THE FUTURE OF COMMERCIAL LITIGATION: HOW NOT TO FALL OFF THE EDGE OF A FLAT WORLD

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I. Introduction

1 Many will recall the book written by Thomas Friedman about ten years ago in which he argued that the world is becoming flat.[1] While it would be premature to say the "flatteners" he identified have run their course, their impact is certainly more pronounced now than they have ever been. Individuals and corporations can access the world "farther, faster, deeper and cheaper than ever" before.[2] Transnational economic activity has reached unprecedented levels and cross-border disputes have acquired hitherto unseen levels of complexity.

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[1] Thomas L Friedman, *The World is Flat: The Globalized World in the Twenty-first Century* (Farrar, Straus and Giroux, 2005).

[2] Thomas L Friedman, "A Manifesto for the Fast World" *The New York Times* (28 March 1999) <https://www.nytimes.com/books/99/04/25/reviews/friedman-mag.html> (accessed 22 January 2016).

2 Throughout history, those who have failed to adjust to new paradigms have faced existential threats. We should not expect judges to be spared from this. In the context of commercial litigation I want to advance three trends in today's increasingly flat world that necessitate rethinking and retooling on our part if we are to remain relevant. If we chose to carry on with business as usual, instead of acting to face the future, I fear we may fall of the edge and society in general will be the worse for it.

3 Briefly, the three trends[3] are these:

(a) First, the flattened world is characterised by extensive transnational trade; and arbitration has grown in importance to become, arguably, the primary purveyor of justice in the resolution of disputes that stem from this. There are costs and consequences associated with privatised justice that we should be aware of.

(b) Second, the world has been flattened in large part owing to the force of technology and recent technological advances have either already caused, or will

[3] One American lawyer has said it should come as no surprise that the careers of judges are threatened and that America has been headed in that direction for decades. He identifies "[t]he Federal Arbitration Act, online dispute resolution, and a refusal to invest in court staffing" as having caused this situation (Monica Bay, "Will Tech Steal Judge Jobs?" *CODEX The Stanford Center for Legal Informatics* (1 May 2015) <http://codex.stanford.edu/will-tech-steal-judge-jobs/> (accessed 22 January 2016). I consider this an insightful comment that may be of global relevance—of course with the necessary adjustments to take into account such things as local legislation *etc*.

very imminently cause, seismic shifts in the way the legal profession is arranged and functions. While many of these advances will sustain rather than disrupt the work of judges, some will displace some types of judicial work. Additionally, judges will need to stay abreast of these technological changes to competently resolve increasingly complex and document intensive commercial disputes.

(c) Third, as the world flattens, we have seen a gradual convergence in substantive and procedural aspects of the law. This is an emerging trend, but I consider that convergence is not only inexorable, and within limits, it should be actively encouraged.

4 Allow me to examine each of these three trends in greater detail.

II. Growing importance of arbitration as a purveyor of justice in commercial disputes

5 I begin with the ever growing importance of arbitration in resolving commercial disputes and the costs associated with privatising the job of dispensing justice.

(a) The arbitrator as a legal entrepreneur

6 Let me start by briefly tracing the evolution of arbitration in the aftermath of World War II. That was a time marked by decolonisation and capital flows from former colonial powers to newly independent, developing countries. The parties supplying the capital were sceptical of the prospects of fair and impartial hearings in the courts of the host nation. Hence there was a demand for neutral, non-national adjudication of international business disputes. Arbitration met this demand and hence grew in prominence.[4]

7 In the early decades after the war, international arbitration remained different from litigation and was promoted as such. Arbitration was seen as "almost a kind of non-law".[5] Arbitrators were chosen not for their legal competence, but rather for their personal integrity and their understanding of commercial realities and technical matters. Arbitral decisions were based on "equity and practical needs instead of formal legal rules" and the system of precedent was not strictly adhered to. Proceedings were characterised by maximum flexibility and awards were

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[4] Julian D M Lew QC, "Achieving the Dream: Autonomous Arbitration" (2006) 22(2) Arbitration International 179 at pp 184–185; Russell Thirgood, "International Arbitration: The Justice Business" (2004) 21(4) Journal of International Arbitration 340 at p 349.

[5] Ralf Michaels, "Roles and Role Perceptions of International Arbitrators" in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014) (Walter Mattli & Thomas Dietz eds) at p 58.

fulfilled “as a matter of honour”. Put simply, arbitration provided “adequate decisions for the individual case”.[6]

8 From about the 1970s arbitration underwent a sea change. Whatever its precise genesis, arbitration saw at least two distinctive changes. First, proceedings became “judicialised”. This term has been used as a short-hand to refer, among other things, to:

(a) the introduction of litigation-style procedure to regulate arbitral proceedings;

(b) the tendency towards a more adversarial process; and

(c) greater reliance on traditional legal argumentation and on precedents in reaching decisions.

9 The term is also *unfairly* used to suggest that arbitration proceedings have become slower and more laborious. I say “unfairly” because in fact good commercial courts boast better rates of efficiency and speed.[7] In any event, in

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[6] Ralf Michaels, “Roles and Role Perceptions of International Arbitrators” in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014) (Walter Mattli & Thomas Dietz eds) at pp 58–59.

[7] Sundaresh Menon, Patron’s Address, Chartered Institute of Arbitrators: London Centenary Conference (2 July 2015) at paras 30–32 <http://www.supremecourt.gov.sg/docs/default-

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real terms, what it means is that arbitrators now function in many ways much like judges except that they are privately appointed and bound to the parties in respect of their fees in a way that a judge would not be. Accompanying this has been a shift towards the view of the arbitrator as a legal entrepreneur in the business of providing adjudicative services.[8] The injection of entrepreneurship has opened the market for arbitrators, which used to be dominated by a "small, closed group of self-regulating artisans", to more "open and competitive business".[9]

10 Against that brief sketch of arbitration's evolution, let me turn to the costs that might be associated with privatised justice.

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source/default-document-library/media-room/ciarb-centenary-conference-patron-address.pdf> (accessed 22 January 2016).

[8] Ralf Michaels, "Roles and Role Perceptions of International Arbitrators" in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014) (Walter Mattli & Thomas Dietz eds) at pp 58–59.

[9] Russell Thirgood, "International Arbitration: The Justice Business" (2004) 21(4) Journal of International Arbitration 340 at p 343.

(b) Costs of privatised justice

(1) Privatised justice is a business

11 Society generally holds its collective commitment to justice in high regard. Bracton, writing in the 13th century, said "the King should do justice…lest the King and the justices fall into the judgment of the living God because of an injustice".[10] More recently Professor Joseph Weiler has observed that in the 18th chapter of Genesis when Abraham pleads the cause of any righteous people in Sodom with God and asks, "Will the Justice of the whole Earth not Himself do justice?" Abraham was contending that "[God] Himself is subject to the strictures of justice" and the rule of law.[11] Simply put, all adjudicators must themselves adhere to these strictures.

