

JUDGING IN AN INTERNATIONAL WORLD

By

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It is an honour to be here today with such a distinguished panel.² It has also been a pleasure to renew my links with the International Pacific Bar Association (the IPBA) and the wonderful IPBA annual conferences, which have been going from strength to strength, like the organisation itself.³ It is also, as always, a pleasure to be in Singapore.

Today I wish to reflect upon two matters that are pertinent to current members of the judiciary in light of the increasing influence that globalisation has on our national courts. I have chosen to explore how international influences can affect our role as judges and also the interplay between courts and arbitral tribunals in commercial dispute resolution.

I turn first to the question on what it means to be a judge in a national court that operates in an international world. While judicial independence is, of course, jealously guarded by all properly functioning judiciaries and is an essential part of the rule of law,⁴ it is still clear that the judiciary is one branch of the state and thus plays an important role in the state's identity and functioning.⁵ Accordingly, as we now live in an increasingly globalised world, national judiciaries face a tension, as do all branches of government, between the need to adapt to and accommodate the realities of globalisation and the need to ensure that their national identity is retained.

¹ Judge of the New Zealand Court of Appeal. Speech given at the Inter Pacific Bar Association (IPBA) conference in Singapore on 4 May 2010: in the session moderated by Justice V K Rajah (Singapore): "Transnational Issues for Judges in the New Global Financial and Business Climate". My thanks to Court of Appeal clerk, Natasha Caldwell, for her help with the footnotes to this paper. The views expressed are my own and not necessarily shared by the New Zealand judiciary or the New Zealand Government.

² Keynote Speaker: Chief Justice Chan Sek Keong (Singapore). Panel: Chief Justice Myron T Steele (Delaware), Chief Justice James Jacob Spigelman (NSW).

³ For further information on the IPBA see <<http://www.ipba.org>>.

⁴ See generally, David Boies "Judicial Independence and the Rule of Law" (2006) 22 *Journal of Law & Policy* 57. As argued by C L Montesquieu in *L'Esprit des Lois* (1978), reproduced in S M Cahn *Classics of Modern Political Theory: Machiavelli to Mill* (Oxford, Oxford University Press, 1997) at 343-353, "there is no liberty if the judiciary power be not separated from the legislative and the executive."

⁵ As outlined by Steven Foster in *The Judiciary, Civil Liberties and Human Rights* (Edinburgh University Press, Edinburgh, 2006) at 8, the courts play a powerful role in the defence of individual freedom and it is the duty of all courts to establish whether the government actually possesses the power it claims.

In a common law world it is now accepted that judges have a lawmaking role, albeit a limited one.⁶ It has also been argued that a judge's personal outlook and judicial philosophy, developed in part by his or her life experiences and environment, can play a critical role in decisions on the cases where knowledgeable and experienced jurists may disagree as to the result.⁷ Thus, in what is now an internationalised world, judges face the challenge of developing a jurisprudence (both substantive and procedural) that is sensitive to, and reflective of, the society in which it operates but which also recognises the increasing internationalisation of that particular society.⁸

Courts all over the world are dealing more and more with disputes with a cross-border flavour and even societal expectations are influenced by the increasingly global world our citizens inhabit.⁹ For courts to try to serve their societies without regard for the world outside their particular jurisdiction would be to ignore the environment that those using the courts inhabit.

Moreover, courts are also dealing more and more with international treaties entered into between States, either because such treaties in their jurisdiction become part of domestic law once entered into, or, in a dualist system, because they have been incorporated through statute into domestic law.¹⁰ National courts are also required to deal with global model laws¹¹ to the

⁶ See the arguments made by Ronald Sackville in "Why Do Judges Make Law? Some Aspects of Judicial Law Making" (2001) 5(1) *University of Western Sydney Law Review* 59.

⁷ Sir Terence Etherton "Liberty, the Archetype and Diversity: A Philosophy of Judging" [2010] P.L 727 at 740. Additionally, in the speech delivered by Justice Sonia Sotomayer in response to the Presidential nomination for a position on the United States Supreme Court bench, she noted that wealth of experiences, personal and professional, has helped her appreciate the variety of perspectives that present themselves in every case that she hears. She noted that her personal experience has helped her to understand, respect and respond to the concerns and arguments of all litigants who appear before her as well as to the views of her colleagues on the bench. See: "Full Text: Judge Sonia Sotomayer's Speech" *Time Magazine* (2009) <<http://www.time.com/time/politics/article>>.

