

THE TEMPTATION OF DOMESTICITY – AN EVOLVING CHALLENGE IN ARBITRATION

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L'auteur s'attache à démontrer dans ses développements qu'il est primordial dans le domaine de l'arbitrage commercial, que les praticiens du droit et les juridictions joignent leurs efforts afin d'assurer la mise en oeuvre cohérente et systématique des législations nationales qui s'inspirent de la Convention de New York et de la Loi type de la CNUDCI.

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I INTRODUCTION

It is a pleasure to be with you here in beautiful Queenstown, and I am once again grateful for the invitation extended to me by the Arbitrators' and Mediators' Institute of New Zealand. Over a number of years now, I have presented at this excellent conference about the role of the courts in the reinvigoration of arbitration practice in Australasia.¹ Last year, I spoke about the establishment of the specialist Arbitration List in the Commercial Court of the Supreme Court of Victoria, and I introduced our then brand new Arbitration Rules and Practice Note. I am very

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1 Past speeches and papers are accessible on the Supreme Court of Victoria's website <www.supremecourt.vic.gov.au/home/contact+us/speeches/speeches+-+justice+croft>.

pleased to say that since the commencement of the new Rules, the Arbitration List has flourished and I have heard a number of important, high-profile applications. For instance, in late 2014 I heard an application for the issue of subpoenas to attend before the AFL Anti-Doping Tribunal in the Essendon supplements case,² while last year began with the urgent Formula 1 enforcement proceedings,³ and ended with the enforcement of a SIAC award in the Gutnick case.⁴ Coincidentally, all three of these high-profile cases were of some interest to the sports-mad public of Melbourne – albeit rather tangentially in the Gutnick case, with those proceedings having nothing to do with Mr Gutnick's former presidency of the Melbourne Football Club!

This year, I again wish to discuss with you the role of the courts in arbitration. I will focus on an evolving challenge in this area – a challenge which I have come to know well sitting in the Arbitration List, and that I have come to describe as the "temptation of domesticity".⁵ The "temptation of domesticity" describes the intuitive appeal of approaching matters for determination through the prism of legal doctrines and principles with which the court is most familiar. In the case of Australian courts – and, for that matter, those here in New Zealand – this, at the very least, means considering matters through a common law lens, if not going so far as to apply common law doctrines and equitable principles expressly. Like all temptation, such an approach is attractive in the short-term, but ultimately has the potential to interfere with broader, longer-term objectives. Chief among these long-term objectives is the promotion of international uniformity in international commercial arbitration practice.

As I will explain, the international provenance of Australia and New Zealand's arbitration regimes necessitates an international judicial approach. Particular regard is to be had to the reasoned decisions of courts in other countries – particularly those in our region – where their arbitration law shares a common basis with ours in the

2 *Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 Players* [2014] VSC 635 (19 December 2014).

3 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792; *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786 (collectively, "the Sauber case").

4 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (22 December 2015); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016) (collectively, "the Gutnick case").

5 See *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 321; *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [12]–[24], [43]–[49]; Justice Clyde Croft, "The Temptation of Domesticity' and the Role of the Courts in Australia's Arbitration Regime" (2015) 89 *Australian Law Journal* 684; Chief Justice James Allsop and Justice Clyde Croft, "The Role of the Courts in Australia's Arbitration Regime" (Paper presented at the Commercial CPD Series, 11 November 2015).

New York Convention⁶ and the Model Law.⁷ Accordingly, courts must resist the temptation to approach issues arising in arbitration-related applications using principles not found in these international instruments, and which may be peculiar to a particular jurisdiction or domestic legal system.

II THE INTERNATIONAL PROVENANCE OF NATIONAL ARBITRATION LEGISLATION

I turn first then to consider the international provenance of Australia's domestic and international arbitration regimes – noting of course that much of what follows is also relevant in the New Zealand context, given that the *Arbitration Act 1996* (NZ) ("the Arbitration Act") is also based on the Model Law.