12 One way we try to ensure this where national judges are concerned is by granting them tenure. This divests the judge of a financial interest in his judicial output. But this fundamental guarantor of justice and independence is absent in arbitration. Arbitrators offer a service and inevitably have a keen interest in being

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[10] *The Responsible Judge: Readings in Judicial Ethics* (John T Noonan Jr & Kenneth I Winston gen eds) (Praeger, 1993) at p 267.

[11] Joseph Weiler, "Abraham, Jesus, and the Western Culture of Justice" in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011). (Ulrich Fastenrath et al gen eds) at p 1319.

appointed to hear more cases. This creates two *potential* problems that can result in compromising the quality of justice they dispense.

(i) Repeat arbitrators

13 The first concerns the issue of repeat arbitrators. Arbitrators are privately contracted service providers. As with every other service provider they depend on repeat business. How can concerns be dispelled that arbitrators might become biased towards particular parties whether "out of the possibility of future financial gain, a sense of business loyalty, or simply an emotional attachment"?[12] To be fair, many arbitrators uphold the highest standards of integrity and are able to discharge their duties to the parties without regard to the possibility of future appointments. But, as the industry becomes more open, the prospect of arbitrators deciding cases based on financial motivations become more real.

14 This challenge is presently dealt with by requiring arbitrators to disclose recent past appointments by the same counsel or parties, giving the counter-party

[12] Kanaga Dharmananda & Raphaël de Vletri, "Impartiality and the Issue of Repeat Arbitrators" (2011) 28(3) Journal of International Arbitration 187 at p 189.

an opportunity to object to his appointment.[13] Such challenges of course will not automatically succeed.[14]

15 There have been past calls for a tighter disclosure regime.[15] But others have argued against such a move contending that it would be inappropriate to attempt to transpose notions of independence and impartiality that were originally developed in relation to judges because, it is said, "the very concept of party-appointed adjudicators is anathematic to traditional notions of judicial impartiality".[16] But, this suggests that party-appointed arbitrators are perhaps not expected to be truly impartial, which might be surprising, at least to some.[17]

16 Perhaps the problem is institutional and hence more intractable. While a tighter disclosure regime will certainly reduce the appearance, if not the actuality, of bias on the part of arbitrators, it will also result in more challenges against

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[13] IBA Guidelines on Conflicts of Interest in International Arbitration, Orange List rr 3.1.3 and 3.3.8.

[14] IBA Guidelines on Conflicts of Interest in International Arbitration, Part II paras 34.

[15] Fatima-Zahra Slaoui, "The Rising Issue of 'Repeat Arbitrators': A Call for Clarification" (2009) 25(1) 103.

[16] Kanaga Dharmananda & Raphaël de Vletri, "Impartiality and the Issue of Repeat Arbitrators" (2011) 28(3) Journal of International Arbitration 187 at p 198.

[17] For a discussion of the opposing arguments concerning the role of party-appointed arbitrators with respect to neutrality, see part II of *Olga K Byrne*, "A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel" (2003) 30 Fordham Urban Law Journal 1815.

nominees.[18] This in turn will contribute to delays and increase costs which are also integral factors that should be taken into account when assessing the *quality* of justice.

(ii) Over-commitment and lack of case management

17 Second, arbitrators may end up taking on more cases than they can reasonably handle. This inevitably delays the arbitral process. Additionally, owing to time constraints, this can result in a hands-off approach to managing the case that tends to be characterised by the issuance of a templated Procedural Order that schedules the matter for hearing based on a set of standard directions.[19] The parties come to the hearing with no idea of what might concern the tribunal and so prepare with more or less equal emphasis on each and every point.

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[18] Kanaga Dharmananda & Raphaël de Vletri, "Impartiality and the Issue of Repeat Arbitrators" (2011) 28(3) Journal of International Arbitration 187 at p 195.

[19] David W Rivkin & Samantha J Rowe, "The Role of the Tribunal in Controlling Arbitral Costs" (2015) 81(2) *Arbitration* 116 at p 125. I made this same point in my closing remarks at the Singapore International Arbitration Forum 2013 in the following terms:

> About 16 years or so ago I appeared in an international arbitration that was held before a prominent continental lawyer. I remember watching with admiration as he distributed a draft Procedural Order that had evidently been saved on his computer. The standard form of PO 1 has evolved since then and it seems clear from much of what was said today that in many respects, this is now passé. It is less the content of the PO than it is the danger that it has become the default for structuring every arbitration where the arbitrators are themselves very busy and so seem more concerned with lighting the fuse so that they can come back to it a year or two later when it is time to get to the business end of resolving the matter.

18 An overcommitted arbitrator may also end up improperly delegating tasks to arbitral assistants. The pending challenge against the largest arbitral award in history, the Yukos Award, alleges, among other things, that the tribunal did not personally fulfil its mandate because the arbitral assistant played a disproportionate role in analysing the evidence and legal arguments and in drafting the award. This has added fuel to an on-going debate on the permissible limits to which arbitral tribunals may rely on assistants and the nature of the duties that may properly be delegated to them.[20]

19 These are not new concerns, and practical ways of addressing them abound. But these have not been widely resorted to.[21] Just recently, David Rivkin, President of the International Bar Association and one of the leading arbitration practitioners in the world, again raised many of these issues.[22] From the parties'

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[20] Dmytro Galagan, "The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandatate?" *Kluwer Arbitration Blog* (27 February 2015) <http://kluwerarbitrationblog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/> (accessed 22 January 2016).

[21] Sundaresh Menon, "Standards in need of bearers: Encouraging reform from within", Chartered Institute of Arbitrators: Singapore Centenary Conference (3 September 2015) at paras 4145 <http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf> (accessed 22 January 2016).

[22] David W Rivkin, "A New Contract between Arbitrators and Parties" *HKIAC Arbitration Week Keynote Address* (27 October 2015) <http://sccinstitute.com/media/93206/1000973790v2-hkiac-keynote-address.pdf> (accessed 22 January 2016).

perspective, these shortcomings result in delays, inflation of costs and errors of fact and/or law all of which can affect the quality of justice.

(2) Matters that involve important questions of public interest are put outside the reach of constitutional actors

20 I move to the second societal cost of privatised justice. Briefly put, it causes matters that involve important questions of public interest to be placed outside the reach of traditional constitutional actors.

(i) The domain of commercial arbitration is expanding

21 The domain of commercial arbitration has expanded over time. At one stage, commercial arbitration was generally concerned only with claims arising directly out of a contract. Gradually, more and more claims based on statutes have become arbitrable.[23] Often, the statutes in question regulate economic activity involving significant public interest. For example, courts across a number of jurisdictions have considered anti-trust, intellectual property, consumer and

[23] Julian D M Lew QC et al, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 9-36.

securities disputes arbitrable.[24] One commentator has noted that by virtue of this, courts are ceding part of their role as "guardian[s] of public policy"[25].

