LEVEL TWENTY SEVEN CHAMBERS

International Arbitration: trends, developments and opportunities for future growth

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1. For those of us who were brought up and educated in Brisbane, the instinct to relocate to live and work in some other part of the world is compelling. In particular, for those who aspire to an international legal practice, a move overseas may be seen – at this stage – as the most realistic option.

2. It is this last point that warrants, and has indeed often attracted, further comment. Australia is well placed to obtain important and substantial international work: we are on the doorstep of a fast-growing area of commerce as part of the Asia-Pacific region, and we have an established profession of arbitrators and lawyers, many of whom are well-respected internationally. Yet, perhaps surprisingly, we lag behind our major competitors in terms of appealing to the global legal audience and to international contracting parties in selecting the forum in which their disputes will be heard.

3. This paper deals with two broad issues: first, some trends or developments in Australian courts engaging with foreign and international law issues and, in particular, trends and developments which may have an impact upon the desirability of Australia as a forum for international dispute resolution; and second, the question of whether we need, or should have, an Australian International Commercial Court.

[1] This paper was delivered by Shane Doyle QC at Level Twenty Seven Chambers on 19 April 2018, and formed part of a presentation with David Grief and Lucas Bastin of Counsel, of Essex Court Chambers, London, "*So you want to be an international lawyer?"*.

Trends and Developments

4. It would be both difficult and perhaps foolish to purport to exhaustively cover the trends or developments in Australian courts engaging with foreign and international issues – so this paper shall be limited to three recent trends of interest.

5. First, there has been appreciably more arbitration and some more international arbitration occurring in Australia in recent years, than in the past.

6. The cause for that, at least as far as concerns international commercial arbitration, is probably the consequence of the large resources infrastructure activities which have been undertaken in and around the coast of Australia over the last 10 to 15 years. This has led to construction disputes, pricing and delivery disputes and access disputes between or involving those foreign stakeholders who have opted for resolution of their disputes by a private arbitration.

7. The reasons why such commercial parties might prefer arbitration to court-based litigation is not the subject of this paper. But the obvious factors are: privacy, the possibility (at least) of a speedy resolution and – most importantly, some say – the selection of the decision makers.

8. On the other hand, and as will be addressed later, the growth of international commercial arbitration in Australia is stunted when compared with the trends elsewhere in the world and, in particular, the Asia-Pacific region.

9. From a legal professional point of view, this is a disquieting trend. We are well placed to be competitive in attracting this kind of work. However, in substance, it seems that we are leaving the field of competing in those markets to the professionals of other jurisdictions – especially our British colleagues.

10. For instance, London chambers have pursued professional opportunities in Hong Kong and Singapore (and elsewhere) by setting up chambers there, sending clerks and others to make promotional and educational trips to these emerging markets, and

jointly marketing British chambers and law firms, including in the developing markets for arbitration administration centres.

11. There is simply no culture of this in Queensland and not much of one in Australia. It also seems, that despite our geographic advantage and pool of talented professionals, we really have – in substance – given up.

12. Not only, however, have we given up, but the other two developments upon which this paper will briefly touch have, to some extent, sullied the image of our legal system as being truly sympathetic to international arbitration.

Trina Solar (US) Inc v Jasmin Solar Pty Ltd

13. The first concerns the recent decision of *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6.

14. Without canvassing the facts in any detail, ultimately the case concerned a supply agreement which contained a choice of law provision selecting New York law. It also contained an arbitration provision. An arbitration had been commenced in New York. The respondent in the arbitration (Jasmin) asserted it was not a party to the supply agreement and thus not a party to the arbitration agreement, because it was made by a related company not acting as agent.

15. It ran that point in a preliminary stage of the arbitration and failed because of the operation of New York law. The New York law of privity is different to that in Australia.

16. Jasmin then commenced proceedings in Australia and sought leave to serve the proceedings out of the jurisdiction in New York.

17. The intended foreign defendant (Trina Solar) submitted that leave should not be granted because it would be futile. If leave was given, then under s 7 of the *International Arbitration Act* 1974 (Cth) (**IAA**) the court should stay the proceedings because they are proceedings instituted by a party to an arbitration agreement.

18. Section 7(2) of the IAA provides:

> "*Subject to this Part, where:*
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> *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
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> *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*
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> *on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter*."

19. That all seemed fairly straightforward.

20. The judge at first instance and the Full Federal Court on appeal, however, held that according to our choice of law rules in Australia, the question of whether there was an arbitration agreement was to be decided by the law of the forum and not the chosen foreign law.