⁸ David Baragwanath in "Who Now is My Neighbour? Cross-Border Co-operation of Judges in the Globalised Society" [2004-2005] *Inner Temple Yearbook* 22 argues that the public awareness of the phenomenon of globalisation has not passed law by.

⁹ For instance, it was noted in a survey jointly conducted by LexisNexis and the International Bar Association, that, as businesses and trading are getting increasingly international or involved in cross-border trade, lawyers' clients are increasingly demanding international knowledge.

See "LexisNexis-IBA Global Survey" (2003) <<http://www.lexisnexis.com/presscenter/iba>>.

¹⁰ For instance, s 4 of the Sale of Goods (United Nations Convention) Act 1994 provides that the provisions of the United Nations Convention on Contracts for the International Sale of Goods have force in New Zealand. Section 209(1) of the Maritime Transport Act 1994 confers the force of law in New Zealand on the the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1968) 1412 UNTS 128 (the Hague-Visby Rules), as set out in the Fifth Schedule of the Act.

¹¹ For example, New Zealand's Arbitration Act 1996 incorporates the United Nations Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade law on 21 June 1985. The Insolvency (Cross-Border) Insolvency Act 2006 implements the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law in 1997.

extent that they have been adopted in domestic law. When courts are required to engage with international instruments, whether they have been introduced via legislation or directly, it is obvious that international conformity is desirable, given that the underlying objective of such international treaties and model laws is to achieve uniformity across jurisdictions.¹² Accordingly, it is imperative that judges remain abreast of international developments.

Even when interpreting purely domestic statutes or adjudicating on disputes that do not fall within the reach of domestic legislation, most jurisdictions would consider it helpful to see how courts and other tribunals elsewhere are dealing with such matters.¹³ And common law jurisdictions are not limiting themselves to the traditional common law world. Indeed it has been said that the mother of the common law itself, England, is now increasingly part of a

¹² Section 5 (b) of the Arbitration Act 1996 states that the aim behind the introduction of the United Nations Model Law on International Commercial Arbitration was the promotion of the international consistency of arbitral regimes. Section 3 of the Insolvency (Cross-Border) Act 2006 provides that the purpose of the Act is to implement the Model Law on Cross-Border Insolvency. The New Zealand Law Commission in *Cross-Border Insolvency: Should New Zealand Adopt the UNICTRAL Model Law on Cross-Border Insolvency* (NZLC R52 1999) at [E7] had recommended the adoption of the Model Law as it was recognised that New Zealand had a high degree of foreign investment and was heavily dependent upon exports for income. Furthermore, as noted by the New Zealand Court of Appeal in *Dellabarca v Christie* [1999] 2 NZLR 548, with reference to the Hague Convention on the Civil Aspects of International Child Abduction which is incorporated within New Zealand's domestic law, the Court "should if possible interpret the convention in the same way as others do, in this matter of international concern, as Lord Denning MR indicated in a case about the Warsaw Convention 1929 on carriage by air, *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at p 655. The Hague Convention is similarly designed to operate on a uniform basis between the 50 or more parties to it." Similarly, the Court in *Punter v Secretary for Justice* [2007] 1 NZLR 40 at [171] stated that as "the Hague Convention is an international convention, there should not be any differences between jurisdictions in the interpretation of the concept of habitual residence... If there are differences in interpretation between common law and civil law jurisdictions, the Courts should be working to eliminate rather than perpetuate them. ...We also note the comments of the Court of Appeal of England and Wales in *Re S (A Child: Abduction)* at para [31] that questions of habitual residence under the Hague Convention are to be determined by reference to the international jurisprudence, recorded on the Permanent Bureau's INCADAT website. The Court made no distinction between common law and civil law jurisdictions in this regard."