22 The concern can be illustrated by reference to some controversial, sharply split decisions of the US Supreme Court in recent years which, it has been said, have "vastly expand[ed] the power of companies to impose and control arbitration procedures while tying the hands of state legislatures and courts".[26] *Rent-A-Center v Jackson*[27] concerned a free-standing, wide-ranging arbitration agreement that the parties had executed when the plaintiff was employed by the defendant. The arbitration agreement gave the arbitrator "exclusive authority to resolve any dispute relating to the [arbitration agreement's] enforceability". The plaintiff sued his former employer for race discrimination and retaliation. The defendant sought to have the proceedings dismissed and to compel the plaintiff to arbitrate his claim. The plaintiff opposed this on the basis that the arbitration agreement was unconscionable and hence unenforceable because, among other things, it was one-sided and required arbitration only of claims which an employee

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[24] *Arbitrability: International & Comparative Perspectives* (Loukas A Mistelis & Stavros L Brekoulakis gen eds) (Kluwer Law International, 2009) at paras 3-14–3-15.

[25] Russell Thirgood, "International Arbitration: The Justice Business" (2004) 21(4) Journal of International Arbitration 340 at pp 350–351.

[26] Thomas J Stipanowich, "The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration" 22 Am Rev Intl Arb 323 at p 325.

[27] 130 S Ct 2772 (2010).

was likely to bring but not those the employer would likely pursue. Additionally the plaintiff argued that the fee-splitting arrangement and the limitations on discovery called for by the arbitration agreement made it unconscionable. The Supreme Court by a 5-4 majority rejected the plaintiff's claims because none of his unconscionability challenges was specific to the delegation provision.

23 The upshot of *Rent-A-Center v Jackson* is that faced with a delegation provision, which is likely to become ubiquitous in employment and consumer contracts, a party seeking to avoid the arbitration agreement will not be able to rely on concerns that it might have about the general elements or structure of the arbitration agreement as a whole. It has been observed that this "significantly circumscribes the judicial policing function".[28]

24 In *AT&T Mobility v Concepcion*[29], another 5-4 decision, the US Supreme Court rolled back the scope of the doctrine of unconscionability which has been described as the "primary tool for judicial policing of overreaching" in standardised contracts between corporations and individuals.[30] The court reversed the decision

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[28] Thomas J Stipanowich, "The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration" 22 Am Rev Intl Arb 323 at pp 367–368.

[29] 131 S Ct 1740 (2011).

[30] Thomas J Stipanowich, "The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration" 22 Am Rev Intl Arb 323 at p 380.

of the Court of Appeals for the Ninth Circuit, which was based on a precedent of the California Supreme Court[31], and upheld the validity of an arbitration agreement contained in a cellular telephone contract that required claims to be brought in an "individual capacity". Hence, contracting parties were held effectively to have waived the right to file class action lawsuits in mandatory arbitration agreements. The precise reasons for the Supreme Court's decision need not detain us,[32] save to note that the court denied effect to the California law which held class-action waivers unconscionable, primarily on the basis that it undermined efficiency and expedition that was expected in arbitration agreements.[33] It has been observed that the court's commitment to efficiency and economy comes at a heavy price in that insofar as standard form contracts are concerned, where parties are not bargaining at arm's length, fairness calls for a degree of court supervision.[34]

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[31] *Discover Bank v Superior Court* 36 Cal 4th 148 (2005).

[32] See Gary Born, "The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors", *Kluwer Arbitration Blog* (1 July 2011) <http://kluwerarbitrationblog.com/2011/07/01/the-u-s-supreme-court-and-class-arbitration-a-tragedy-of-errors/> (accessed 22 January 2016) for discussion of the Supreme Court's reasons.

[33] Thomas J Stipanowich, "The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration" 22 Am Rev Intl Arb 323 at p 381.

[34] Thomas J Stipanowich, "The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration" 22 Am Rev Intl Arb 323 at pp 384–387.

25 These cases demonstrate an undeniable pro-arbitration slant and a gradual expansion of the domain of arbitration. And it has to be said the US is not alone in this.[35]

(ii) Investor-State arbitration impedes States' ability to regulate investment-linked activities

26 Let me also mention a separate aspect of this, which pertains to investor-State arbitration. This can impede the ability of States to regulate activities that may affect the interests of investors. In such cases, investors may potentially

[35] See in Singapore, *Sim Chay Koon and others v NTUC Income Insurance Co-operative Limited* [2015] SGCA 46 where the court held that the appellants' employment related statutory claims should first be put before the arbitral tribunal as per the parties' arbitration agreement and that the appellants should raise any relevant objections they had such as those in relation to the tribunal's jurisdiction, the validity of the arbitration agreement, or the arbitrability of their claims in that forum first. See also *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57 where the court construed the concept of "non-arbitrability" narrowly. In Hong Kong and China, see Alfred Wu, "Pro-arbitration decisions in Hong Kong and China" *Norton Rose Fulbright* (October 2015) <http://www.nortonrosefulbright.com/knowledge/publications/132591/pro-arbitration-decisions-in-hong-kong-and-china> (accessed 22 January 2016). In Brazil, see Arnoldo Wald *et al*, "Brazil as "Belle of the Ball": The Brazilian Courts' Pro Arbitration Stance (2011-2012)" (2013) 2 Les Cahiers de l'Arbitrage <http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/Wald_-_Brazil_as_Belle_of_the_Ball.PDF> (accessed 22 January 2016). In Malaysia see *Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application* [2011] 7 MLJ 539 and discussion of that case in Lim Wei Jiet, "Winner: Malaysia, the Future Hub of Arbitration in Asia" (15 April 2015) <http://ciarb.org.my/ymg/2015-04-winner.php> (accessed 22 January 2016). In Australia see *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 295 ALR 596* and *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109* and discussion of those cases in Kess Dovey & Daniel Allman, "Australian courts adopting pro-arbitration stance" (23 January 2014) <http://www.kwm.com/en/uk/knowledge/insights/australian-courts-adopting-pro-arbitration-stance-20140123> (accessed 22 January 2016).

bring host states to arbitration pursuant to the dispute resolution mechanism that is usually contained in Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs"). Chief Justice Robert French of Australia has observed that these tribunals may even be a "cut above the courts". This is because disgruntled investors can, and in fact have successfully used the arbitral process to challenge the decisions of apex courts by characterising them as acts of the host State that are in breach of its treaty obligations.[36] The spectre of constitutional office-holders' decisions being overridden or held illegal by private arbitrators might give us pause for thought.[37]

