

LKK

LÉVY KAUFMANN-KOHLER

DEEP BLUE & THE SUNNY SIDE

AI AS ARBITRATOR – PANACEA OR PROBLEMATIC?

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AI as Arbitrator

- The outlook of AI in IA: now, near and next
- Legal framework: does an arbitrator have to be human?
- Limitations of AI as Arbitrator
- Potential for AI as Arbitrator
- AI, Precedent and Predictability
- The way forward



Outlook of AI in IA Now

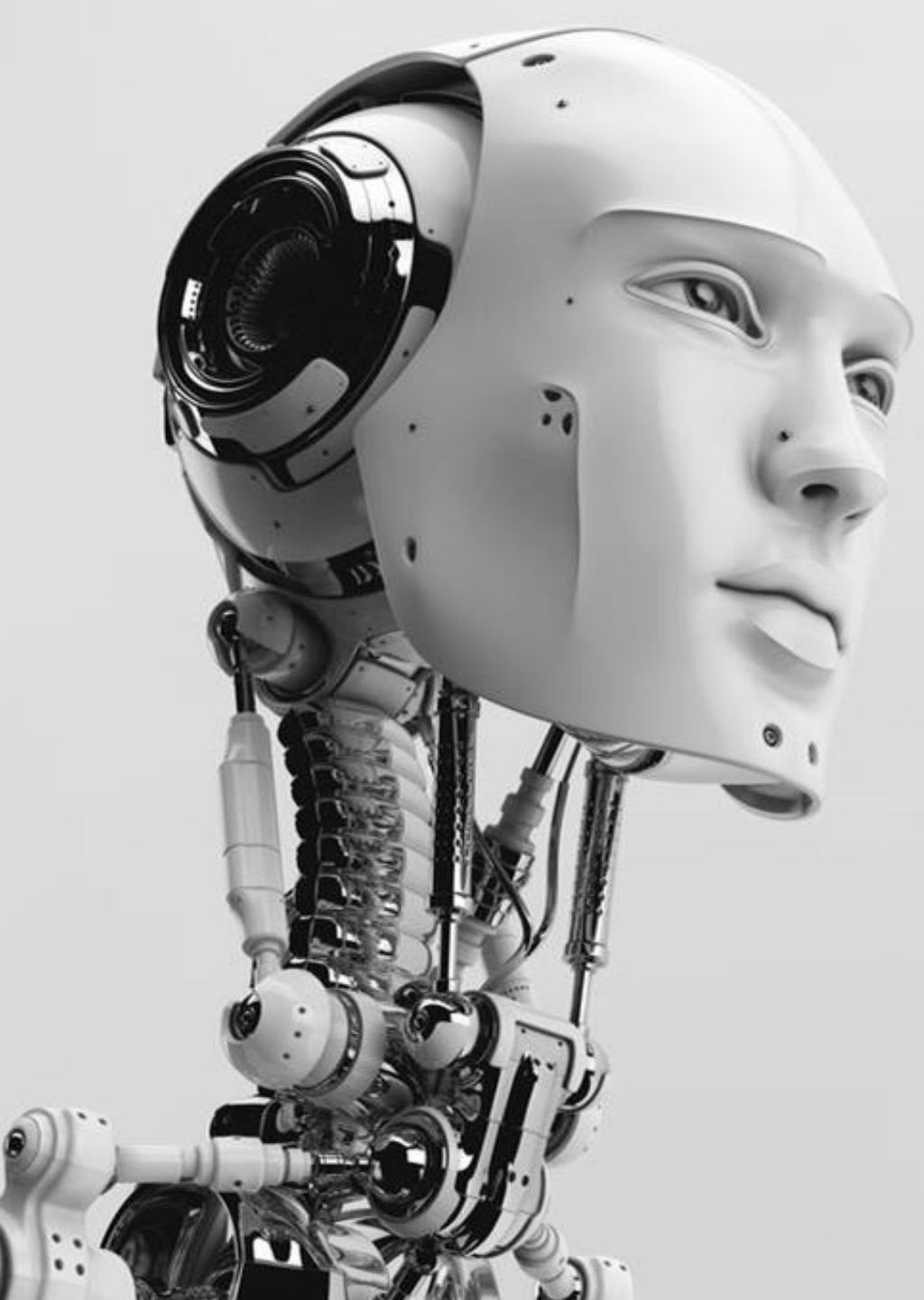
- Counsel-focused tools
- Limited scope



Outlook of AI in IA

NEAR

- **Supporting Arbitrators**
 - *“Selective sub-contracting”*
- **Procedural aspects**
 - Case management
 - Preliminary drafting
- **Substantive aspects**
 - Precedent analysis
 - Decision-support / Nudging



