

## UNFOLDING CONVERSATIONS 2018

### ADDRESS BY THE HONOURABLE JUSTICE LEE SEIU KIN

1 The Singapore Mediation Centre Board of Directors, Chairman of SG Tech Mr Saw Ken Wye, Ladies and Gentlemen, a very good evening.

2 In the first quarter of 2018, half of the top ten global companies ranked by market capitalisation were tech companies like Apple, Amazon, Microsoft, Facebook and Alibaba, reigning over traditional multinationals and retail giants.<sup>1</sup> The global boom in the tech industry in recent years has been phenomenal to say the least. *Forbes Global 2000* estimates that the 60 tech companies that feature in its list collectively account for \$56.8 trillion<sup>2</sup> in market value while *Forrester* estimates that the global tech market is set to grow by 4% in 2018.<sup>3</sup>

3 Ancillary to this has been the growth of tech legal battles, some with particularly high-stakes. A case in point is the high-profile patent

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<sup>1</sup> <https://www.forbes.com/sites/forbestechcouncil/2018/05/08/how-to-navigate-the-challenges-of-new-tech-legal-disputes/#5f236daf2e86>.

<sup>2</sup> <https://www.forbes.com/sites/kristinstoller/2018/06/06/worlds-largest-tech-companies-2018-global-2000/#729340814de6>.

<sup>3</sup> <https://www.forbes.com/sites/forrester/2017/10/18/global-tech-market-will-grow-by-4-in-2018-reaching-3-trillion/#4ae9921d12c9>.

dispute between Apple and Samsung over whether Samsung had copied Apple's smartphone design. That battle started in 2011 and resulted in an initial US\$1 billion ruling in Apple's favour. However, as is usual in a ruling with an award of high damages, this was followed by a long series of appeals which shaved down the verdict to US\$539 million for Apple. The two companies also had other patent battles both in the US and internationally, which dragged on for 7 years. The fight finally came to an end in June this year through a settlement agreement<sup>4</sup>, but not before apparently chalking up hundreds of millions of dollars in legal costs. One commentator has said that he was not sure what Apple and Samsung got out of the expensive litigation, but "what [it] showed is that litigation is not the ideal way to solve these fights".<sup>5</sup>

4 While Apple and Samsung may have deep pockets to go through a protracted law suit, the stark reality for most businesses is that the issue of costs weighs heavily when disputes arise and can impact the future of the company. I have sat on the High Court bench for more than 17 years and my experience has convinced me that you should generally choose mediation as the first option to resolve any legal dispute that your business may face. Quite apart from the financial cost of a lengthy court

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<sup>4</sup> <https://www.theverge.com/2018/6/27/17510908/apple-samsung-settle-patent-battle-over-copying-iphone>, <https://qz.com/1316350/apple-and-samsung-lawsuit-comes-to-a-close-after-seven-years/>.

<sup>5</sup> <https://www.bloomberg.com/news/articles/2018-06-27/apple-samsung-settle-patent-infringement-dispute>.

litigation or arbitration – and you will be surprised at how costly it can get for even the smaller disputes that make their way to the High Court – the biggest cost for a court battle will be the time that senior management will have to devote not just through the trial, but throughout the litigation process. This is time that can better be spent in managing your existing business and in getting new business. As with wars between nations, people embark on litigation with a sense of righteousness and indignation in the beginning, with an expectation of a quick victory, only to be surprised by the drain on money and time as the battle rages on, eventually to be exhausted by the entire process as it comes to a weary end. Or so they think it has ended. Because the other party has launched an appeal and the process starts over ... .

5 I say this not as a critique of the civil litigation process, but as an accurate description of it. Because the result of that process is an order of court that has consequences on a party and may be enforced by the law, it is essential that civil litigation is conducted in a manner that ensures fairness and preserves the right of all parties to be heard. This necessarily means that the process cannot be a fast one, but the consequence of that is that costs invariably add up. For this reason, it is always worthwhile to invest in a process that may avoid litigation and yet come up with a satisfactory resolution of the dispute, if that process is

much cheaper, faster and has a decent chance of success. That process is mediation.

6 To gain a better appreciation of mediation, one needs to understand what the process is that mediation seeks to avoid. In litigation, the plaintiff claims that the defendant has committed one or more legal wrongs. The legal wrong may be a breach of a term of a contract between the parties resulting in financial loss to the plaintiff. Or it may be an infringement by the defendant of a right in law such as a patent. The court needs to make a determination whether the facts that the plaintiff relies on to support its case are proven or not, whether the facts the defendant relies on in its defence are proven or not, and whether the law is as claimed by the plaintiff. After these are determined, the court makes a finding on whether the defendant is liable to the plaintiff in law. This finding is imposed by the court and is binding on them whether or not one or both parties disagree with it. The litigation process is also public in nature, where accusations are made against individuals in open court and placed on the record, which results in relationships being soured.