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[36] Chief Justice RS French AC, "Investor-State Dispute Settlement – A Cut Above the Courts?" *Supreme and Federal Courts Judges' Conference* (9 July 2014) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf> (accessed 22 January 2016); ***Saipem SpA v The People's Republic of Bangladesh*** (ICSID Case No ARB/05/07) ("*Saipem* case"), Award (30 June 2009); *Frontier Petroleum Services v Czech Republic* (UNCITRAL, 12 November 2010); *ATA Construction, Industrial and Trading Co v Jordan* (ICSID Case No ARB/08/2), Award (18 May 2010)

[37] See my discussion of the *Saipem* case and this point more generally at paras 5 to 15 of Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" *Keynote address at the 4th Annual Singapore International Investment Arbitration Conference* (3 December 2013) <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/international-investment-arbitration-in-asia---the-road-ahead-on-3-december-2013-(final-031213---clean).pdf>(accessed 22 January 2016)

(iii) Other consequences of the expanding domain of commercial arbitration and the reach of investor-state arbitration

27 And there are other consequences that flow from the expanding scope of arbitration. First, arbitration can encroach upon the ability of States to implement uniform, centrally-decided, socio-economic policies on politically significant matters such as employee, consumer and environmental protection. Arbitral tribunals which dispense private justice in these areas in relation to individual cases, displace the role that courts have traditionally played in deciding such matters for the whole polity. This has implications on how non-parties would otherwise adjust their behaviour in the shadow of the law.

28 Second, privately contracted arbitrators may reach problematic decisions on the sorts of issues I have mentioned because of the financial overtones affecting their relations with one of the parties. As I said earlier, there are a great many respected arbitrators of the highest integrity, but as arbitration becomes an open industry, the potential for failure will rise significantly. *The New York Times* recently ran an extensive two-part series. Though it has to be said that the reporters relied heavily on anecdotal evidence entirely in an American setting, nonetheless it highlights the seamy underbelly of the arbitration of contract claims

in such areas as employee and consumer protection.[38] The article reports that more than three dozen arbitrators who were interviewed described how they felt beholden to the companies that appointed them. One particularly egregious example concerned a sex discrimination claim brought by a doctor against a medical group that had dismissed her. The article enumerates various procedural lapses and instances of apparent or actual bias on the part of the arbitrator including the fact that the award which went against the claimant contained passages pulled, verbatim, from the medical group's legal briefs. The recount of the claimant's experience ends with the following statement:

> "It took away my faith in a fair and honourable legal system," said [the claimant] who is still paying off $200,000 in legal costs seven years later.

The point on legal costs tucked away at the end of that sentence might give rise to separate concerns about the efficiency of arbitration.

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[38] Jessica Silver-Greenberg & Robert Gebeloff, "Arbitration Everywhere Stacking the Deck of Justice" *The New York Times* (31 October 2015) <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0> (accessed 22 January 2016); Jessica Silver-Greenberg & Michael Corkery, "In Arbitration, a 'Privatization of the Justice System'" *The New York Times* (1 November 2015) <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0> (accessed 22 January 2016).

(3) Loss of the public goods that adjudication in national courts produces

29 The third downside of privatised justice is that it results in society losing some of the public good that come out of adjudication in the national courts.

30 I refer here to the precedents and legal rules that we generate,[39] which establish "norms of behaviour" for the whole community.[40] In contrast, arbitral tribunals settle disputes between private parties. Their concern is not to establish norms of behaviour for the community or to progressively develop the law. Indeed, many awards are not published because of the significant party interest in confidentiality which is an important factor that draws parties to arbitration in the first place.[41] Hence, the privatisation of justice tends to dry up the rich, behaviour-moulding stream that emanates from the courts.[42]

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[39] Landes & Posner, "Adjudication as a Private Good" (1978) 8 Journal of Legal Studies 235.

[40] Jack B Weinstein, "Some Benefits and Risks of Privatization of Justice through ADR" (1996) 11 Ohio State Journal on Dispute Resolution 241 cited in Craig Loveless, "The Dangers of Privatising Civil Justice through Mandatory ADR" (2003) UCL Jurisprudence Rev 368 at pp 377379.

[41] Niels Petersen, "Book Review: Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press, 2014) & Valériane König, *Präzedenzwirkung internationaler Schiedssprüche: Dogmatisch-empirische Analysen zur Handels- und Investitionsschiedsgerichtsbarkeit [The precedential effect of international arbitral awards: Doctrinal and empirical analyses of the Commercial and Investment Arbitration]* (Berlin: Walter de Gruyter, 2013)" (2014) 25(4) Eur J Int Law 1205.

[42] Thomas E Carbonneau, "The Revolution in Law Through Arbitration (Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture)" (2008) 56 Cleveland State Law Review 233 at p 267.

31 Before I leave the topic of arbitration, I must caution against a knee-jerk reaction, judicial or legislative, to narrow the scope of arbitration indiscriminately. In my view arbitration must and indeed will continue to play an important role, alongside litigation in national courts, in resolving transnational disputes. The system of arbitration could use some adjustments and improvements, not wholesale abandonment. The reform of arbitration must come from within the industry. But at the same time, national courts must recognise that they too have an important role to play in the resolution of transnational commercial disputes. I will shortly suggest a number of ways through which this is already being recognised and acted upon.

III. Developments in information technology will change judicial work

32 I leave the topic of arbitration and the various costs of privatised justice and move to the second trend I identified earlier. This concerns the exponential growth in information technology.

33 The term “exponential growth” is so frequently used imprecisely that its real meaning is lost on many. Richard and Daniel Susskind suggest the following thought experiment in their latest book for us to truly appreciate what it actually means. They tell us to start by imagining an ordinary sheet of paper of

unremarkable weight. Then, we are to imagine repeatedly folding this sheet in half. In their words:

> After four folds, it will be as thick as a credit card. … If it could be folded eleven times, it would be as tall as a can of Diet Coke. After ten more folds…it would be taller than Big Ben. After a further ten folds, it would reach into outer space. After twelve more folds, it would reach the moon. And, if [we] could fold this single piece of paper 100 times, it would create a wad over 8 billion light years in thickness.[43]

34 This seems incredible at first blush; but it follows from the fact that each new iteration is equal to and so doubles all that has been achieved until and including the previous iteration. In 1965, Gordon Moore, the co-founder of Intel, predicted that the processing power of computers would grow at such an exponential rate with processing power doubling every two years or so. Amazingly, his prediction has come to pass and is still holding strong. If Moore's Law continues unabated, by 2020, an average desktop computer will have roughly the same processing power as a human brain; and by 2050 "one thousand dollars of computing will exceed the processing power of all human brains on Earth"![44] All this growth has brought about systems and machines that are increasingly capable of performing

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[43] Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015) at pp 156-157.

