Kluwer Arbitration Blog

The Future of Arbitration: 5, 10, 25 Years and Beyond

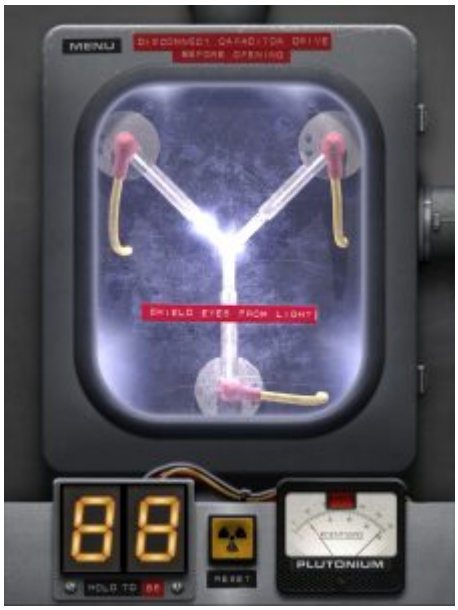
Michael McIlwrath (MDisputes) · Wednesday, June 20th, 2018

At the recent Finnish Arbitration Institute's Arbitration Day in Helsinki, I spoke on the topic of the future of arbitration from the user's perspective.

While I am not a futurist by any stretch, I do have something to say as a user, since I have been an in-house counsel in a global company for the past 20 years. Also, in 2016-17, I had the honor of chairing the Global Pound Conference (GPC), an event held in 29 cities around the world where we asked over 2,000 stakeholders the same 20 questions to help shape the future of commercial dispute resolution.

A consistent finding from these events was that users are the ones most likely to bring about change.[1)] Therefore, in trying to predict the future of arbitration, I will focus on the effect of pressures that users will bring to bear in the coming years.

About predicting the future



I feel relatively confident that my short-term predictions in this post are likely to come to fruition. Although they may arrive a bit sooner or later than I predict, they are all grounded in trends or dynamics that are already shaping dispute resolution practices.

The longer-term, of course, will be less constrained by current practices and expectations. This

allows bigger swings about how dispute resolution may radically depart from customs we currently know and trust, and how it might adapt to society as it will come to exist.

One thing about the future, however, does not require a time machine to be certain it will occur: the users who will most shape the future will not be me or my contemporaries. We are already being displaced by a younger generation that, unlike us, trained in international arbitration at university, is quicker to adopt new technologies, and is highly networked. They also include a vocal contingent of "super-users," the third party funders.

The next 5-10 years

The most significant development in the next five years will be the emerging divide between procedures for resolving low value/low complexity disputes on one end, and high value/complexity on the other.

While discussion about efficiency in arbitration typically focuses on larger-sized disputes (where the largest costs are incurred), institutions will continue to introduce tools to make it cost-effective to resolve disputes on the lower end. They will do this to retain market share, realizing there are many more small cases than large ones, and therefore more opportunities to attract and retain users.

To do this, institutions will market new forms of automation, especially versions of Online Dispute Resolution (ODR). At least initially, users will adopt these tools not because they appear *better* than non-automated procedures, but because they offer a method of resolution where no viable alternative is available.

In rules revisions, institutions will sacrifice some degree of party autonomy in favor of more efficiency, and users will ultimately embrace this. An example of this today are the recent SIAC and ICC rule changes imposing a sole arbitrator in smaller-sized cases, even where the parties had agreed to three arbitrators in their contract, or the proposed "Prague Rules" that impose a more restrictive "civil law" flavor on international proceedings.

Mediation will continue its steady growth, especially as an escalation step in medium and large disputes, or in cases that were once sent to investment arbitration. There will still be fewer mediations than arbitrations, but leading institutions will offer both to keep users from moving to other providers.

Institutions will seize upon the lack of accessible information about arbitrators—a common user complaint—and transform it to opportunity. As the 2018 Queen Mary/White & Case survey highlighted, 43% of in-house counsel respondents stated they have insufficient information to make an informed choice about the appointment of arbitrators. If nearly half the market wants more information, why are institutions not providing it? Because they are run mainly by arbitrators, not users.

This tension will not last. Within the next five years, the transparency trend will gather speed. Institutions will offer competing avenues to provide users with information about arbitrators (in particular case their management skills) and awards rendered under their rules.

Institutions will also explore new forms of cooperation, especially in the sharing of administrative resources and technology. Some of this will be driven by the need for expensive compliance with regulatory frameworks, like Europe's new privacy regulation, or ensuring cybersecurity, or

adopting modern electronic case management systems. This pooling of back-offices will be a boon to regional institutions, allowing them to punch above their weight with limited resources.