Outlook of AI in IA

NEXT

- **Supplanting Arbitrators**
 - Quality and quantity of data
 - Complexity and value of disputes

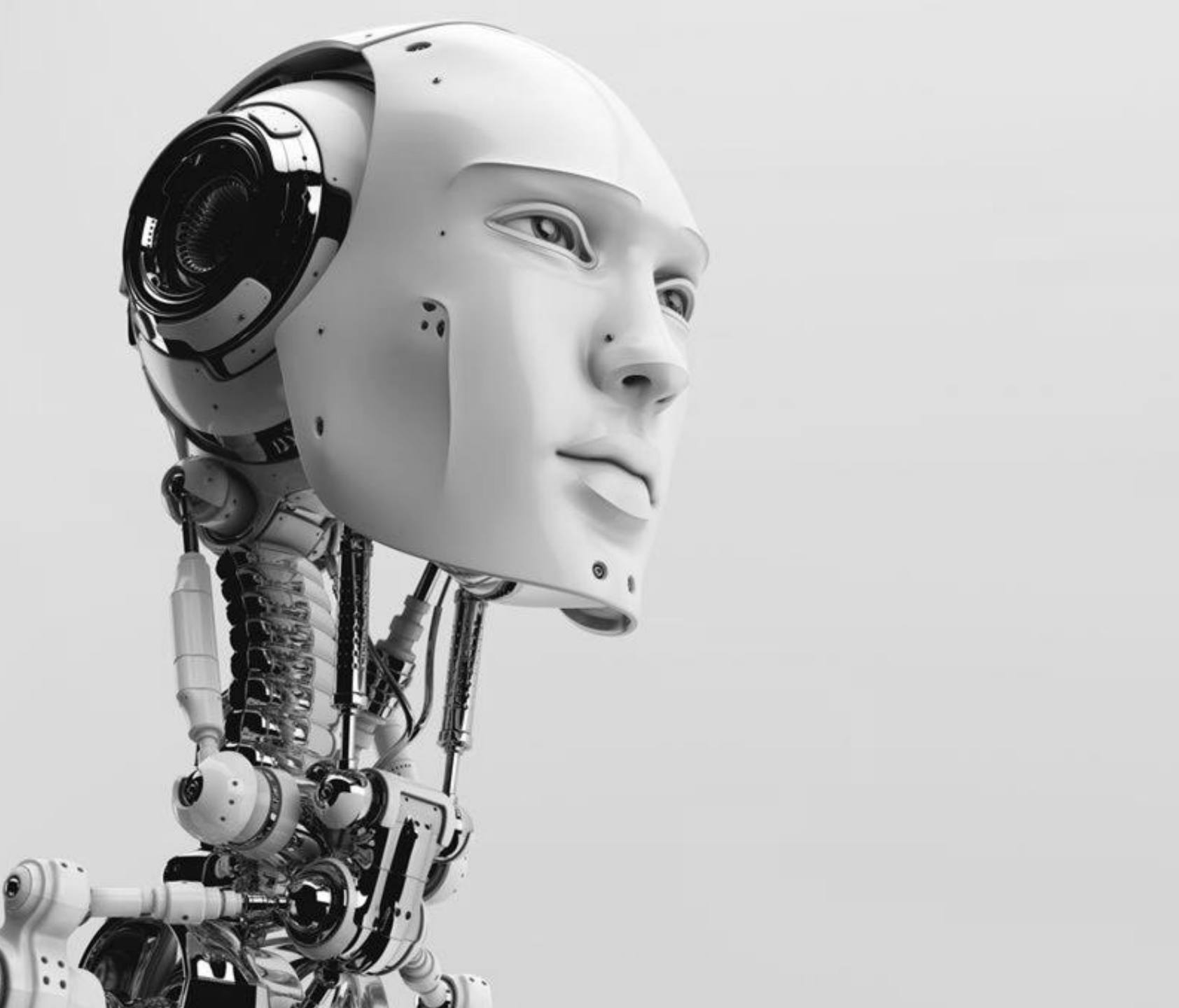


Smart Contracts

Consumer

Construction; Maritime

Investment



Outlook of AI in IA

NEXT

- **Nature of decision-making**
 - Rule-based
 - Case-based
 - Machine learning

LEGAL ISSUES

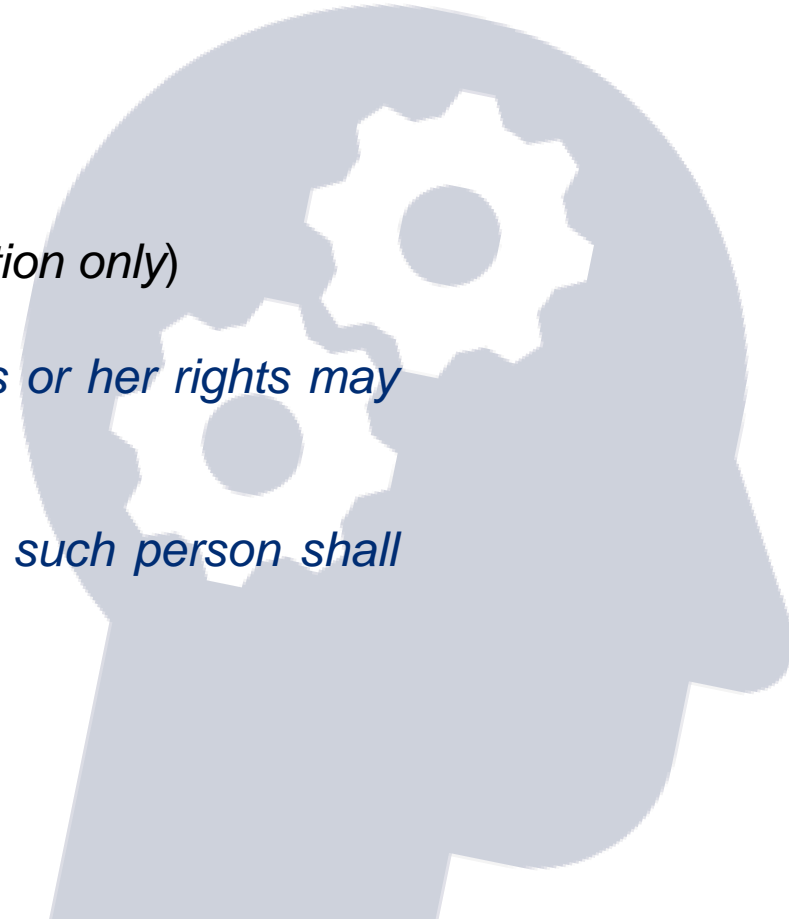
does an arbitrator have to be human?

