NOT JUST AN ALTERNATIVE

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While predictions can certainly be made about the future of arbitration, one thing is certain – it's here to stay, says Ramon Mullerat.

Aún a pesar de las diversas predicciones sobre el futuro del arbitraje, una cosa es cierta, afirma Ramon Mullerat: que el arbitraje ha llegado para quedarse. Cuando pensamos en el futuro, un punto de partida es contemplar el pasado, donde las iniciativas arbitrales no han parado de sucederse. Esto parece ser una particularidad en la evolución del arbitraje.

There is an understandable curiosity in the legal market concerning the promising evolution of arbitration. And while it is always difficult to make predictions about the future, especially in the current climate, conferences and articles are thriving on that very topic.
And when thinking about the future, a good starting point is to contemplate current developments. This is true particularly in the evolution of arbitration where, over the past half century, there has been an almost over abundance of initiatives introduced.

The present
Over recent years, arbitration has experienced remarkable growth as more and more matters have become arbitrable. The enlargement of arbitrability to include competition, insurance and employment matters is a good example. Its use has also increased in securities, sports, investment, air space, tax and other fields.
Changing times have also brought out favourable acceptance of arbitration by state courts, businesses, States and international organisations are increasingly using it to resolve their disputes. Arbitral institutions themselves have multiplied and branched out, new countries are adopting the arbitration culture and the number of international arbitrators is on the rise.
Institutionalised arbitration now overshadows the use of ad hoc arbitration. Party autonomy has become the indisputable pillar of arbitration 'nemine discrepante'. The 'splitting baby' myth is evanescing and the majority of arbitration outcomes are now outright 'win' or 'lose' awards.
The traditional advantages of arbitration – time and cost – are disappearing, however, and thus the spirit of arbitration weakening. Where once they were clearly different, arbitration has recently become almost indistinguishable from litigation.
While it is impossible to forecast the future with complete accuracy, I believe there is much evidence around upon which optimistic predictions can be made.

The predictions
ADR is currently on the rise and many believe that arbitration, and particularly international arbitration will become the main 'go to' method for resolving commercial disputes, often relegating litigation and the courts to being the 'alternative'. Arbitration will also continue to be a pivotal factor in the convergence of common and civil law.
Successful investor-state arbitrations should hopefully strike balances between transparency and confidentiality and between the rights and obligations of the parties, investors and State sovereignty. I see new fast-track procedures being introduced everywhere to mitigate time consuming and costly arbitrations. And the majority of future arbitrations (and litigation) proceedings becoming electronic, also cutting down on time and cost.
We will also see the removal of current hurdles to encourage the use of arbitration. This is the case, for example, of a common seat for all cases and an 'only tribunal' to supervise arbitrations – in sports law disputes. And with class actions having been admitted in US arbitration, they will no doubt now become accepted worldwide, even with the necessary limitations.
Smooth cooperation with courts will need to be further sought to complete the revision of the 2010 UNCITRAL Rules and so supplement the arbitrators' lack of potestas.

One current concern has been the growing number of civil liability claims against arbitrators. Hopefully, going forward, a balance will be struck between arbitrators' immunity and contractual liability to find an acceptable solution to this.
Another is the revision of the successful IBA Guidelines on Conflicts of Interest 2004. Current Guidelines have a certain bias towards the arbitrators and need some slight adjustments to better protect the interests of the parties and the arbitral institution itself. Also I hope that the proposals to replace the 15th New York Convention will be abandoned.
We need solutions to be found to the new phenomenon of proceedings funded by third parties since these practices can represent a threat to ethics and distort litigation.
The future will undoubtedly see the 'emergency arbitrator' being adopted by most arbitration regimes worldwide, giving parties the opportunity to seek interim solutions before an arbitral tribunal has been created.
There are, however, other novelties on the horizon that are beyond the limited scope of this article.

The future is bright

My crystal ball does have its limitations. Making longer term predictions would need the help of a higher power in answering some tough extra-arbitral questions, such as: What is the future of the world's geopolitics? When will civil and common law sufficiently increase their convergence? How much further will the technological revolution impact on justice? When will judicial courts have universal jurisdiction?
Most of these topics were discussed by some of the brightest arbitration minds at the recent International Arbitration Congress in Barcelona, and they concluded that there is a bright future for arbitration in front of us.
Finding more effective ways to meet the dispute resolution needs of an increasing array of human conflicts is therefore a very worthwhile pursuit.But as former French Ambassador Jules Jusserand said: "The future is not in the hands of fate, but in our hands." Therefore the future of arbitration will require effort, enthusiasm and encouragement from the arbitration community.

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