¹³ The influence of overseas jurisprudence on the development of New Zealand's case law was acknowledged by Cooke P in the decision of *Aratiki Properties Ltd v Craig* [1986] 2 NZLR 294 (CA) at 298 where he stated that new trends in overseas authorities would justify the Court of Appeal undertaking a review of one of its own previous decisions. As outlined by the Hon Michael Kirby AC CMG in "International Commercial Arbitration and Domestic Legal Culture" (paper presented at the Australian Centre for International Commercial Arbitration Conference, Melbourne, 4 December 2009), a feature of the law of many Commonwealth countries is that the lawyers are not hostile to other legal cultures, at least where the foreign law follows the legal traditions of the common law. While there is continuing debate about whether the United States Supreme Court should rely on foreign law in determining decisions, Justice Steven Breyer has recently labelled such debate as irrelevant arguing that, while decisions from overseas jurisdictions are not binding on the Court, judges are entitled to consider them. See Jesse J Holland "Supreme Court Looks to Foreign Law for Tips" *Huffington Post* (2010) <http://www.huffingtonpost.com/2010/04/01/supreme-court-looks-to-fo_n_521265.html>.

European jurisprudence.¹⁴ From discussions with a number of you over the last few days I understand that this trend is not limited to the common law world.

On a practical level, the information available to courts and counsel appearing before them from outside their particular jurisdiction has increased to an extent that would have been unthought of even 20 years ago.¹⁵ There is also increasingly cooperation and dialogue between judges, both in a general sense through, for example, meetings of chief justices and other judicial conferences but also dialogue in relation to individual cases, although this is usually of a procedural nature and not without its challenges.¹⁶ An example of a field where there has been extensive dialogue (and no doubt more to come) is in cross border insolvency.¹⁷

All this means that courts are increasingly having to listen to many and varied voices. In light of this fact, ensuring that the right balance between an indigenous jurisprudence and a global jurisprudence is achieved and that there is an appropriate amount of dialogue between jurisdictions is a challenge that currently faces national courts.¹⁸ I would see the increasing influence of international voices upon national courts as an opportunity better to serve both the law and those coming before the courts. Having been part of this wonderful organisation (the IPBA) for so many years, the benefits of such cross-fertilisation and dialogue are evident to me.

¹⁴ David Baragwanath in “A Second Hand Rose? Creating A New Zealand Jurisprudence” (Address to Otago Law School 23 April 2010) argues that influence that European developments have had on English jurisprudence has enriched such English case law.

¹⁵ As noted by David Baragwanath, *ibid*, electronic databases now permit common law courts access to the resources of the civil law and the globalisation of modern life has led courts of non-Anglophone states to maintain an English language website.

¹⁶ There has been judicial recognition of the importance of judicial cross-border assistance. For instance, Millet LJ in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) at 82 has noted that the respect the courts show for the territorial integrity of each other’s jurisdiction should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another.” However, it has been argued that parochialism can act as a barrier towards international co-operation. For instance, David Baragwanath, above n 8, argues that the concerns voiced by Professor Andre Tunc in 1977 that in the field of trade law parochialism was an impediment to the unification of the law, are concerns that are as equally applicable in the twenty-first century.

¹⁷ Professor Campbell McLachlan in *Lis Pendens in International Litigation* (Martinus Nijhoff, Leiden, 2009) notes at 87 that one of the most prominent examples of trans-border co-operation in recent years has been initiated by judges themselves in the course of actual pending litigation. He refers to the agreements that were made between courts in the integrated management of transnational insolvencies following the collapse of worldwide groups of countries in the Maxwell and BCCI insolvencies.

¹⁸ David Baragwanath in “A Second Hand Rose”, above n 14, notes that in the New Zealand context, the removal of the Privy Council as New Zealand’s final appellate court means that the superior courts in New Zealand now have the responsibility of fashioning an indigenous jurisprudence, however, he notes that there remains high value in turning towards other jurisdictions to seek the best idea or concept required to achieve justice in the instant case.

The second issue I would like to discuss today is the role that both arbitral tribunals and the courts play in commercial dispute resolution. I will examine this from the perspective of what commercial parties want from dispute resolution – or I should probably say what commercial parties need, as we all know that parties actually in dispute often act quite contrary to what they say they want in the idealised abstract. In the course of this exercise, I will assess briefly whether those needs and wants are best served by the court system or by arbitration and make some comments on the role of each.

It is important to emphasise that I am not suggesting that the courts are better than arbitration or vice versa. Rather, I consider it important that the parties' choice in that regard is respected (especially by the courts if the choice is for arbitration).¹⁹ There is, however, one aspect of the increasing move towards arbitration that is of concern (particularly in cross border disputes). Increased reliance by commercial parties on arbitration could hinder the development of the law if court systems are routinely bypassed. This should be of concern to all in terms of the rule of law.