- **Few express prohibitions / express permission**

- Article 1450, French Code of Civil Procedure (*domestic arbitration only*)

*“Only a **natural person** having **full capacity** to exercise his or her rights may act as an arbitrator.*

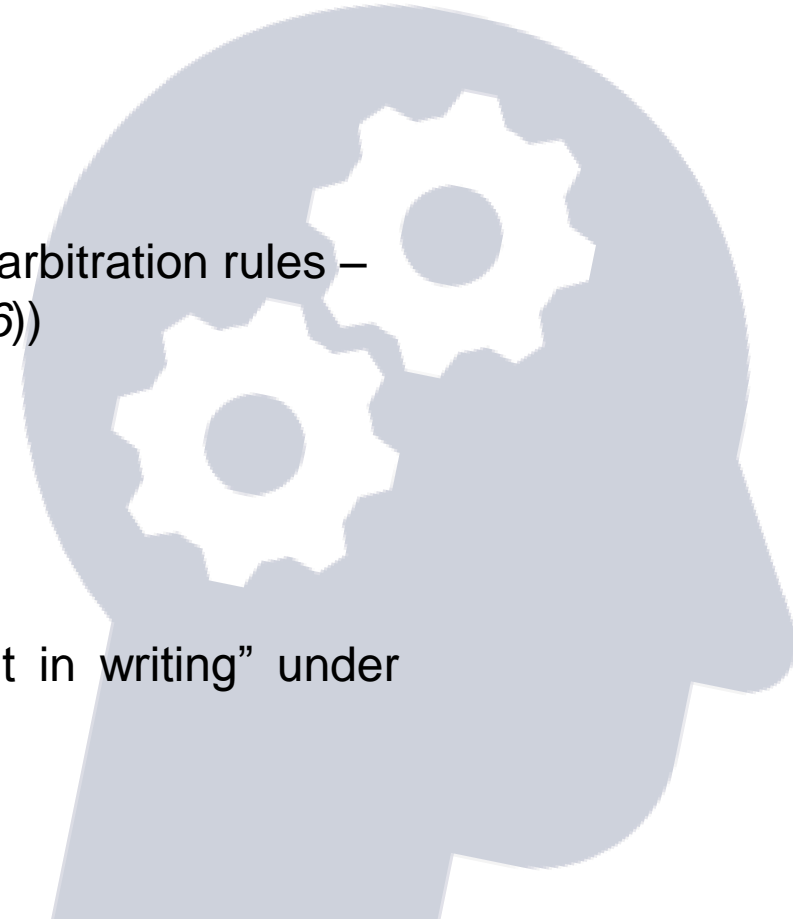
Where an arbitration agreement designates a legal person, such person shall only have the power to administer the arbitration.”



