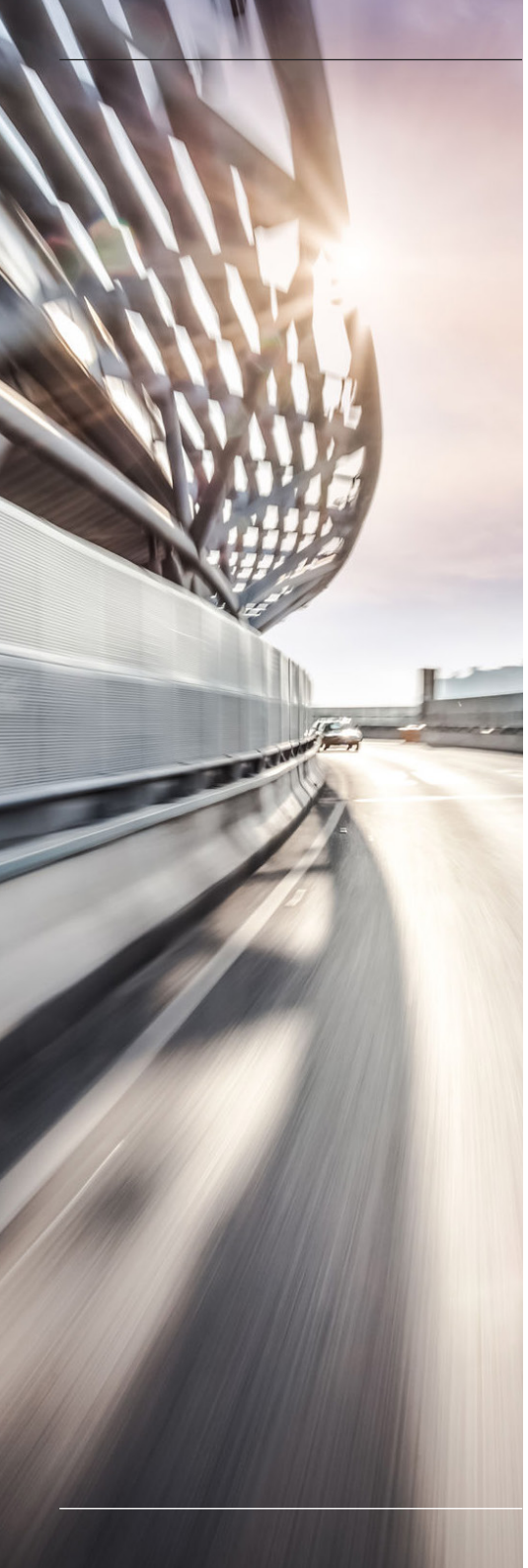


looking to obtain and enforce an arbitral award in a cross-border disputes is manifest in the OBOR Initiative. Unlike a court judgment, arbitral awards are much easier to enforce cross-border than national court judgments, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. By definition, a significant number of OBOR disputes will involve parties of different nationalities, with assets in different jurisdictions. Arbitrating OBOR disputes will produce awards that can be readily enforced in most, if not all, of the OBOR countries. To my mind, therefore, arbitration should be the dispute resolution mechanism of choice for OBOR contracts, combined with mediation wherever appropriate.

Many of the arbitral institutions in this region have been undertaking preparatory work in readiness for the impact of the OBOR Initiative. Although there may be a lag of a year or so before the majority of disputes begin to emerge I think we will all see an increase in workload as the PRC government's investment strategy gets underway.

"… we are all going to feel the impact of China's "One Belt, One Road" initiative on our dispute resolution practices…"

Court disruption disrupted

By Mark Beer, OBE

What would I pick as the one 'next big thing' for the legal sector? My answer – disruption. Not just technological, but also through new markets - products addressing non-consumption in an existing market, such as low-cost airlines - and low end disruption i.e. when a lower-cost offering steals customers for whom price is focus. In addition, physical disruption, as clients eschew expensive offices for augmented **reality access 24/7**, and disruption in the wake of the **Fourth Industrial - or digital - Revolution** will leave most legal systems behind.

Having worked in private practice, in-house, in hedge funds and for the last 10 years as part of a judiciary, I can see the potential impact of disruption versus the complacency of many legal systems reluctant to adapt.

For this article, I solely focus on disruption of the Courts. Considering my current position as Registrar at the DIFC Courts it is important to note that these opinions are my own and do not necessarily reflect any official policy or position.