Turning to what is needed for successful commercial dispute resolution, I have identified a number of factors that are of particular importance. Others might have a slightly different list but the themes will be similar. Commercial parties that are engaged in dispute resolution need a process that is speedy, cost effective, predictable, confidential, and commercially sensitive. They also increasingly want choice of tribunal and choice of governing law. Finally, they would like to be able to enforce any decision in their favour and to have access to interim measures.²⁰

¹⁹ This was a point strongly made by Justice Rajah yesterday when welcoming the group who visited the Supreme Court.

²⁰ In Robert B Shanks, Maria Chedid and Cedric Chao "Tools That Create Successful Resolutions in International Arbitration" [2007] ACC Docket 40, the authors outlined that according to a survey of over 100 in-house counsel at leading corporations over the world, a vast majority view international arbitration as the preferred method of dispute resolution. The authors noted that the most basic benefits of international arbitration (as compared with litigation in foreign courts) could be seen to include avoidance of local courts that might favour their own nationals, relatively widespread acceptance of enforceability of foreign awards and the opportunity to secure confidentiality of proceedings. In Richard Naimark and Stephanie E Keer "What do parties really want from international commercial arbitration?" (2002) 57 *Dispute Resolution Journal* 80, the authors examined the empirical data released by the Global Center for Dispute Resolution Research about private international commercial arbitration. It was found that commercial parties valued a fair and just result as the most important attribute, even above receipt of a monetary award, speed of outcome, cost or arbitrator expertise. Professor McLachlan, above n 17, notes at 190 that a perceived advantage of arbitration over litigation in international commercial disputes is the provision of a neutral forum within which cross-border disputes can be resolved.

In terms of the goal of speedy resolution, it cannot be assumed that international arbitration will invariably be quicker than court processes. Courts in some jurisdictions are very fast. For example, I understand that in Singapore fixtures can often be allocated before parties are even ready and I am sure that judgments follow equally efficiently once matters are heard. Admittedly, other jurisdictions do not do so well in this regard.²¹

As to expense, there is probably not much to choose from between the courts and arbitration in this regard. What is, however, necessary to achieving cost effectiveness is to ensure that all procedures are focussed upon ensuring that parties are only required to put before the tribunal or court information that is absolutely necessary. Many of the court systems in our jurisdictions fail in that regard.²²

Commercial parties' desire for predictability can be seen as related to their ability to choose forum and law which I will come to later. It is, however, unrealistic to expect total predictability in any individual case. Even assuming a properly functioning, independent court or arbitral tribunal which is free of corruption, there is still the inherent uncertainty of

²¹ The Hon Michael Kirby, above n 13, outlines at 10-11 the results from a report entitled "Courts", prepared by four researchers conducted in 109 countries with co-operation from member firms of the *Lex Mundi Group* of legal firms. The report found that the most significant average mean delay between commencement and recovery of judgment for developed common law countries was that of Hong Kong where the delay was found to be 192 days. For civil law countries of the French tradition the greatest delay was found in Italy and was 630 days. For civil law countries of the German tradition the greatest delay was in Austria where it was 547 days and for the civil law countries of the Scandinavian tradition it was Norway with a delay of 365 days. For developing common law countries the greatest delay was 390 days for Bangladesh, while for developing civil law countries the greatest delay was 745 days for Morocco. The average mean delay in days between commencement and recovery of judgment for Singapore is 60 days. This is a shorter time period than NZ, the UK and Hong Kong. However, Singapore did fall behind Canada, Australia and the USA. Canada has the shortest average mean delay with a timeframe of 43 days).