[44] Raymond Kurzweil, *The Singularity is Near* (2005) cited in Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015) at p 157.

tasks that were once thought of as the exclusive preserve of humans. Richard and Daniel Susskind predict that "[j]obs will disappear, ways of life will be ended and hard-earned qualifications will be rendered defunct" as a result of these machines.[45]

35 One task that machines of this sort will be able to perform is particularly relevant for our purposes. They can "delve into our reserves of past experience"[46], "grasp patterns and glean insights inaccessible to the human mind"[47], if only because of the sheer volume of materials involved, and make accurate predictions in a way that mimics human intelligence. Researchers have used various terms such as "machine learning, neural networks, big data, cognitive systems, or genetic algorithms" to refer to this capability.[48] By whatever name, it represents a breakthrough in Artificial Intelligence.

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[45] Richard Susskind & Daniel Susskind, "No lawyers: my laptop will see your laptop in court" The Sunday Times (11 October 2015) <http://www.thesundaytimes.co.uk/sto/newsreview/features/article1617529.ece> (accessed 22 January 2016).

[46] Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015) at p 160.

[47] Jerry Kaplan, *Humans Need Not Apply: A Guide to Wealth and Work in the Age of Artificial Intelligence* (Yale University Press, 2015) at p 4.

[48] Jerry Kaplan, *Humans Need Not Apply: A Guide to Wealth and Work in the Age of Artificial Intelligence* (Yale University Press, 2015) at p 5.

36 Early efforts to enable machines to behave in an apparently intelligent fashion primarily used what is known as the "symbolic systems approach" to AI. This required programmers to painstakingly mine the knowledge of human experts and then "hardwire their knowledge and experience into a system".[49] The alternate approach to AI, known as "neural networking" did not take off until recently. This only requires the programmer to present sufficient examples to the computer of how a decision is made without having to spell out the problem-solving process. To put it another way, rather than telling the computer *how* to solve the problem, it involves the programmer showing the computer *what* he has been doing. This required too much memory and data processing capacity for early generation computers to handle but that is no longer a constraint thanks to the exponential growth in processing power and memory and also because the Internet provides "enormous troves of examples" for these systems to learn from.[50]

37 Big Data techniques are already being used in the field of medicine, to provide diagnoses from symptoms; and in law, to analyse databases of decisions

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[49] Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015) at p 186.

[50] Jerry Kaplan, *Humans Need Not Apply: A Guide to Wealth and Work in the Age of Artificial Intelligence* (Yale University Press, 2015) at p 29.

by judges and regulators to predict outcomes of cases.[51] The Lexis Advance MedMal Navigator uses this technology to offer lawyers predictions on potential medical-malpractice cases so as to enable them to quickly determine whether a case is worth taking on. And Lex Machina does for patent lawyers what MedMal Navigator does for medical-malpractice attorneys. It "webcrawls" the internet for data from all known, reliable sources of patent law and uploads these into a master database and then predicts how a new patent will fare based on the data collated. Some of these systems can even take into account a number of variables such as the ruling history of the judge who will likely decide the case. Yet another product, Verdict & Settlement Analyzer, uses the same technology to trawl through case law to offer attorneys advice on whether a motion will be approved or denied. It also provides general counsel advice on whether a matter should be handled internally or by outside counsel.[52]

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[51] Richard Susskind & Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015) at p 163; Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at pp 4849.

[52] Joe Dysart, "The Dawn of Big Data: How lawyers are mining the information mother lode for pricing, practice tips and prediction" *ABA Journal* (1 May 2013) <http://www.abajournal.com/magazine/article/the_dawn_of_big_data/> (accessed 22 January 2016).

38 Some forms of technology assisted review ("TAR") tools that e-discovery vendors offer also employ Big Data techniques.[53] TAR refers to a computerised system of classifying documents in a collection as either meeting—or not meeting—certain criteria.[54] In the context of e-discovery, TAR is typically used to identify documents that are "responsive to a [particular] request for production, or to identify documents that are subject to privilege or work-product protection".[55]

39 Put simply, TAR is modern technology's answer to a problem of its own creation. Technology has brought about an explosion in the volume of information that we produce and keep. When parties are drawn into litigation, they may well be required to give discovery of relevant electronically stored information ("ESI") in their possession, custody or power. Lawyers have traditionally turned to keyword searches to identify relevant ESI. But such information does not lend itself easily to such keyword searches because, as Andrew Peck, a US Magistrate Judge and a leading judicial scholar on TAR puts it:

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[53] The literature on TAR commonly use the term "machine learning" when explaining the technology involved. As I mentioned at [36] above, this is simply another term which is used interchangeably with "Big Data".

[54] Maura R Grossman & Gordon V Cormack, "A Tour of Technology-Assisted Review" at p 1 (draft available at <http://www.wlrk.net/docs/GrossmanCormackABAPerspectivesBookChapter1ATourofTARMay2015.pdf> (accessed 22 January 2016)

[55] Maura R Grossman & Gordon V Cormack, "Grossman-Cormack Glossary of Technology-Assisted Review" (2013) Fed Courts L Rev 7 at p 19

> Lawyers are used to doing keyword searches in "clean" databases, such as Westlaw and Lexis, which use full sentences, full words (not abbreviations), and largely the same words to describe the same concept. E-mail collections are not clean databases. People use different words to describe the same concept; even business e-mails are informal, rampant with misspellings, abbreviations and acronyms.[56]

40 Broadly speaking there are two approaches to TAR. The first employs "rule bases". A rule base comprises a large set of rules, drafted by subject matter experts, that are used to classify documents as meeting—or not meeting—the relevant criteria. This has close affinity with the early approach to AI which I have spoken of. The second TAR method employs Big Data techniques. Under this method, a computer "learning algorithm" infers "from example documents, characteristics that indicate relevance or non-relevance".[57] It then extrapolates from what it has learnt to classify the complete collection. One variant of this is called "continuous active learning" ("CAL"). Under this method, "review and training continue in iterative cycles" resulting in the algorithm itself learning and

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[56] Andrew Peck, "Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?" *Legaltech news* (1 October 2011)

[57] Maura R Grossman & Gordon V Cormack, "A Tour of Technology-Assisted Review" at p 2 (draft available at <http://www.wlrk.net/docs/GrossmanCormackABAPerspectivesBookChapter1ATourofTARMay2015.pdf > (accessed 22 January 2016)

being refined over time.[58] Both TAR methods have been shown to be able to "equal or exceed the effectiveness of human review".[59] Additionally, it has been shown that CAL produces "*substantially* higher recall and higher precision"[60] than several other information retrieval methods.TAR thus has the potential to reduce the man hours required to manually sort out documents, and will ultimately lower legal costs associated with discovery. Unsurprisingly, TAR has been gaining prominence in litigation and has received judicial endorsement in both the UK and the US.[61]

41 Other AI-based problem-solving tools have also ventured into the legal field. For example, IBM's Watson, famous for its participation in the the US TV quiz show *Jeopardy!*, has since evidently "gone to law school". IBM's Watson can understand complex questions spoken to it in natural language, look through a

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[58] Maura R Grossman & Gordon V Cormack, "A Tour of Technology-Assisted Review" at pp 15–16 (draft available at <http://www.wlrk.net/docs/GrossmanCormackABAPerspectivesBookChapter1ATourofTARMay2015.pdf > (accessed 22 January 2016)

[59] Maura R Grossman & Gordon V Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Manual Review (2011) 17 Rich J L & Tech.