At a recent conference in London attended by the UK's judiciary, a futurologist predicted a world of holographic judges and decisions made by robots using artificial intelligence. I'm not proposing to look too far into the future but rather to examine disruption on our doorsteps. In their 1995 Harvard Business Review article "Disruptive Technologies: Catching the Wave", even then, Bower and Christensen's premise was that if organisations fail to make the technological investments that future customers expect, they should expect low-cost competitive alternatives to enter the marketplace, addressing the needs of the unserved and under-served populations.

Monopolies are often marked by lack of innovation. The justice sector, sadly, is no exception. Alternatives take a long time to filter through, let alone those resulting in cost-efficiencies. Is the decline of case numbers a reduction of disputes, or a reduction in public trust? Regrettably, many baulk at the idea of court users as 'customers' or 'serving customers' even. But I'm convinced that with sufficient nurturing, we might ensure that in the future Courts can serve those most in need in their communities.

Some disruptive practices

The Global Center for Digital Business Transformation says that for true disruption to occur it needs to be combinational: it needs to 'fuse cost value, experience value, and platform value to deliver products and services that make offerings from incumbents immediately unattractive or obsolete'.

Worldwide, we see examples of Courts considering disruptive practices. The use of a virtual court by

the DIFC Courts, allowing access from anywhere via a Smart Phone delivers their service in a way which is convenient to the community, and not the other way around. It is part of a shift visible in Dubai, Abu Dhabi, Singapore and Shenzhen, towards Courts seeing themselves as a service.

Online Dispute Resolution is also on the rise. Disruption has been mostly led by the private sector, primarily through large online retailers. Does this mean the future of Court disruption will be a partnership between the private sector and the judiciary? The cooperation between the DIFC Courts and Microsoft is a step in that direction. China announcing an internet court to trial internet-related disputes on an online court platform in Hangzhou, a hub for e-commerce, is another.

Many courts have implemented - with varying degrees of success - 'intelligent automation', which is hardly 'disruptive' but a good first step for an organisation which may not have adapted its practices for decades. However, the peculiar passion of maintaining big workforces and budgets leads to 'unintelligent manualisation' i.e. these projects run over budget, don't deliver the desired outcomes and create the need for more staff and even bigger budgets.

The disruptors to court disruption

The reasons for the difficulties encountered when Courts embrace innovation, particularly disruptive innovation, are plentiful.

Complacency
A product of inflexibility and a belief in the monopolistic right to deliver justice. There is no competition and the judiciary serves 'mother justice' rather than the community.

Jurisdiction
Fixed jurisdictional limits can cause inefficiencies. If a Court in one district is busy, but quiet(er) in the next, would the Head of a Court look to balance the work between the two, or ask for more resources instead? Are the limits set for small claims based on objective science? If not, why are Courts so reluctant to change them? Think of the benefits achieved if Courts were to find ways of working together, especially to ease the burden of international enforcement, rather than claiming jurisdictional independence.

User vs Customer
Many Courts see the people who come to them for help as 'users', rather than customers. A useful analogy is the way that you and I 'use' the road to get to work. The road does not need to serve our needs, other than providing a route. It might be badly maintained, full of pot holes and congested with traffic, but we still 'use' the road. How much innovation have we seen in roads versus the innovation we see in, say, the design of the cars that ride on them? Why? Because we are customers to the car manufacturers and users to those who maintain our roads.

Unhappy judges and staff
The UK Judicial Attitude Survey published by UCL Judicial Institute in February 2017 is an example of how morale in Courts around the world is low. Inefficient processes, designed decades ago, complicated by technology increase inefficiencies, requiring more – rather than less - people. Think filing paper submissions and scanning them into the system! If staff are unhappy, it follows that the commitment to drive through innovation will not go beyond the team meetings discussing accessing the digital vortex.

Protectionism
Michele R Pistone and Michael B Horn from the Christensen Institute in *Disrupting Law School: How disruptive innovation will revolutionise the legal world* say: "Access to a lawyer is expensive and out of reach for many potential customers because the market for legal services is opaque, the provision of legal services has been restricted through licensure, and the services themselves have traditionally been provided on an individual, customised basis." Unless we see further deregulation and delinking of the Bars, Law Societies and Courts, and for so long as they are seen as a closed shop, innovation will be stifled.

