necessarily have an arbitration class and I personally didn't know what arbitration was when I graduated. So, I think there are a lot more opportunities for young people to get good skill sets and an expertise in arbitration. As a recruiter for associate positions at a law firm, I think it's wonderful to have all these skilled people. On the other hand, one also needs to be in a bit realistic. It is not everyone who will be able to do arbitration straight from the outset. It might be a good idea to work in the litigation department and/or in other departments for number of years before moving into arbitration. So it's not something unusual or unheard of, even in these days. I guess potentially the other difference between the younger generation and the institutionalizing generations in arbitration is one that is particularly close to my heart. That difference is that the younger generations very often bring more diversity to the table and when I mean diversity, I mean diversity in terms of gender, in terms of where they come from, the geographical spread around the world. I think this is something that makes arbitration much more interesting these days and whereas young generations bring the expertise, they also bring new ideas and some fresh thinking, which means that means not the same faces all over again and again. I think, particularly in arbitration, this is something that I think is that if it is really helpful and is something that should be encouraged even more encouraged in years to come.

Q: If I may, I'd like to talk to you a little more about diversity and about how the field has changed since you began. What I'm hearing from you is that increased diversity is something that has changed in arbitration for the better over the last few years. Is that correct?

A: I think it has already changed a bit, but it has the potential to go further in that direction. I think if you look at the ways arbitrators are appointed, it has been for many years, quite a small group of people and frankly they all looked a bit similar, they all came from similar countries. I think here, we see more diversity. I think the arbitration institutions really have played an important role in making sure that there is more diversity in the arbitral tribunal panel. I have spoken to different people in arbitral institutions and very often they tell me that if there are issues with awards, it's not necessarily the younger generations where the institutions have appointed new people with a fresh look and rather, it is older generations that potentially have taken on too many cases or aren't able to commit enough time, etc. to their cases. So I think institutions see that bringing in new people who are keen to work on cases and committing enough time and effort to make an arbitration award really perfect. The institutions find that their efforts to appoint younger generations really have been rewarded and I think the clients in arbitration see that too. I think there has been more of a tendency to allow for much more diversity in arbitral panels, so I think it's a very good thing.

Q: We mentioned significant differences, but do you see any significant similarities or ties that bind between the two generations?

A: At the end of the day, arbitration is the same and the skill sets needed are very much the same. I think I said on a number of panels where there were a number of different generations represented on the panel that working together has always been an extremely wonderful experience. So I think in terms of the actual skills, there's very little difference in the skills that I've tried to describe earlier.

Q: Is there anything else you'd like to say generally about the generations in arbitration?

A: I think we've probably brushed most of the important parts. I think there are, on both sides from the younger generations but also from the more institutionalized generation, there is a lot of support for each other. I wouldn't want to describe this as an antagonistic relationship. I think both sides need each other and appreciate the relationship with each other.

Q: I know I've taken a lot of your time, but I did have one final question looking forward a bit. That is, what do you think is the next big challenge or innovation that awaits international arbitration?

A: I think for the innovation point, we briefly touched upon that note with diversity among the arbitrators and amongst arbitration practitioners. If I could just add one final thought on the challenges, and I'm a little mindful of ending on a negative note, but I think there is indeed a challenge to make sure that arbitration remains attractive to the users of international arbitration. The users, being commercial clients, companies who will put arbitration clauses in their contracts, have complained for many years now about judicialization of the arbitration process. They get frustrated by a number of things that have been borrowed from national litigation systems like e-discovery and they believe arbitration is getting too long and costly. Frankly, it becomes a bit like litigating in court and so, I think there is a shared responsibility here between institutions and the arbitrators and the arbitration counsel, the lawyers representing clients, but also the clients to make sure that arbitration becomes or remains attractive for its users. There are a couple of institutions that have taken this really seriously. The ICDR, international arm of the American Arbitration Association, has, in its latest revisions to the 2014 ICDR rules for instance, included a fast-track procedure that's incredibly quick, something like three months or so is possible if the amount in dispute is below a certain threshold. So there are a number of initiatives, very concrete initiatives, to make arbitration quicker and less costly and I think we should all keep that in mind as sitting arbitrators, working as counsel, and as institutions, that this is a really really serious concern for years to come.

Q: It has been a pleasure speaking with you and I really appreciate you taking the time to talk with me and to share your thoughts and experiences.

A: It's been my pleasure really, thank you so much for your questions and I look forward to hearing from you in the future.