7 In mediation, although the process may involve considerations of the strength of the legal case of each party, the approach can be and is

often wider than what a court of law can consider. Mediation involves the participation of a neutral third party, who is called the mediator, and he will objectively facilitate discussions with a view to bridging the difference between the parties. Unlike a court of law, a mediator does not and cannot impose a solution on the parties. He uses his skill and experience to guide them to settlement terms that they both can agree on. The mediator will analyse the case before him and try to uncover the parties' real interests in a dispute. He will facilitate discussions of those underlying issues to try to bridge the difference between the parties. Like a skilled psychologist, he will attempt to enable the parties to gain new insights into their dispute and discover out of the box solutions that are not possible in the civil litigation process. Anything that aids the attainment of that objective is relevant. This is quite unlike civil litigation where only the issues pertaining to the legal case are relevant. In many disputes, there are underlying issues that do not surface in the claims or defence filed in court, often because they are not relevant from the legal standpoint, but sometimes because the parties do not wish to highlight those underlying issues.

8 Mediation also allows parties to go beyond a monetary remedy to craft a settlement that meets their commercial interests. An agreement reached in mediation is driven by a problem-solving approach and is

ultimately decided by the parties. If there is no agreement, then the mediation has not resulted in a successful outcome and both parties can walk away from it and proceed with litigation.

9 Since the mid-1990s, the Singapore courts have recognised and supported the benefits of alternative dispute resolution methods such as mediation. Apart from implementing court-annexed mediation at the State Courts, at the Supreme Court, there are various directives and measures that have been put in place to encourage lawyers and their clients to consider mediation at an early stage, where appropriate.

10 To illustrate my points, I am going to contrast two tech disputes that I have personally been involved with, which went through different dispute resolution routes. The first is one that I presided over as judge. This case came before me at the start of the millennium and involved the National Skin Centre (“NSC”) and a company called Eutech Cybernetics (“Eutech”)<sup>6</sup>. NSC had contracted with Eutech, a software developer, for a Y2K compliant computer system with customised software. NSC terminated the contract when Eutech failed to commission the system despite extended deadlines. NSC wanted compensation for Eutech’s breach of contract. Eutech in turn claimed damages for wrongful

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<sup>6</sup> [2001] SGHC 369.

termination of the contract. The suit turned on what was a fairly straight forward finding of fact and the sum at stake was about S\$700,000. Nevertheless, the trial lasted almost three weeks, involving 11 witnesses. In the end, I made the finding that Eutech had missed the initial and extended commissioning deadlines, at which point NSC had the right to terminate the contract. Eutech could have remedied the situation within the specified time frames and resuscitated the contract, but it had failed to do so. But the story does not end there. Eutech appealed, and this prolonged the matter for another two months. In the end, both sides endured the rigours of litigation over a two-year period, involving a three-week trial and an appeal. Eutech was found liable in damages for the sum of almost \$400,000. Although NSC succeeded in recovering part (but not all) of its claims, the costs recovered would only have been be a percentage of the total costs that NSC had to pay to its solicitors.

11 Prior to my first appointment to the High Court bench in 1997, I was appointed the mediator in a dispute between two technology companies. Because mediation is confidential, I cannot disclose their identities, but they are large entities that are still active today. One party was the vendor of hardware and software in a supply and installation contract amounting to millions of dollars. You may recall that the mid-

1990s was a time of great technological change and this supply contract fell victim to that. Before any hardware could be delivered, the purchaser terminated the contract and claimed that its terms permitted such termination due to the change in technology. The vendor naturally claimed for loss of profit. If it had gone to litigation, the court would have to decide whether (i) there was a term in the contract that entitled termination on such grounds and (ii) whether on the facts, such grounds existed. If the purchaser succeeded on both points, then the court would have held the termination to be valid and dismissed the vendor's claim for loss of profits. Otherwise the court would have upheld the vendor's claim and ordered the purchaser to pay an amount equivalent to the profits foregone by the vendor. In the mediation, I helped the vendor realise that the purchaser had no choice but to terminate the contract to cut losses. There was no way the purchaser could have proceeded with accepting delivery of equipment that would no longer work. On the other hand, I pointed out to the vendor that while they had an interest in recovering loss of profit in a contract it had undertaken in good faith, they had a greater interest in preserving their good relationship with the purchaser, which was a large corporation. There would be more profit from future contracts from the purchaser. I suggested that the parties consider settling their disputes by the purchaser agreeing, going forward, to award contracts to the vendor amounting to the sum of the



contract that had been terminated. That way the vendor can make up for the loss of profits in the aborted contract, while the purchaser, which would have to make other purchases in any event, was no worse off contracting with the vendor for such future purchases. Most importantly, the relationship between them was not soured by a long litigation. The parties eventually came to a settlement along those lines. It was a one-day mediation, involving only two representatives who were authorised to make decisions for their respective companies, along with one or two counsel on each side.

12 So, having heard these two cases, which route would you choose? If you do not relish your name and details of your business disputes making its rounds in the press and on social media, and if time, costs and having control of how the dispute is resolved are important to you, the choice is obvious.

13 The Singapore Mediation Centre (SMC), our host tonight, is the pre-eminent centre for mediation in Singapore. It was set up in 1997 with the support of the Ministry of Law and the Judiciary to lead a new direction for the culture of dispute resolution. Over the last 21 years, SMC has facilitated over 3,900 mediation matters and has a settlement rate of about 70%. Of those that have settled, about 90% are settled

within one day. The total worth of disputes that SMC has administered amount to close to \$9 billion. Their professional mediators are trained and skilled and have an array of specialisations. You will see some of them in action during the mock mediation shortly.

14 With this, I wish you a pleasant evening and hope that you will leave tonight convinced about the benefits of mediation and will make it a part of your broader business strategy.

15 Thank you.