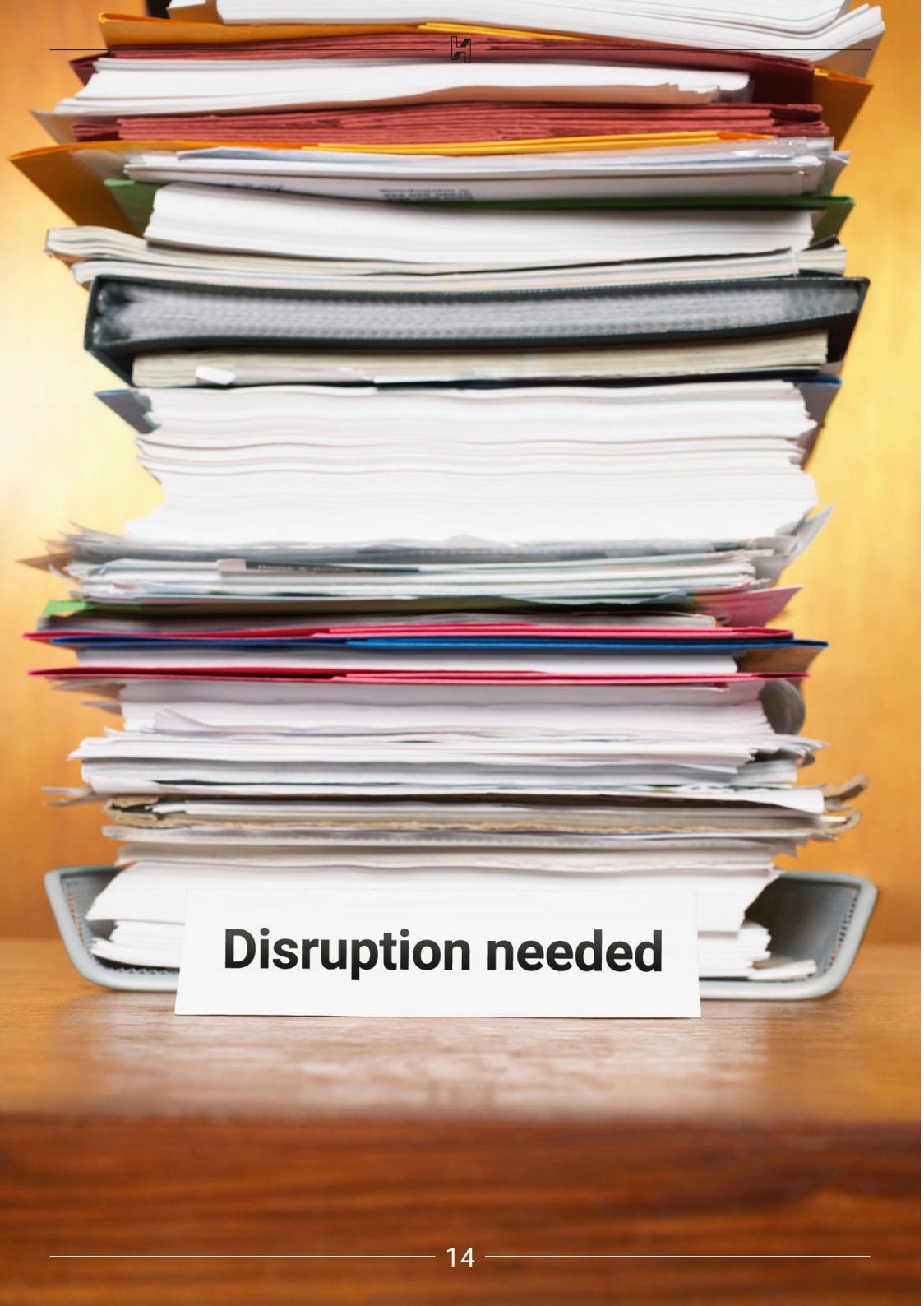
Lowest common denominator thinking
'We can't innovate because we need to be committed to the least capable, least tech-savvy potential audience'. Agreed, they should not be denied the chance to access justice in the same way that it has been done for hundreds of years – in writing, but that thinking should not be allowed to prevent the development of tech-savvy solutions offering access justice, say, through a Smart Phone.