21. This can lead to some odd outcomes. Take, for instance, this example:

    (a) An Australian party posts an acceptance of an offer which is never received. Assume it contains a Swiss choice of law term. Also assume that under Swiss law, acceptance is complete upon receipt only. The approach taken by the Federal Court leads to the Australia court concluding there is a contract between the parties by which they have selected Swiss law to govern that contract, but when applied means there is no contract. The outcome of this arrangement would depend entirely on the place where proceedings were commenced.

    (b) Instead, if it was Swiss law that was to be applied, the Australian court would form a view consonant with the view of the Swiss law.

22. However, that is not why the case is significant. The intended foreign respondent also argued that whatever the common law position might be, the IAA required that the putative proper law be applied to decide whether there was an arbitration agreement.

23. The Act, by s 8, provides for enforcement of a foreign award in a sense rather automatically, but subject to certain limited exceptions, including where a party is able to show that the agreement was not valid according to *the proper law of the agreement* (which is to be understood as the putative proper law) or if there was none, *the law of the place of the award*. Section 7, does not identify a choice of law.

24. The IAA defines the expression 'arbitration agreement' (s 3(1)) to mean "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention". Each Contracting State agrees to 'recognise an agreement in writing under which the parties undertake to submit to arbitration....': Art II(1) and (2).

25. The Convention has been ratified by over 150 Contracting States and it "seeks to establish a single uniform set of international legal standards for recognition and enforcement of international arbitration agreements (and arbitral awards)".[2] It is also directed to the recognition and enforcement of arbitral awards made in a foreign country including awards which would **not** be recognised as awards by domestic law: Article 1 (1); Article III.

26. Under the Convention, recognition and enforcement is only to be withheld if (inter alia):

> "the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made": Article V para 1 (a).

27. The Convention is here using the language of "agreement" and the identification of parties to it in a broad sense as still an appropriate description even though it is null

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[2] Born, "The law governing international arbitration agreements: An international perspective" (2014) 26 SAcLJ 815-848.

and void, or inoperative. The Convention does not contemplate any other test of validity in the forum (the recognising Contracting State).

28. This is all reflected in the provisions of the IAA.

29. Given that an award is enforceable unless according to the putative proper law there is no valid contract under s 8 of the IAA, whatever the common law position may be, the statutory position ought to be that a stay of court proceedings under s 7 of the Act should be granted where according to that putative proper law there is a valid contract.

30. If this is not so –

    (a) there would be something of an unseemly rush for the court and the arbitral tribunal to get to judgement or award first; and

    (b) the court has to be schizophrenic in applying the law of the forum for the s 7 question but ignoring it for the s 8 issue – both being directed to whether an entity is a party to an arbitration agreement.

31. Greenwood J agreed.[3] Unfortunately (in obiter) Dowsett and Beach JJ did not.[4]

32. These kinds of uncertainty and technical points are the very things which parties by choosing arbitration hope to avoid.

33. This is an unfortunate development, which serves to frustrate the evident intention of the parties to commit the resolution of their disputes, including as to whether there is a contract of arbitration at all, to the putative proper law of the contract and not the law of whichever jurisdiction may be the forum.

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3 [2017] FCAFC 6 [82]-[83].

4 Ibid, [178] to [184], esp [182].

The award of indemnity costs

34. A further development is the rather confusing position in this country concerning costs of an unsuccessful challenge to arbitral awards.

35. It should be the case that the unsuccessful party has to pay indemnity costs. It has lost, and in breach of its contractual promise that gone to court to try for a better result – and failed. But quite aside from the correct position, in this country it is simply unclear what the outcome in any particular case may be.

36. First, a number of years ago, in *Altain Khuder LLC v IMC Mining Inc (No 2)* [2011] VSC 12, Croft J awarded indemnity costs against an award debtor who successfully sought to resist enforcement of a foreign award. He did so by analogy to the approach in Hong Kong, which treats it as a general rule that indemnity costs will be awarded against such an unsuccessful party. The approach in Hong Kong is based in part upon the treatment of challenges to arbitral awards as "exceptional events", because "the whole principle of arbitration is that a person who obtains an award in his favour is entitled to expect that the Court will enforce the award as a matter of course".[5]

37. Justice Croft's decision was reversed on appeal and the Court of Appeal in *obiter* expressly disagreed with Croft J's approach, opining that there was no reason to treat proceedings under the IAA differently to any other proceedings.[6]

38. After the *Altain Khuder* decision, Allsop CJ suggested, speaking extra judicially, that the approach to enforcement proceedings might need to adequately reflect the public policy considerations that should properly attend them. It seems that in his view, enforcement proceedings in arbitral awards are "different in character" to other civil proceedings.