Finally, before the decade is over, Kluwer will publish the 5th edition of Gary Born's treatise on international commercial arbitration. The treatise will grow from three to five volumes in order to accommodate published arbitration awards that will begin to lay the foundation of an emergent international commercial arbitration jurisprudence.

After 10 years of change

As users become more experienced with technology tools to resolve their lower value disputes, demand for them will creep into higher value and more complex cases.

Leading institutions will begin to market resolution methods that draw on data analytics and tools of predictive justice that purport to help users assess likely outcomes and resolve their disputes earlier. The ability to better predict outcomes will bolster amicable methods of resolution, especially mediation.

Users will begin to appoint arbitrators based on their ability to automate by incorporating machine learning into the tasks of sorting facts and developing their legal analysis of the case. The IBA's arbitration committee will recommend full disclosure of the types of AI-assistance, algorithms, or other technologies arbitrators use in aid of the management of proceedings or the drafting of awards.

At the same time, the market will see an emerging "professionalization" of the role of international arbitrator, akin to that imposed on lawyers, doctors, and even mediators (who are already licensed/certified in many countries). Initially there will be regional, state-sponsored certification regimes for court-referred disputes and other domestic cases. Partly in response to these inconsistent approaches creeping into international cases, global certification schemes, codes of conduct, and accompanying enforcement regimes for international arbitration will come into existence.

Gender diversity in the appointment of international arbitrators will be close to parity in both regional and global institutions. Diversity will still be a concern, however, as there will still be a broad gap in the geographic and ethnic backgrounds of those being appointed.

Building on their successes in sharing back-office resources, regional institutions will extend their collaboration to attract more users. The international arbitration market will be split between large multinationals and the "super regionals."

But the biggest competition facing arbitration in 10 years will be from the courts. And not the ambitious international courts that are already underway in Singapore or planned in Germany and France, but rather domestic courts.

Many users insist on including an arbitration clause in their contracts not because of the enforcement advantages or flexibility or confidentiality it provides, but simply the lack of an acceptable court alternative. Yet the commercial courts of many countries are already undergoing sweeping reforms and multi-year modernization efforts. This will continue, making it difficult for a contracting party to object to the courts of a buyer's home country because they are not fair, competent, or efficient.

In the late 2020's, Kluwer will publish the seventh and last version of Gary Born's treatise to appear in printed form. It will return to its original two volumes, but buyers will have access to an on-line database of annotated arbitration awards and court decisions equivalent to a much larger, multi-volume set.

25 years and beyond

The changes to occur in the next two decades will establish new norms and expectations for users. In the eyes of future users, the lines between human decision-maker and automated processes will become increasingly blurred. Users will still want a human to be held responsible for the quality of a decision, but they will look mainly to institutions to fulfill this role.

Above all, users will expect technology to quickly crunch the data of the issues in dispute and provide accurate, predictable awards.

As we get closer to the singularity, the point where human and machine intelligence intersects, users will be able to select arbitrator programs that may that offer different approaches or that may even be modeled on human decision-makers. In this future, the Finnish Arbitration Institute could be called to address party disagreements over whether the dispute calls for a "John Beechey" or a "Carita Wallgren-Lindholm" flavor of arbitrator.

And, finally, *Born on Arbitration*, currently scheduled by Kluwer for release on June 20, 2043, will be an interactive artificial intelligence. The voice of Gary Born will answer user queries about any type of arbitration by drawing on the author's collected writings and all arbitrations conducted to date.

The future or not?

Or, possibly, little will change.

Perhaps in the year 2043 we will still be gathering information about arbitrators exclusively via word of mouth, complaining that the procedure is too expensive for many disputes, struggling to agree dates for hearings 12 to 24 months after the first procedural conference, and arguing over whether a respondent in Europe should receive additional weeks to reply on a submission that falls due during the summer holidays.

Check back in 25 years and let me know.

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References

?1 Interestingly, this was not the same finding of the recent Queen Mary/White & Case International Arbitration survey, which found that 80% of respondents believe that “arbitral institutions” are best placed to make an impact on the future evolution of international arbitration. But in her own remarks at the event, Heidi Merikalla-Teir, the Secretary General of the Finnish Arbitration Institute, clarified why this data is not inconsistent. She pointed out that arbitral institution themselves look to what the market wants, which means offering services that users will need.

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