The best is the enemy of the good
There is a belief, often exacerbated by the IT company's sales force, that Court technology needs to be faultless. A recent bid for an IT tender in Europe contained a $400,000 price tag for the design, testing, implementation and support of an integrated and scaleable platform built by an SME in the UK. The cost of 'testing' the software charged by the Ministry's appointed 'technology implementer' was a further $2 million. Is the desire to have a perfect system, not only costing tax payers dearly, but also putting a brake on innovation?

Structure and hiring
A Chief Justice who is supremely well qualified to render legal judgments, may have no experience in corporate management, administrative functions or innovative IT. If the Chief Justice is fortunate, (s)he is able to appoint an experienced Chief Administrator. Both work closely to develop a clear vision about how to serve their community and drive efficiencies throughout the judiciary and are empowered to make tough decisions about staffing and investment in disruptive technology. However, that is rarely the case. A Chief Justice might have a say in the appointment, but based on a shortlist provided by the Executive. Civil servants do not always have the focus as described above. They are often hampered by committees and the use of external consultants to validate their decisions. When projects run over budget and/or fail to deliver, ownership is hard to pinpoint. The system promotes inefficiency and a lack of accountability. Procurement processes to which they are tied, may not always promote nimble and cost effective implementation of IT reform.

Funding
Whilst Courts in most jurisdictions have their independence enshrined in statute, very few benefit from true financial independence. There are some useful hybrids, such as in Singapore, where a judicial budget is independent from the 'administrative' budget. For most courts, the annual budget review is painful. It is no wonder that many grab what they can. Inability to plan over multi-years, not knowing if funding will be forthcoming, leads to short term and sometimes ill thought out spending patterns. Often the attitude is to spend all of the budget within the financial year.

The use of said excuses for the lack of disruptive innovation in Courts is widespread. The upshot is a lack of public trust and confidence in its ability to help the community. We see a decrease in case filings in many civil courts and the continued rise of arbitration, which is well suited to embrace disruptive innovation. A continued cost/benefit imbalance for many civil and commercial cases makes them uneconomic to pursue and, even if economic to pursue, some systems try to cut off the routes to litigation funding vital to address the cost/benefit imbalance created by the system itself. In some judiciaries, the system implodes on itself with ever higher legal costs driven by a monopolistic and protectionist approach to litigation and arbitration combined with an unwillingness to allow alternatives (such as litigation funding) to address that imbalance.



How to avert a crisis

So, what can be done to address this imminent crisis? Holographic judges? Possibly, but not yet. Let's get the foundations in place for the Courts to enter the digital vortex. Let's introduce the basics to support 'combinational disruption' across cost, experience and platform.

Let's sweep aside Court leaders solely focussed on budgets and staff, and support those committed to delivering justice that serves the people.

Let's destroy any hint of monopoly behaviour by the Courts or the legal community; lower the cost of justice and, for complex disputes, open up a party's right to fund justice, provided appropriate safeguards are in place to ensure transparency as well as to avoid the issues raised in *Excalibur Ventures LLC* and *Ors -v- Psari Holdings Limited and Ors*.

The key to a Court's success are the team members whose job it is to help those in need, so let us empower them to help and use intelligent automation to remove drudgery, not increase it. Let's advocate a judge to registry staff ratio of 1:3, not 1:300. Let Courts with international parties embrace an international bench, use the language most convenient to the parties, and collaborate with other courts, be it through using blockchain to speed international enforcement of judgments or work balancing between Courts within a territory.

Will this happen?

In my view, yes, but not universally and not quickly. The meeting of commercial courts from 5 continents in May 2017 in London, attended by Chief Justices of 16 jurisdictions, showed a willingness to engage in a dialogue to share best practice and work together to keep pace with rapid commercial change. Where that leads, and whether we will see an organisation setting standards for the world's leading commercial courts (cfr IOSCO for securities regulators), remains to be seen. Certainly, if the UK's Lord Chief Justice is involved there is considerable hope, as set out in his recent speeches at the DIFC Academy of Law Lecture and Grand Court of the Cayman Islands Guest Lecture.

Along the way, we will see bright spots of disruptive innovation in Courts which will attract the bulk of the world's major international commercial disputes – my predictions – London, DIFC, Singapore and Hangzhao/Shenzhen.

Would I be delighted to be proven wrong by other jurisdictions taking the lead – absolutely.

"Monopolies are often marked by lack of innovation. The justice sector, sadly, is no exception."