LEGAL ISSUES

does an arbitrator have to be human?

- **Implied prohibitions**
 - Human characteristics of arbitrators under national legislation; arbitration rules –
 - Nationality (e.g. *Article 11(1), UNCITRAL Model Law (2006)*)
 - Death / Resignation (e.g. *Article 15(1), ICC Rules (2017)*)
- **Party autonomy**
- **Evolutionary interpretation / amendments**
 - UNCITRAL Recommendation on interpretation of “agreement in writing” under the NY Convention



LEGAL ISSUES

does an arbitrator have to be human?

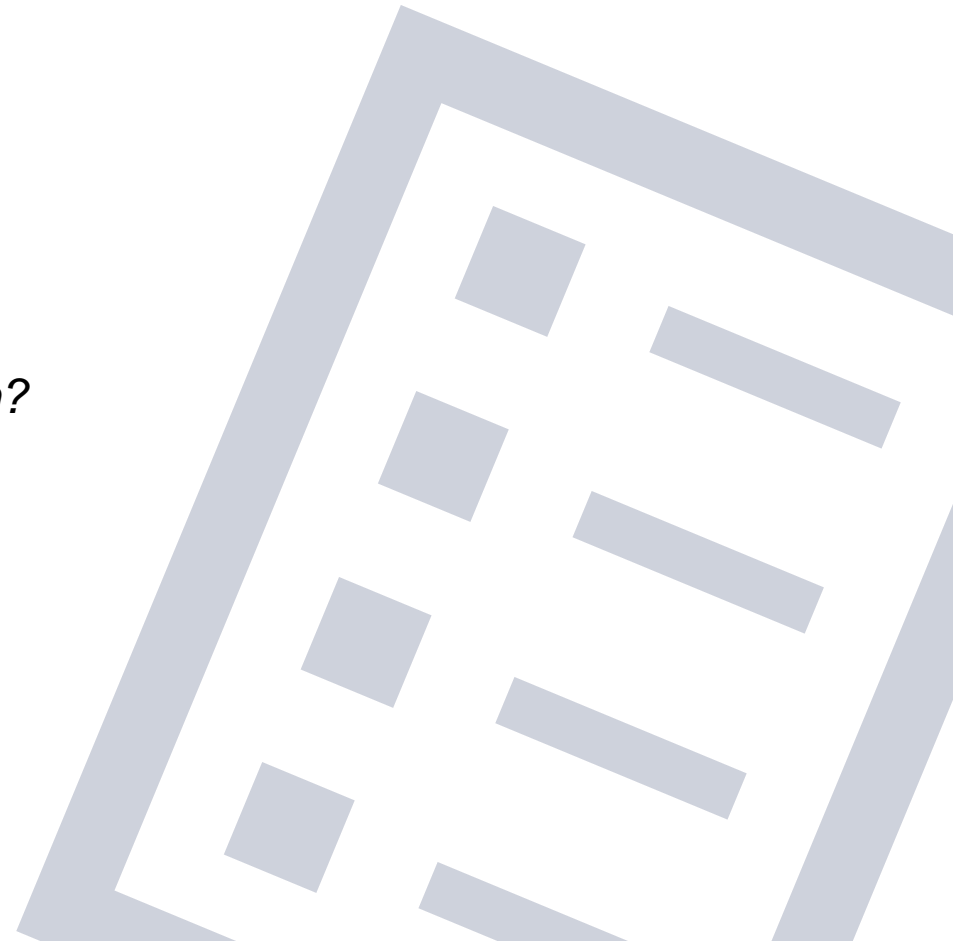
- **Appointment Issues**
 - Which algorithm? Who to administer the program?
 - Appointment in default of agreement