Across the Tasman, the *International Arbitration Act 1974* (Cth) ("the International Arbitration Act") gives the Model Law the force of law in Australia,⁸ and the Uniform Commercial Arbitration Acts – which govern domestic arbitrations in Australia, and which are enacted in each State and Territory – substantially reproduce the terms of the Model Law.⁹ Another important object of the International Arbitration Act is to give effect to Australia's obligations under the New York Convention. Similarly, as you will all be aware, here in New Zealand the Model Law not only forms the basis of the provisions of the Arbitration Act, but section 3 expressly permits reference to the Model Law and its preparatory works when interpreting the Act.

The Full Court of the Federal Court of Australia had cause to consider the international provenance of Australia's arbitration regime in its highly influential judgment in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*, which was handed down in July 2014.¹⁰ The facts of the case were relatively straightforward and involved the distribution in Australia of air conditioning units manufactured in China by TCL. TCL breached its promise to Castel of exclusivity

6 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ("the New York Convention").

7 *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) ("the Model Law").

8 *International Arbitration Act 1974* (Cth) s 16(1).

9 The Uniform Commercial Arbitration Acts are enacted in each State and Territory other than the Australian Capital Territory. See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration (National Uniform Legislation Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld).

10 (2014) 311 ALR 387 ("the *TCL* case").

of rights of distribution of certain TCL products and Castel successfully obtained an arbitral award in its favour following a 10-day hearing.

TCL sought to resist enforcement and have the award set-aside, arguing that the arbitration tribunal had failed to accord it procedural fairness, thereby breaching the rules of natural justice and rendering enforcement of the award contrary to the public policy of Australia. TCL argued that the proper approach was to revisit in full the questions which were before the tribunal in order to determine whether the rules of natural justice had been breached. Murphy J dismissed TCL's arguments and enforced the award. Despite an unsuccessful challenge to the constitutional validity of his Honour's decision in the High Court, TCL pressed its appeal to the Full Federal Court.¹¹

By its grounds of appeal, TCL challenged Murphy J's findings (among others) that –

- there is a need to balance the efficacy of enforcing international arbitral awards with public policy; and
- that uniformity across jurisdictions is a relevant consideration when determining whether enforcement would be contrary to the public policy of Australia.

TCL also sought to comprehensively re-agitate arguments made before Murphy J as to the asserted inadequacies of the factual findings of the tribunal.

The Full Federal Court found that there was no breach of the rules of natural justice and therefore that enforcement would not be contrary to public policy. In relation to the international provenance of Australia's arbitration regime, the Full Court said that:¹²

it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the ... [International Arbitration Act] permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments

11 See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533.

12 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387, 405 [75].

of common law countries in the region, such as Singapore, Hong Kong and New Zealand.

Similar sentiments have been expressed by the Victorian Court of Appeal in the context of the Uniform Commercial Arbitration Acts.¹³

Here in New Zealand, in *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd*, the Court of Appeal has described the relationship between the Model Law and the Arbitration Act in the following terms:¹⁴

Implementing the ... Model Law, the Act was "designed to substantially overhaul and modernise" New Zealand arbitration law and bring the statutory provisions "into line with the international regime".¹⁵

Over 15 years ago – but in a similar vein – in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, the Court of Appeal acknowledged that assistance in interpreting the Act may be "gained by considering the experience of other common law jurisdictions."¹⁶ The Court of Appeal only identified England and Australia's arbitration legislation as mirroring that of New Zealand; however, it surely would not take much by way of detailed reasoning to extend this to other countries – particularly those in our region – where their arbitration law is based on the Model Law or the New York Convention. Indeed, as I have just said, this is clearly now the position in Australia following the *TCL* case.

III ENFORCING AND CHALLENGING AWARDS

I now turn to consider examples of the temptation of domesticity in a range of arbitration-related applications which may come before the courts. But first, in the spirit of the international perspective mandated by our respective arbitration regimes, it is fitting that I refer to what is but a fraction of the writings of the Chief Justice of Singapore on this topic. Delivering the judgment of the Singapore Court of Appeal around this time last year in the case of *AKN v ALC*, Menon CJ framed the issue as follows:¹⁷

A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy

13 See eg *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 (1 July 2014) [24]–[27].

14 [2015] 2 NZLR 180 at 188 [31].