²² In New Zealand, a sub-committee of the Rules Committee has explored options for reforming the test for discovery. The main debate amongst the committee has been about the criteria for non-standard discovery, which attempts to cover cases where standard discovery is too onerous and also where standard discovery is not sufficient. In discussion by the Rules Committee about the sub-committee's options for reform, the suggestion was also made that draft rules must cover the option of electronic discovery within their scope. See Rules Committee "Minutes of Meetings Held on 22 February 2010 and 31 May 2010" (2010) <http://www.courtsofnz.govt.nz/about/system/rules_committee/meetings>. In the United Kingdom, reform of the civil justice system occurred following a report by Lord Woolf into the efficiency of the system. The Woolf reforms of the civil justice system included: encouraging settlement at the earliest stage through pre-action protocols; the provision of information for parties and encouraging parties to use alternative dispute resolution processes; court management of cases with strict timetables and penalties for unreasonable behaviour; and court allocation of cases to one of three "tracks" depending on the value and complexity of the case. These reforms have been noted to have been working well to the extent that there has been a continuing drop in the number of claims issued and that pre-action protocols are promoting settlement. However, despite the reforms it has been noted that the problem of legal costs in civil cases continues. The weight of opinion is that costs have increased or at least been front-loaded. Moreover, there is growing evidence that disputes about costs may have increased as a result of the reforms. See generally, Hazel Genn in "Solving Civil Justice Problems: What Might be Best?" (Scottish Consumer Council Seminar on Civil Justice, January 19 2005).

the litigation process.²³ Further, by their very nature, cases that result in actual adjudication are unlikely to be cases where the issues (whether factual or legal) are simple.²⁴ If they were, then the case would have settled.

What should, however, be expected of any properly functioning legal system is that like cases should as far as possible be treated alike and that, for the vast majority of common disputes that arise between commercial parties, outcomes should be reasonably predictable.²⁵ This should allow rational decisions to be made on what one might call the flight or fight response.

Predictability of outcome in the courts might, however, be at risk if courts are being bypassed in favour of arbitral tribunals. This is because precedents risk becoming outdated if commercial disputes stop coming before the courts. This in itself carries a risk for commerce. The situation is exacerbated if confidentiality is insisted upon in any arbitral proceeding not only for commercially sensitive information but also for any purely legal decision.

Even though arbitral decisions do not have precedential value,²⁶ legal discussions in arbitral awards might promote dialogue and make it more likely that like cases are treated alike.

With regard to the argument that confidentiality in the arbitration process is one of the key benefits of arbitration, I suspect that this argument is to some extent illusory. For example, disclosure of the existence of disputes and their possible financial impact is often required to

²³ Joseph A. Grundfest and Peter H. Huang in “The Unexpected Value of Litigation: A Real Options Perspective” (2006) 58 *Stan L Rev* 1267 at 1270 note that the inherent uncertainty in the litigation process can be attributed to a number of causes. For instance, there is uncertainty about the facts underlying the plaintiff’s claim and about the interpretation of the law to be applied to those facts. There is also uncertainty about the damages, if any, that will be awarded if the plaintiff’s claim prevails. The authors also note that litigants modify their strategies during the lawsuit and increase, decrease, accelerate, defer, or terminate litigation expenditures in response to new information which is a further cause of uncertainty.

²⁴ Leandra Lederman in “Precedent Lost: Why Encourage Settlement and Why Permit Non-Party Involvement in Settlements?” (1999) 75 *Notre Dame L. Rev* 221 at 221 notes that settlement is the usual outcome of most disputes. Moreover, as outlined by H. Lee Sarokin in “Justice Rushed is Justice Ruined” (1986) 38 *Rutgers L. Rev* 431 at 431, the study of law focuses on reported cases which represent about two or three per cent of all lawsuits which are instituted.

²⁵ As noted by Rupert Cross and J.W Harris in *Precedent in English Law* (4th ed Clarendon Press, Oxford, 2004) at 3, one of the most basic principles of the administration of justice is that like cases should be treated alike. Gabrielle Kaufman-Kohler in “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 3 *Arbitration International* 357 at 374 argues that the creation of rules that are consistent and predictable is part of the ‘inner (or internal) morality of law’. He thus reasons that when making law, decision-makers have a moral obligation to strive for consistency and predictability and thus to follow precedents.

²⁶ It is well established that international arbitration lacks a doctrine of precedent, at least as it is formulated in the common law system, see generally, Gabrielle Kaufman-Kohler, *ibid*. However, Kaufman-Kohler argues that, while arbitrators do not have a legal obligation to follow precedent, arbitrators should seek to follow precedent in order to foster an environment that is predictable. As noted by Shanks, Chedid and Chao, above n 20, at 56, although arbitrators are not bound by precedential authority, they are often informally guided by the precedential authority of the applicable jurisdiction.

be made in financial statements and to regulators.²⁷ Such disclosure might lead to questions by shareholder organisations or journalists where further information will need to be given. In addition, confidentiality is normally lost if for any reason there needs to be examination of arbitral awards in the courts.²⁸

On the other hand, there is no doubt that confidentiality is a real advantage currently enjoyed by arbitration over the court system.²⁹ However, it can be argued that there might be more room for courts to allow protection of commercially sensitive information more readily, even within the context of open justice.³⁰ There may well be different considerations in civil than criminal matters in this regard. If there is more scope for confidentiality in the courts, this might meet the needs of at least some commercial parties and arrest some of the flight from the court system (and the consequent concerns regarding the potential harm occasioned to the rule of law).