[60] Maura R Grossman & Gordon V Cormack, "A Tour of Technology-Assisted Review" at p 16 (emphasis added) (draft available at <http://www.wlrk.net/docs/GrossmanCormackABAPerspectivesBookChapter1ATourofTARMay2015.pdf > (accessed 22 January 2016)

[61] See for *eg, Irish Bank Resolution Corporation Ltd and others v Quinn and other* [2015] IEHC 175; *Rio Tinto plc v Vale SA et al* (2015) WL 4002286 (S D N Y) at p 2; and *National Day Laborer Organizing Network v U.S. Immigration & Customs Enforcement Agency* (2012) 877 F.Supp.2d 87 (S D N Y) at 109.

vast database of stored documents, draw conclusions and offer solutions in natural language.[62] A new service-provider called ROSS Intelligence builds on IBM's Watson to help lawyers do legal research.[63] Lawyers can ask ROSS legal questions in plain language and ROSS promises to "read[] through the *entire body of law* and return a cited answer and topical readings from legislation, case law and secondary sources".[64] Dentons, the world's largest law firm, has recently signed a deal with ROSS Intelligence.[65]

42 It therefore can no longer be thought outlandish to expect that litigation lawyers handling document-intensive, complex commercial disputes will soon use Big Data to sieve through mounds of paper, identify relevant documents and then identify trends and insights that might not otherwise be obvious to their human assistants. And the case theories they run before judges will increasingly be informed by insights gleaned from these services. Additionally, they will also have recourse to AI-based problem-solving tools to assist with legal research. By and

[62] "Watson takes the stand", *The Atlantic* <http://www.theatlantic.com/sponsored/ibm-transformation-of-business/watson-takes-the-stand/283/> (accessed 22 January 2016).

[63] Kim-Mai Cutler, "YC's ROSS Intelligence Leverages IBM's Watson to Make Sense of Legal Knowledge" *TechCrunch* (27 July 2015) <http://techcrunch.com/2015/07/27/ross-intelligence/> (accessed 22 January 2016).

[64] <http://www.rossintelligence.com/> (accessed 22 January 2016).

[65] "I say, IBM Watson – Dentons tech investment arm team up with IBM on startup platform and signs AI digital adviser ROSS Intelligence" (6 August 2015) <http://www.legaltechnology.com/latest-news/i-say-ibm-watson-dentons-tech-investment-arm-teams-up-with-ibm-on-startup-platform-and-signs-ai-digital-adviser-ross-intelligence/> (accessed 22 January 2016).

large, these technological advances will sustain rather than disrupt the work of judges. But it follows that courts will have to invest in these services and judges must stay abreast of developments if they are to continue to play an involved and effective role in managing complex commercial cases.

43 I should finally touch on one other category of new technological services that will likely become the dominant way of resolving all but the most complex and high-value disputes.[66] I am referring to online dispute resolution or "ODR" services where the process of formulating a solution to a dispute is entirely automated with only a residual role for human intervention. This is already being used to resolve the approximately 60 million disputes that arise amongst eBay users yearly.[67] In a variant of this service, Cybersettle, which was launched in 1998, has since handled over 200,000 claims with a combined value in excess of $1.6 billion. It uses a patented, automated process known as "double-blind-bidding".[68] Under this system, a claimant and a defendant each confidentially submit the highest and lowest settlement figure that would be acceptable to them. A settlement is

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[66] Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future (Oxford University Press, 2013) at pp 93 and 102

[67] <http://pages.ebay.com/services/buyandsell/disputeres.html>; Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 102.

[68] Diane Levin, "Cybersettle makes the case for resolving disputes online" *Mediation Channel* (20 February 2008) <http://mediationchannel.com/2008/02/20/cybersettle-makes-the-case-for-resolving-disputes-online/> (accessed January 22 2016)

achieved when the two ranges overlap, with the final figure usually being a split down the middle.[69]

44 I believe such ODR services should be encouraged. They free up judicial resources for complex and high-value judicial work that machines hopefully will not be able to handle. Additionally, they allow disputants to simply, quickly and cheaply resolve their disputes.

IV. Gradual convergence in law and judicial practice

45 The final trend is the move towards convergence in substantive areas of law and judicial practice. As I noted earlier, this is still an emerging trend. But its presence is unmistakable. It may be traced in part to the widespread rise of arbitration which served in part to bring civil and common lawyers into direct contact with one another; and in part to the prevalence of connective technology which has helped to break down many barriers and promote the sharing of knowledge, information and materials. The IBA Rules on the Taking of Evidence is a prime example of an instrument that seeks to breach the gulf between the common and civil law approaches to evidence; and the document production

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[69] Richard Susskind, "The Internet in the Law: Transforming Problem-Solving and Education" in *Society & The Internet: How Networks of Information and Communication are Changing our Lives* (Oxford University Press, 2014) (Mark Graham & William H Dutton eds) at p 275.

rules of the Singapore International Commercial Court are modelled on this. There has also been growing recognition that the resolution of some types of disputes would benefit from judges playing a more involved role in the fact-gathering process—a traditional hallmark of the civil law tradition—rather than leaving fact-finding entirely to the cut and thrust of the adversarial process.[70]

46 The move towards convergence may also be attributed to other factors. Many areas of law, such as intellectual property and anti-trust, are founded upon well-established economic principles that hold true, to some degree at least, across many legal systems. This encourages courts and lawyers to consult decisions from other jurisdictions for inspiration as well as for guidance. Aside from this, there are more interactions between judges on a personal level and also formal platforms that encourage interactions among judges. These realities open the possibility of judges taking account of foreign legal ideas and experience in their work.[71]

47 There are several examples of such interconnections between courts. To cite just a few: the Supreme Court of Singapore entered into a Memorandum of

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[70] John H Langbein, "The German Advantage in Civil Procedure" (1985) 52 The University of Chicago Law Review 823 at pp 858–862

[71] Elaine Mak, *Judicial decision-making in a globalised world: a comparative analysis of the changing practices of western highest courts* (Hart Publishing, 2013) at p 5.

Understanding ("MOU") with the Supreme Court of New South Wales in 2010, under which we may refer questions of New South Wales law to the New South Wales Supreme Court and *vice versa*. Our New South Wales counterparts and we have each since signed a similar MOU with the New York state courts. Periodic dialogues take place between the commercial judges of Hong Kong, New South Wales and Singapore where cutting-edge issues in commercial litigation are discussed.[72] And the judiciaries of ASEAN have established a joint platform for judicial training and development.[73] In family law, the Hague Conference has initiated a system in which judges of countries that have ratified the Hague conventions on family law matters, such as the Convention on the Civil Aspects of International Child Abduction, gather for periodic judicial seminars. This has led to the establishment of a judges' network with its own newsletter.[74] In my view, these are encouraging moves and we should be looking to develop and deepen inter-jurisdictional connections.