39. His Honour said:

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5 *Altain Khuder LLC v IMC Mining Inc (No 2)* [2011] VSC 12 [11] citing *Wing Hong Construction Limited v Tin Wo Engineering Company Ltd* [2010] HKEC 919.

6 (2011) 38 VR 303, 391-2 [335]-[336].

> "The decision to enter into an arbitration agreement represents a bargain between the parties under which they consent to refer disputes to an arbitrator, along with the concomitant undertaking to accept and abide by the arbitral award. Commencing litigation to resist enforcement (if without foundation) may be viewed first and foremost as an abandonment of that contractual bargain."[7]

40. In doing so, Allsop CJ analysed the approach in the United Kingdom – where indemnity costs are awarded for unsuccessful challenges save in exceptional circumstances – and Hong Kong which, as Croft J applied in his judgment, follows a similar line of reasoning.

41. His Honour then later (although not deciding the point) appeared to call for the adoption of this same approach in the decision of *Ye v Zeng (No 5).*[8] His Honour's approach is also consistent with that taken by Martin CJ in *Pipeline Services WA Pty Ltd v ATCO Gas Australia Ltd*.[9]

42. The issue then came up again more recently in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169.

43. In that case, Beach J considered whether there was a special rule that indemnity costs should be ordered against parties that have unsuccessfully sought to set aside an arbitral award. Noble Resources argued that such an order "is justified by the character and context of international commercial arbitration, the 'exceptional nature' of an Art 34 challenge, public policy and international precedent".

44. Beach J rejected the existence of a "special rule" of this kind for a number of reasons, a few of which are worth mentioning briefly.

45. First, he considered that the silence of the UNCITRAL Model Law and the IAA on the question of costs means that it is the law of the forum which determines the principles to be applied, and underlying those principles in the case of indemnity costs

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7 James Allsop, "The Enforcement of International Arbitration Awards and Public Policy" (Speech delivered at AMTAC and Holding Redlich Seminar, 10 Nov 2014) 30-40.

8 [2016] FCA 850 [23].

9 [2014] WASC 10 (S) [18].

are questions of public policy – and it is, again, the public policy of the forum which is to be applied.

46. Second, Beach J considered that this approach is consistent with international precedent. In this way, he analysed the decisions in the United Kingdom and Hong Kong differently than others have done. In his Honour's view, those forums were applying their respective laws of the forum, supported by the public policy of each. Accordingly, any rule that they were propounding was justified in that setting.

47. Finally, his Honour considered whether the laws of Australia – including the IAA – and the public policy of Australia, justifies a modification to the usual rule of costs.

48. Beach J rejected that any such modification was justified for a number of reasons, including the nature of arbitration itself. His Honour observed that:

> "The parties to the arbitration agreement can be taken (applying objective contractual theory) to have contracted in the knowledge of and with an awareness that either party was entitled to pursue an Art 34 challenge that had reasonable prospects of success. After all, the arbitration agreement would have been entered into within the setting of the UNCITRAL Model Law, including the non-derogable rights contained therein…".

49. As noted above, Chief Justice Allsop's approach seems to me to be the correct one Either way, seven years after Justice Croft's decision in *Altain Khuder*, the position in this country is still unclear. Although there may be fair reasons for the difficulty,[10], this lack of certainty is again a factor which impacts upon the perception and desirability of Australia as a forum for determining international disputes.

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[10] See e.g. Hammerschlsag J in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd (No 2)* [2015] NSWSC 564 [31]-[39].

The quest for an Australian International Commercial Court

50. Turning now to the second topic for this paper, a question which is being asked more frequently is whether Australia should follow other jurisdictions and establish an International Commercial Court.[11]

51. There is a need to first distinguish between two possible forms of an International Commercial Court. The first is a "court" only in the administrative sense. There are numerous examples that come to mind: the International Court of Arbitration of the International Chamber of Commerce; the London Court of International Arbitration; the European Court of International Arbitration; and the Singapore International Arbitration Centre (although, obviously, it does not call itself a court).

52. The second is a "court" in the sense of an adjunct of the present court structures. A recent but apparently successful example of this is the Singapore International Commercial Court (SICC).

53. But do we need either kind of "court" in Australia?

The Court in the Arm of Government sense

54. Australia does not presently have a Court in the **second** of these senses.

55. Success for Australia as a centre for international dispute resolution is, in no small part, a matter of perception. Commercial parties have the freedom to select the forum for their disputes, and they vote with their feet.