LIMITATIONS OF AI AS ARBITRATOR

practical and ethical issues

- **Trust in the system**
 - Transparency of the algorithm
 - Design risks – *gaming the algorithm*; “*bad learning*”
 - Impact on counsel role – *from persuasion to optimisation?*



LIMITATIONS OF AI AS ARBITRATOR

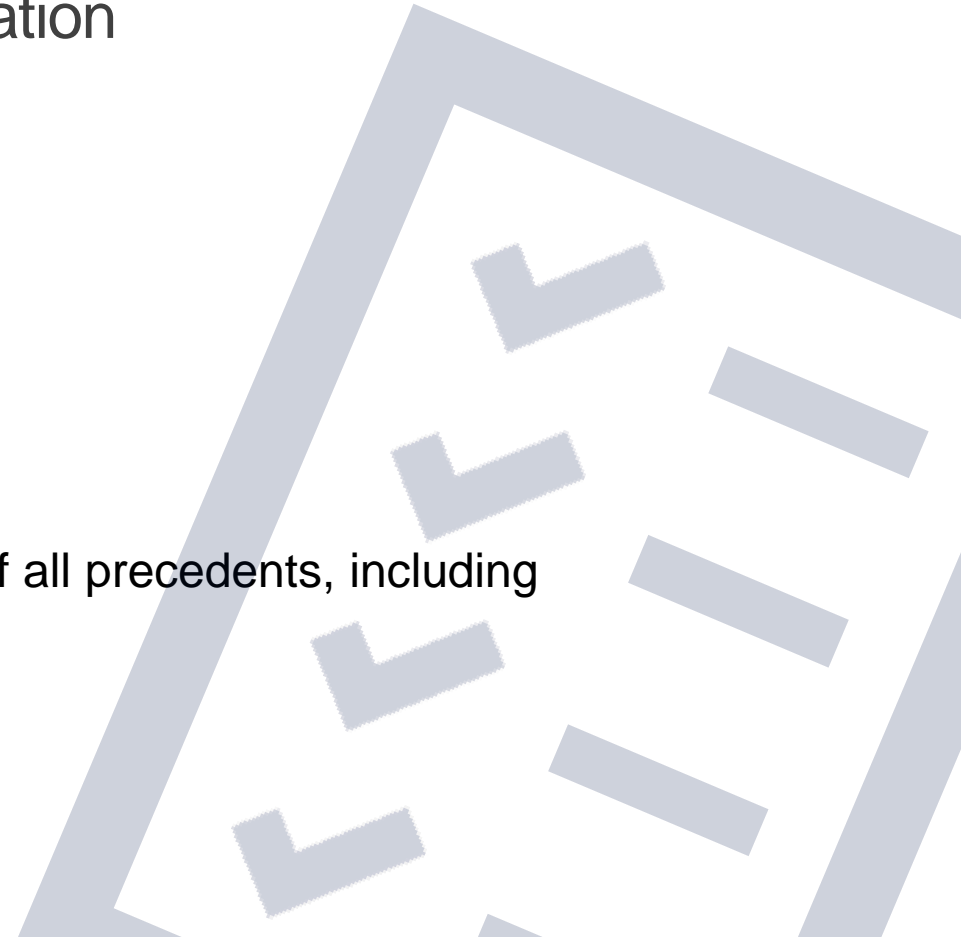
practical and ethical issues

- **Nature of the arbitral / judicial function**
 - The impact of *experience*, *emotions* and *empathy* – somatic markers
- Inputs –
 - Interpreting ambiguity in contractual terms
 - Ascertaining the intention of contractual parties (*to the extent relevant*)
 - Assessing the veracity of documentary and witness evidence
- Outputs –
 - A just, fair, and commercially reasonable result
 - Decision expressed through a reasoned award

POTENTIAL FOR AI AS ARBITRATOR

addressing the fundamental weaknesses of arbitration

- **Time and cost efficiency** (once implemented at scale)
 - Impact on access to justice
 - Reduced potential for awards to be set-aside
- **Quality of decision-making**
 - Removal of conscious and unconscious bias
 - *iura novit curia* realised - access to, and consideration of all precedents, including recent developments
- **Consistency and Predictability in decision-making**
 - Same inputs produce the same result