The next item on the commercial parties' wishlist is an important one. Commercial parties, particularly in specialist areas, want adjudicators who understand the world they operate in. It is thus apparent that arbitration retains an advantage in this regard.³¹ Courts in many jurisdictions are, however, trying to meet this challenge by having specialist commercial

²⁷ For instance, see discussion of the disclosure requirements imposed upon publicly owned companies in the United States by the Securities and Exchange Commission in the Encyclopaedia of Business "Disclosure Laws and Regulations" (2010) <<http://www.referenceforbusiness.com/encyclopedia>>.

²⁸ The principle of open justice is a fundamental tenet of the common law. As outlined in *R v Sussex Justices Ex parte Macarthy* [1924] 1 KB 256 at 259, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." For comparative discussion of the judicial treatment of the open justice principle see the Hon JJ Spiegelman AC "The Principle of Open Justice: A Comparative Perspective" (Address given at the Media Law Resource Centre Conference, London, 20 September 2005).

²⁹ For discussion of the issue of confidentiality in arbitral proceedings see Quentin Loh Sze On SC and Edwin Lee Peng Khooon *Confidentiality in Arbitration: How Far Does it Extend?* (Academy of Publishing, Singapore, 2007); Lim Wee Teck "The Confidentiality of Arbitration Proceedings" (2003) 5 Law Gazette; Michael Huang SC and Katie Chung "Confidentiality on Arbitration" [2010] New Zealand Law Journal 153; Sarah C Derrington "Confidentiality on Arbitration: The English and Australian Approaches Examined" (ICMA XVI Congress Papers, Singapore, 2007).

³⁰ For instance, in Australia the courts have attempted to balance the competing interests of open justice and protection of commercially sensitive information through mandating limited disclosure of such information. As outlined by Hayne J in *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 (VCA) at 40, "it is now commonplace in the courts for material to be made available only to the legal advisers of the parties and nominated experts. Of course such arrangements bring with them their own difficulties and are arrangements that should be adopted only where there is a need to do so; of course they are arrangements that may need to be reviewed as the matter progresses towards trial or as the trial itself proceeds. But they are arrangements that are made and should be made when doing so would strike a fair balance between the competing interests of the party seeking inspection and the party claiming confidentiality."

³¹ As noted in Alan Redfern and Martin Hunter *Law and Practice of Commercial Arbitration* (4th ed Sweet and Maxwell, London, 2004) at 187, one of the advantages of commercial arbitration parties is that parties are able to designate in advance an arbitrator who has specialist knowledge of a particular trade or profession.

courts or judges and in some cases by having systems whereby non legal experts in particular fields might sit with judges in suitable cases.³²

The next wish I have identified is the ability for commercial parties to choose the forum, the decision-maker and the law governing the dispute. Traditionally, this has been a real advantage of arbitration over the court system. This advantage might, however, be mitigated to some extent by the Hague Convention on Choice of Court Agreements.³³ Nevertheless, it must be acknowledged that the ability to choose a particular judge is not something most court systems could entertain.