56. Therefore, if we are to encourage and attract this kind of work to Australia, then we must be cognisant of how Australia, as a forum for dispute resolution, is perceived.

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11 See e.g. The Hon Chief Justice Marilyn Warren AC and The Hon Justice Clyde Croft, 'An International Commercial Court for Australia: Looking Beyond the New York Convention' - A paper presented by the Honourable Chief Justice Marilyn Warren AC and the Honourable Justice Clyde Croft at the Commercial CPD Seminar Series, Melbourne, 13 April 2016.

57. It is apparent that parties are voting with their feet to go elsewhere; so it seems at least some change must be needed.

58. International law issues can be complex. One argument in favour of such a court in Australia might be that it is worthwhile to have a court or tribunal with specialist judges who have the capacity to deal with these issues day in and day out, who are given an opportunity to develop the expertise and instincts regarding the answers to these difficult problems, and who encourage and promote coherent and consistent jurisprudence on these issues.

59. This is the approach taken to some extent in Singapore, and its experience appears to so far be a successful one. The SICC, established in January 2015, is a Division of the Singapore High Court that only hears claims of "an international and commercial character".

60. The SICC judges include both Singapore Supreme Court Judges from both the Court of Appeal and the High Court, but also a number of international jurists, including four Australians (of 15 international judges): Justices Patricia Bergin and Roger Giles, both formerly of the Courts of New South Wales; and Justices Robert French and Dyson Heydon, both formerly of the High Court.[12]

61. The SICC also has its own procedural rules and practice directions with various innovations, including that:

    (a) parties may be represented by foreign lawyers in certain circumstances;[13]

    (b) proceedings may be confidential;[14]

    (c) parties may apply for an order to replace Singapore evidential rules with other rules of evidence;[15]

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12 See the full list available at: https://www.sicc.gov.sg/Judges.aspx?id=30.
13 See e.g. Singapore International Commercial Court Practice Directions [26].
14 Ibid [97].
15 Ibid [118].

(d) a party may apply to have a question of foreign law determined on the basis of submissions rather than proof;[16] and

(e) parties may contract out of, or limit, their rights to appeal to the Court of Appeal of the Singapore Supreme Court against any SICC judgment or order.[17]

62. In addition to innovation, the SICC has also demonstrated its efficiency – most judgments (17/23 of those delivered to date) were handed down **within 8 weeks** of the hearing, with some judgments being delivered *ex tempore* and many within a matter of days.

63. It seems, therefore, that it is likely to continue to be a success. So far it has operated with expedition; its members are well regarded; unlike arbitration, third parties can be added to the proceedings; and, unusually, the parties are able to apply for the proceedings to be private.

64. That said, there is not a compelling case for such a court in Queensland or indeed Australia: there is the potential cost of establishing the court; there may be constitutional issues in any court established which did not preserve its "institutional integrity" – meaning possession of the defining or essential characteristics of a court;[18] and, principally, we already have effective commercial divisions in the State courts and the developing importance of the Commercial and Corporations National Practice Area in the Federal Court.

65. That is, if there is a perceptions problem in Australia, it is not because of the want of capable Judges.

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16 Ibid [110].
17 Ibid [139(3)].
18 *Wainohu v New South Wales* (2011) 243 CLR 181 at [44].

Court in Administrative Sense

66. On the other hand: Do we need a Court in the sense of the administrative body which operates as a registry for international Arbitration?

67. In my view the answer, is: Yes. This follows from the experience of such "courts" overseas, which has again generally been one of success.

London

68. The London Court of Arbitration (**LCIA**) has released some of its recent statistics. In 2012, it received 265 requests for arbitration;[19] in 2013, 290;[20] in 2014, 296;[21] in 2015, 326;[22] in 2016, 303;[23] and in 2017, 285.[24]

69. Of course, these numbers are likely dwarfed by the numbers of ad hoc arbitrations. For example, the London Maritime Arbitration Association (**LMAA**) reported 1,720 references in 2016 and 1478 new references in 2017.[25]

70. However, comparisons with London are difficult: it is an established market, it has particular geographical and commercial appeal, and long entrenched historical associations.

Singapore

71. The sole arbitration institution in Singapore is the Singapore International Arbitration Centre (**SIAC**). It administers most of its cases under its own Rules of Arbitration, or the UNCITRAL Rules. It also appoints arbitrators for ad hoc arbitrations.

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19 Annual Report available at: http://www.lcia.org//LCIA/Casework_Report.aspx.