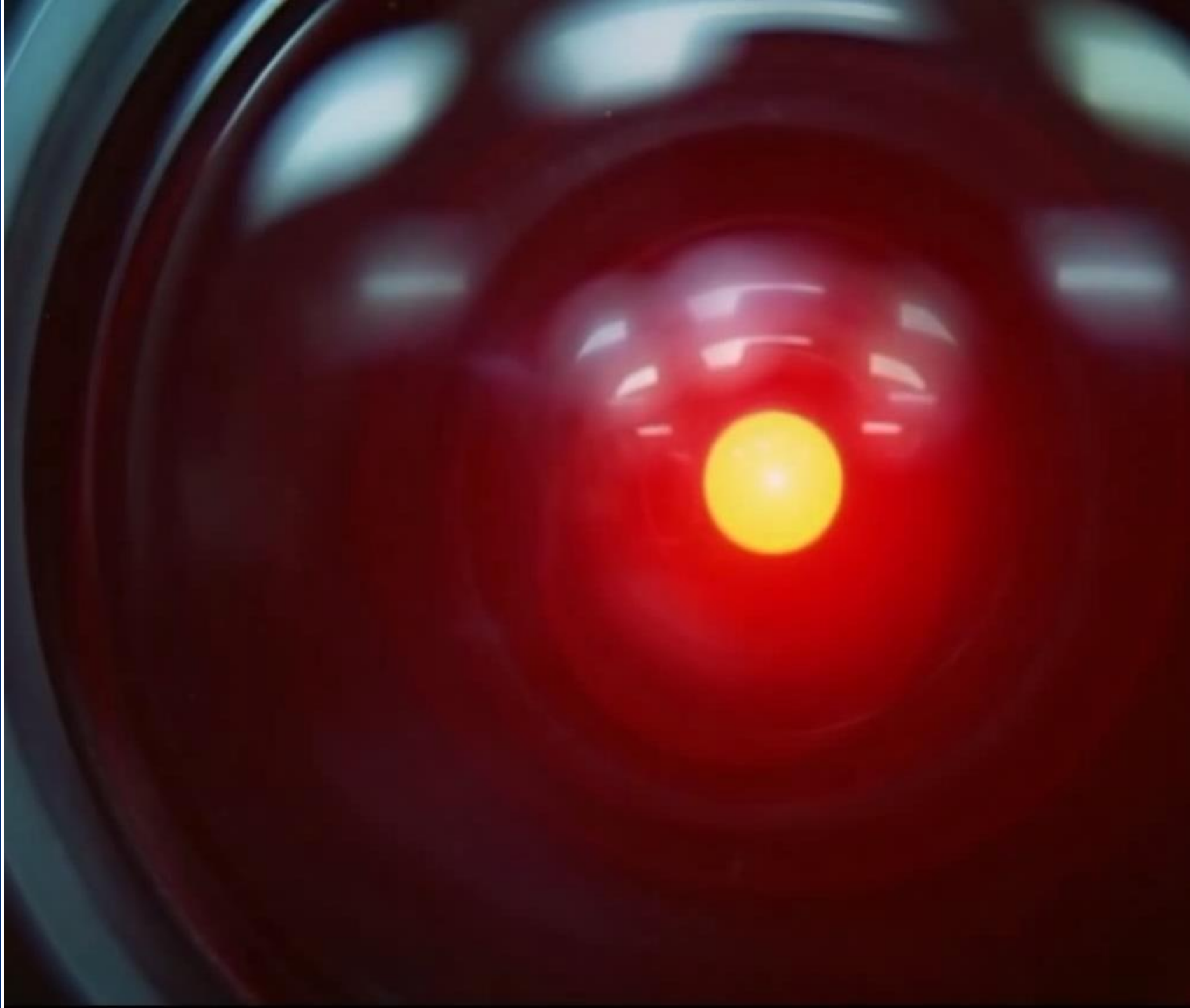
AI, PRECEDENT AND PREDICTABILITY

- Relationship between human and machine decision-making
- The problem of ‘grey zones’
- Contributing to a ‘steady-state’ in the law



THE WAY FORWARD

- Continued development of machine learning technologies
- Recognition of the limitation of technologies
- Proportionate and adaptable regulation



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THANK YOU

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