³² Ian Kawaley in “The Role of Specialist Commercial Courts” (2010) 18 *Journal of the Commonwealth Magistrates’ and Judges’ Association* 16 at 16 notes that in the Commonwealth, commercial divisions have existed in England and Wales and Australia for over 100 years. In Scotland a commercial division has existed within the High Court for many years. Similar courts exist in Canada (Ontario), the Caribbean and in countries such as Ghana in West Africa, Kenya, Tanzania and Uganda in East Africa. Hong Kong has had a commercial list for many years. In other financial centres, such as Singapore, specialist commercial judges exist where formal specialist courts do not. Additionally, G T Pagone in “The Role of the Modern Commercial Court” (paper delivered to the Supreme Court Commercial Law Conference 12 November 2009) discusses the announcement by the Chief Justice of Victoria that a Commercial Court would replace of the Commercial lists. In “A Specialist Patent or Intellectual Property Court for New Zealand?” (2009) 12 *The Journal of World Intellectual Property* 524 I argued that, at least in the intellectual property arena (and possibly more generally), the panel system adopted at the Federal level in Australia should be adopted in New Zealand. In Australia, the intellectual property specialisation model involves specialist panels in the Federal courts. Judges either volunteer or are designated to be members of the panel, but they also participate in other work of the Court. Judges on these specialist Federal Court of Australia panels do not need to have specialist knowledge when they commence serving on the panel but they must take part in educational programmes and develop expertise in the field. The Chief Justice of the Federal Court has described the advantages of the panel system as including the enlargement of the specialist knowledge within the Court and the allocation of specialist cases to a panel which increases the chance of individual judges hearing a reasonable number of cases and the ability to provide judges with the opportunity to engage in work they enjoy. It must, however, be noted that in countries where specialist commercial divisions exist, there remains concern about the flight to alternative methods of dispute resolution. For instance, Hazel Genn in *Judging Civil Justice* (Cambridge University Press, Cambridge, 2010) at 25 notes that the civil justice system in England is currently under threat in light of the growing popularity of alternative dispute resolution.

³³ The Hague Convention of Choice Agreements is the litigation counterpart of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). On 30 June 2005, the 20th session of the Hague Conference of Private International Law unanimously adopted the Convention. The Convention governs the recognition and enforcement of judgments for commercial transactions in circumstances where the parties have agreed upon an exclusive choice of court agreement. Article 3 (b) of the Convention provides that a choice of court agreement which designates the court/s of a contracting state shall be deemed to be an “exclusive choice of court agreement” unless the parties have provided otherwise. Article 5(1) provides that the court/s in a contracting state designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

As to interim measures and enforcement, in most jurisdictions there has to be some reliance on court processes even if only for ultimate coercive effect.³⁴ Ensuring that commercial parties have a good experience with courts when they are forced to use them might mean that they are more willing to use them even when they do not have to.

So what can be done about the risk to the rule of law that may occur if courts are totally bypassed in favour of arbitration? From the perspective of the courts, they need to work on being more responsive to commercial needs within the limits of their core function. I have already mentioned some ways in which this might be done.³⁵

Looking at it from the other side, it might be that commercial parties could consider whether disputes with a high legal and precedential value might be better in the courts. What could also be considered is more publication of arbitral decisions insofar as they relate to the law.³⁶ Lawmakers (and courts) could facilitate these developments by respecting parties' choice of law and jurisdiction and by harmonising their legal systems as much as is consistent with the special characteristics of their jurisdictions.³⁷

In conclusion, it is apparent that both courts and arbitral tribunals play a vital role in commercial dispute resolution and there might well be an opportunity for the IPBA to take the lead in providing a forum for more dialogue between commercial judges in different jurisdictions, arbitrators, policy makers and the users of dispute resolution services on the

³⁴ For instance, if a party seeking enforcement prefers to base its request for enforcement on the court's domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favourable-right provision of art VII(1) of the New York Convention. Shanks, Chedid and Chao, above n 20, note at 52 that local courts may be needed to enforce arbitral discovery orders or assist in obtaining discovery from non-parties over whom the arbitral tribunal has no jurisdiction. It is also noted that once arbitration is completed, parties may resort to the courts to attempt to challenge an arbitral award.

³⁵ For further discussion see Chris A Carr "The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision" (2000) 88 Kentucky Law Journal 183;

³⁶ In Emmanuel Gaillard and John Savage *Fouchard Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) at 188 it is noted that confidentiality would not be breached by publication for reasons of an award on an anonymous basis. The authors argue that publication would satisfy the general interests of business and legal practice as it is legitimate that arbitration users and practitioners have access to rules applied and decisions reached by arbitrators.

³⁷ It must be noted that the Hague Conference on Private International Law has undertaken a lot of valuable work in the field of harmonising legal systems to further the development of private international law. The statutory mission of the Hague Conference is to work for the "progressive unification" of private international law rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status. See generally < http://www.hcch.net/index_en.php>.

different ways in which the courts and tribunals can best cater for the needs of commercial parties.