20 Annual Report available at: http://www.lcia.org//media/download.aspx?MediaId=376.

21 Annual Casework Report available here: file:///C:/Users/bianc/Downloads/Registrar's%20Report%202014.pdf.

22 Annual Report available at: http://www.lcia.org//media/download.aspx?MediaId=500.

23 Annual Report available at: http://www.lcia.org//media/download.aspx?MediaId=570.

24 Annual Report available at: http://www.lcia.org//media/download.aspx?MediaId=679.

25 See full statistics available at: http://www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

72. SIAC has seen a gradual, relatively consistent, increase in its new references per year over the past decade.

73. In 2016, a record number of 343 new references were made – this is up from 271 in 2015,[26] 222 in 2014; [27] 259 in 2013;[28] and 235 in 2012.[29] It is also a significant improvement upon the 90 new references received by SIAC in 2006.

74. Australian parties made up approximately 3.5% of the parties to new arbitrations administered by SIAC in 2016 and Australian arbitrators made up approximately 8% of the arbitrators nominated or appointed to SIAC arbitrations in that year.

75. Further, and notably, in over 71% out of all new Singapore seated arbitrations filed in 2015, one or more of the parties was not Singaporean, while in close to half of these cases, a non-Singapore arbitrator was appointed. Indications are also that the number of foreign parties choosing Singapore as a seat for arbitration is on the rise.

Hong Kong

76. The key arbitration institution in Hong Kong is the Hong Kong International Arbitration Centre (**HKIAC**). It has its own Administered Arbitration Rules, but also applies the UNCITRAL Rules to its administered arbitrations.

77. In 2016, HKIAC received 262 new requests for arbitrations. Its new references have been relatively consistent over the past years. For example: in 2015, there were 271 new references, 252 in 2014, and 293 in 2012.

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26 Annual Report available at: http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf

27 Annual Report available at: http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf

28 Annual Report available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf

29 Annual report available at: http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report.

78. Of the HKIAC administered arbitrations in 2016, 79.8% were conducted in English, with Hong Kong, Singapore, the USA, South Korea, the UK, Japan and the Netherlands being in the top 12 nationalities of the parties involved.

Australia

79. Finally, despite the circumstance that arbitrations are seemingly increasing in Australia, it is still dwarfed by the experiences of Singapore and others.

80. For example, the Australian Centre for International Commercial Arbitration (**ACICA**) was established in 1985. It operates in Sydney.

81. The number of international arbitration cases registered every year by ACICA varies to some degree, but it does not bear any resemblance to the success stories overseas. Between 2003 and 2007, only 7 arbitrations were referred to ACICA.[30] Between August 2010 and 2013, 30 new references were filed.[31]

82. There are other centres for dispute resolution but, again, none matches the growth experienced in Singapore or other overseas centres.

83. Accordingly, it is not unkind to say we have no viable International Arbitration Centre of Australia. There may be a number of reasons for this:

    (a) first, our business and legal services are spread widely;

    (b) second, in terms of a focal centre, Sydney is an obvious candidate – but it still forms only a part of our commerce; and

    (c) third, interstate rivalries may prevent us viewing, and collectively supporting, that as the true centre for our International Commercial Court.

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30 Queen Mary Survey 2008, available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf.

31 James Whittaker, Colin Lockhart and Jin Ooi, 'Australia' in James Carter (ed), International Arbitration Review (Law Business Research, 3rd ed, 2013), p 40 (cited in Reyna Ge, Australia and International Arbitration: Rising to the Challenge of Improving Regional Competitiveness, available at: https://www.ciarb.net.au/wp-content/uploads/resources/essay.pdf).

84. If we wish to attract this kind of work, however, it seems that we should have such a "court". The experience in Hong Kong and Singapore, as our competitors, demonstrates that the existence of such a centre or "court" provides something of a magnet for requests for arbitration.

85. So how might we achieve this? One solution by which it might be easily achieved is through the existing structures of the Registry of the Federal Court of Australia. The Federal Court Registry is already established in many locations across the country, and its link to the Federal Court avoids the interstate rivalry that might otherwise affect the establishment of an international arbitration court.

86. The Registry could provide the International Arbitration Centre services, and there is unlikely to be any constitutional prohibition in it doing so.

87. Finally, the Federal Court is the natural and national court for this Centre. If its registry was able to operate as an Australian International Centre for Arbitration then that, together with the Federal Court of Australia National Practice "Sub-area" dedicated to International Commercial Arbitration, may operate as something of an analogue to the Singapore International Commercial Court.

88. And it is hoped – considering the other trends identified above – that the jurisprudence which emerges out of that practice area will be highly robust in giving effect to the parties' agreement to arbitration, and in providing certainty and consistency in the decisions made and the legal principles applied to those agreements.