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[72] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" (2014) 26 SAcLJ 23 at paras 62–63.

[73] Sundaresh Menon, "Standards in need of bearers: Encouraging reform from within", Chartered Institute of Arbitrators: Singapore Centenary Conference (3 September 2015) at para 26 <http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf> (accessed 22 January 2016).

[74] Catherine Kassedjian, "Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society" (2005) 29 Melb U L Rev 765 at p 794; <https://www.hcch.net/en/instruments/conventions/publications1/?cid=24&dtid=46>; <https://www.hcch.net/en/publications-and-studies/details4/?pid=4823> (accessed 22 January 2016).

48 Convergence should be encouraged for a number of reasons. First, convergence in substantive areas of law, to the extent it is possible, reduces the incentive for forum shopping. Second, greater legal consistency across jurisdictions will lower the costs for parties operating in multiple jurisdictions. This in turn encourages the cross border movement of capital. Third, judicial practices are often perfected through a long drawn-out process of experimentation and refinement. No one jurisdiction can possibly have a monopoly on all best practices simply because of the time that it takes to develop and perfect these. Therefore, it is only sensible that courts look beyond their own borders with a view to importing practices that have proven effective elsewhere. Lastly, such convergence should in time extend to developing a broader and more robust appreciation for and fidelity to the rule of law.

V. How not to fall off the edge

49 Let me conclude this address by offering some thoughts on how we can stay relevant in the face of these trends. I suggest three broad responses that we have initiated in Singapore.

(a) Judiciaries should leverage technology

50 Let me begin with technology which is something that I believe we must embrace. In Singapore, we established a "Courts of the Future Taskforce" last year, consisting of judges, court administrators and technology experts and its mandate was to study how we could leverage on technology innovatively. Allow me to share one vision of the courts of the future:

(a) First, some variant of the AI-based technology tools that are used to predict case outcomes could be incorporated to enable parties, especially litigants-in-person, to get an indication of how their disputes in relatively simple matters might be decided before the actual hearing of the matter. This could save both costs and precious judicial resources by promoting settlements.

(b) Second, ODR services could be incorporated to handle less complex matters. These services might not necessarily be entirely automated and could continue to involve a judicial officer in the backroom deciding cases based on paper submissions. But the parties' attendance could be dispensed with as a general rule, hence significantly reducing costs.

(c) Third, online platforms could be created to allow those who have committed regulatory offences punishable by fines, to plead guilty online.

(d) Fourth, access to justice could be enhanced by creating portals that incorporate AI-based legal problem solving tools like ROSS. Users could ask questions about the law or legal proceedings or legal processes or even administrative matters such as scheduling hearings or conferences using natural language and the systems in turn could respond with easily digestible answers free of legalese.

(e) Fifth, judges could use Big Data to process and analyse materials in complex cases. I believe the potential for this is substantial. The sheer volume of materials placed before judges in complex disputes is staggering. It will become increasingly challenging for judges to digest all the materials placed before them. But yet they will have to do precisely this to render quality decisions. Trial judges are bound to consider the totality of the evidence including contemporaneous objective documentary evidence in making factual findings. Indeed, the best decisions on the facts are those that assess which of the competing case theories provides the best fit for the known objective facts and the documentary evidence. Before too long, smart machines

should be able to undertake a preliminary analysis of the material and provide a reasoned identification of the best few theories that the judge can then assess.

51 The courts of the future will likely operate in ways that are dramatically different than today's courts. Our task is to recognise this reality and start thinking about how we might embrace technology so that it is developed and deployed for our benefit. This requires a change of mindset and a willingness to work with technology experts today so that we might be ready for tomorrow.

(b) Countries should create specialised commercial courts

52 Second, I expect we will see greater use of specialised commercial courts with bespoke procedures for the resolution of international commercial disputes.

53 I mentioned earlier that arbitration first grew in prominence because parties engaged in transnational disputes were doubtful that they would receive hearings that were conducted fairly and expeditiously in local courts before sophisticated judges. In a sense, users migrated to arbitration because of the actual or perceived shortcomings of national courts, and some of these persist.

54 I believe that dedicated commercial courts can address many of the problems associated with litigation in national courts as well as those associated

with arbitration. Models of such courts already exist in the form of the London Commercial Court, the Delaware Court of Chancery, the Commercial Court of the Supreme Court of Victoria and the Dubai International Financial Centre ("DIFC") Courts, just to name a few. Although of a more recent vintage, the Singapore International Commercial Court ("SICC") stands in this group.

55 Adjudication in such purpose-built national courts brings about benefits which arbitration does not:

(a) First, disputes are decided by judges who are not appointed by the parties and also have no financial interest in how long the case runs.

(b) Second, these judges are supported by the administrative apparatus of the court to monitor, manage and move cases along expeditiously. Moreover, judges are themselves sensitive to the importance of this.

(c) Third, judges may exercise coercive powers to join third parties to proceedings even though such parties might not have consented or submitted to the court's jurisdiction.[75] This is particularly important

[75] For the SICC, see O 110 r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). For the DIFC Courts, see rule 20.7 of the Rules of the DIFC Courts.

given the typical multi-party contracting arrangements we frequently see in transnational cases.

(d) Fourth, the availability of appeals means that errors of fact and/or law can be corrected. These usually occur at first instance because the issues in dispute have not been sufficiently distilled and crystallised. Issues are distilled and sharpened as a case progresses through the appellate structure. The possibility of appeals can be a particular advantage if appeals are disposed of expeditiously.

(e) Fifth, the availability of appeals may paradoxically also work to keep costs down by countering the impulse that parties demonstrate towards front-loading in arbitral proceedings.

(f) Lastly, adjudication in national courts can result in published judgments that are not only determinative of the dispute between the parties but will also be instructive for members of the wider business community.

56 The SICC promises its users some benefits beyond these and I mention just two of them. First, with an emphasis on flexibility, parties may by consent agree

that evidential rules other than those in Singapore's Evidence Act[76] shall be applicable.[77] Parties can also apply to have their cases heard *in camera*. The court will consider any agreement between the parties and whether the case has a "substantial connection" to Singapore in deciding whether that should be allowed.[78] Additionally, SICC cases are subject to simplified discovery rules as I mentioned. There is no process of "general discovery" in the SICC.

57 Second, the SICC is international not just in its jurisdiction, but in its outlook and make-up as well. It is staffed not only by our own judges but also jurists from several leading Commonwealth *and* civil law jurisdictions.[79] As a matter of interest, the second case which is now going through the SICC is being heard by Justice Paddy Bergin of the Supreme Court of New South Wales. Additionally, foreign lawyers enjoy relatively liberal rights of audience before the SICC. The involvement of foreign judges and counsel in the proceedings also makes it

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[76] (Cap 97, 1997 Rev Ed).

[77] O 110, r 23(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

[78] O 110, r 30(1) and (2) read with O 110, r 1(2)(*f*) (Cap 322, R 5, 2014 Rev Ed).

[79] Sundaresh Menon "International Commercial Courts: Towards a Transnational System of Dispute Resolution" *Opening Lecture for the DIFC Courts Lecture Series 2015* at para) 28 <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (accessed 22 January 2016)

possible for the court to decide questions of foreign law on the basis of submissions instead of proof.[80]

58 Arbitration practitioners need not worry that the creation of such international commercial courts will "cannibalise" their business.[81] Indeed, they need look only to London which has what is arguably the world's most successful commercial court and is also a major centre for arbitration.[82]

(c) We should encourage convergence

59 Allow me to move to the third broad response, namely convergence. I have already mentioned the emergence of formal platforms for judges from multiple jurisdictions to interact.

60 But Judges cannot be expected to shoulder the work of bringing about convergence on their own. Practitioners, academics and business people must play their part if meaningful and effective convergence is to occur. We launched the Asian Business Law Institute ("ABLI") in Singapore last month to facilitate

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[80] O 110, r 25 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

[81] Quentin Loh J, *Opening Address of the Regional Arbitral Institutes Forum Conference 2014* <http://www.siarb.org.sg/pdf/SIArb%20September%20Issue%20Newsletter%202014.pdf> (accessed 22 January 2016)

[82] Michael Hwang, "Commercial courts and international arbitration—competitors or partners?" (2015) 31 Arbitration International 193 at p 197.

precisely this.[83] The ABLI is a permanent research institute which, at its heart, is concerned with stimulating convergence in the region. It aspires to do for Asia what other institutes such as the UNCITRAL, the European Legal Institute and American Law Institute ("ALI") and have done elsewhere.

61 This has been an especially timely step in the light of recent watershed events that position Asia on the precipice of an unprecedented degree of inter-connectivity. Among the key developments, at the turn of the year, we witnessed the formation of the ASEAN Economic Community ("AEC") which transforms the 10-member ASEAN grouping into a single market and production base. The AEC promises to be an important boost to the competitiveness and connectivity of ASEAN as a whole.[84] Second, China officially launched the Asian Infrastructure Investment Bank ("AIIB") in June 2015 to meet the need for infrastructure developments in Asia. The AIIB is an important component in China's "One Belt, One Road" regional infrastructure plan which aims to expand rail, road and maritime transport links between China, central Asia, the Middle East and

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[83] Sundaresh Menon, "Doing Business Across Asia: Legal Convergence In An Asian Century" (21 January 2016)

[84] Jacqueline Woo, "6 things you need to know about ASEAN Economic Community" *The Straits Times* (13 October 2015) <http://www.straitstimes.com/business/6-things-you-need-to-know-about-asean-economic-community> (accessed 22 January 2016)

Europe.[85] Lastly, representatives from a dozen countries in the Asia-Pacific rim concluded the Trans-Pacific Partnership ("TPP") trade deal in October 2015. The TPP promises to slash tariffs for some important industries, but its particular promise lies in the elimination of non-tariff barriers, such as onerous customs procedures and buy-domestic rules for government agencies, and in the liberalisation of trade in services.[86]

62 The law has been described as the handmaiden of commerce. As economic integration continue apace, the law must progressively be harmonised lest it becomes, in the words of the late Lord Bingham, "an adversary, a fetter, or an irritant" to commerce.[87]

63 Looking ahead, I believe we will go beyond harmonisation in areas of law and judicial practice. Eventually, we could reach a stage where joint-hearings might be conducted involving different national courts. This will not be an entirely novel idea. The Guidelines for Court-to-Court Communication in Cross-border

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[85] Gabriel Wildau & Charles Clover, "AIIB launch signals China's new ambition" *Financial Times* (29 June 2015) <http://www.ft.com/cms/s/0/5ea61666-1e24-11e5-aa5a-398b2169cf79.html#axzz3xSrI3H3W> (accessed 22 January 2016)

[86] "A serviceable deal: TPP is intended to spark a boom in trade in services, but it will be decades in the making" *The Economist* (14 November 2015) <http://www.economist.com/news/finance-and-economics/21678253-tpp-intended-spark-boom-trade-services-it-will-be-decades> (accessed 22 January 2016)

[87] Tom Bingham, "The Law as the Handmaid of Commerce" in *Lives of the Law: Selected Essays and Speeches: 2000-2010* (Oxford University Press, 2011) at p 295.

Cases promulgated by the ALI already contains a provision governing the conduct of joint hearings.[88] The Guidelines state that in such joint hearings, each court may simultaneously hear the proceedings in the other court. The material placed before one court is made available to the other. Counsel appearing before one court, can with the foreign court's permission, appear there as well, and courts are permitted to communicate with each other in advance of and subsequent to the hearing with or without counsel being present. Joint hearings have already been conducted by Canadian and US courts in restructuring applications.[89] At the Fourth Global Forum on Intellectual Property held in Singapore in 2013, Chief Judge Randall Rader of the US Court of Appeals for the Federal Circuit spoke about an IP case in which identical results were reached in a patent dispute that was going on in the US, UK and Germany because the national judges discussed the ways in which they might reach a common result, subject to the limitations of their national laws.[90] Developments of this sort exemplify the collective endeavour

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[88] See Guideline 9 <http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf> (accessed 22 January 2016).

[89] *Eg*, in *PSINet Ltd. et al*, Court File No 01-CL-4155 ("*PSINet* case"); for more details on the *PSINet* case see Alex L MacFarlane & Lisa H Kerbel Caplan, "Harmonizing Cross-Border Restruturing" <http://www.mcmillan.ca/Files/AMacFarlane_LKerbelCaplan_HarmonizingCrossBorderRestructuring_0405FR.pdf> (accessed 22 January 2016).

[90] Neil Wilkof, "Can Patent Judges "Colloquy" Themselves to Greater Uniformity?" (30 August 2013) <http://ipkitten.blogspot.sg/2013/08/can-patent-judges-colloquy-themselves.html> (accessed 22 January 2016)

of the legal systems of the world to provide adjudicative services that are fit-for-purpose in the 21st century.

VI. Conclusion

64 ROSS Intelligence, the "intelligent" legal problem solving service provider prominently displays the following quotation from President John F Kennedy on its website

> Change is the law of life and those who look only to the past or present are certain to miss the future.

I believe that the caution not to become transfixed with past or present ways of doing things is as much applicable to judges and lawyers as it is to anyone else. Let us not "miss the future"; rather, we must choose instead to be equipped to meet it successfully.

65 It has been a great honour for me to deliver the keynote at this conference. Thank you. I wish you all a wonderful conference!