15 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2003] 2 NZLR 92 at 97 [18].

16 [2000] 3 NZLR 318 at 323 [16].

17 [2015] SGCA 18 (31 March 2015) [37] (emphasis added).

many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. *The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases.* This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law ...

The Chief Justice is referring here to perhaps the most prevalent manifestation of the temptation of domesticity, namely where the court is invited in enforcement or setting aside proceedings to intervene to correct errors of law or fact made by an arbitral tribunal.¹⁸ His Honour continued and said that:¹⁹

In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.

As in the *TCL* case, these comments were made in the context of a challenge to an award based on alleged breaches of the rules of natural justice. Another example of an invitation being extended to the court to inappropriately interfere with procedural rulings made by an arbitral tribunal came before me last year in the case of *Cameron Australasia Pty Ltd v AED Oil Ltd*.²⁰

A The Cameron Case

The *Cameron* case involved an application to set aside two procedural rulings – which were rendered in separate partial awards – and the final award of an arbitral tribunal. The substantive dispute submitted to arbitration concerned a claim in negligence for costs incurred in rectifying a leak at an oil well in the Timor Sea, north-west of Darwin.

The first procedural ruling complained of was a decision not to allow the respondent in the arbitration, Cameron, to re-open its case in order to withdraw its voluntary admission that it owed a duty of care in tort to the claimant, AED. In its pleading in the arbitration, Cameron did not admit the existence of the duty of care pleaded by AED. However, in preparing its opening written submissions, and in light of a recent decision of the New South Wales Court of Appeal, Cameron

18 See Chief Justice Sundaresh Menon, "Standards in Need of Bearers: Encouraging Reform from Within" (Paper presented at the Chartered Instituted of Arbitrators, Singapore Centenary Conference, Singapore, 3 September 2015) 17.

19 [2015] SGCA 18 (31 March 2015) [39].

20 [2015] VSC 163 (1 May 2015) ("the *Cameron* case").

decided to admit the existence of the duty. The admission was made despite the High Court granting special leave to appeal the Court of Appeal decision. The arbitration hearing proceeded on this basis, but before the tribunal rendered its award, the High Court overturned the Court of Appeal decision. Cameron therefore sought to re-open the arbitration hearing in order to withdraw its admission – based, as it was, on the overturned Court of Appeal decision.

The tribunal refused Cameron's application. As a result, Cameron submitted before me that it was unable to present its case before the tribunal.²¹ Cameron argued that although the tribunal articulated the correct test with respect to an application to re-open a hearing, it did not apply that test. This led Cameron to argue that the "serious legal errors" of the tribunal in refusing the application to re-open "comprised an affront to the basic fairness of the arbitral process" – and that therefore enforcement ought to be refused and the award set aside.²²

The second procedural ruling complained of was a decision not to allow Cameron to rely on an expert report in circumstances where Cameron chose not to call the expert as a witness in the arbitration. Cameron argued that the arbitral procedure was therefore not in accordance with the parties' agreement – namely, that the tribunal would not be bound by the rules of evidence.²³ Cameron sought to rely on a particular provision of the Supreme Court Rules which provides that a party may put in evidence a report served on that party without calling the expert.²⁴ Given that the governing law of the arbitration was that of Victoria, Cameron argued that the tribunal was not permitted to refuse to admit evidence that was admissible under the rules of evidence.

I rejected both grounds for setting the awards aside and found that Cameron was, in effect, attempting to pursue a merits appeal in the form of an appeal on questions of law. Indeed, the nature of Cameron's arguments revealed that the purported grounds were simply appeals from determinations of the tribunal which were – to borrow the phrase used by the Full Court in *TCL* – "dressed up" as either complaints about the fairness of the arbitral process or as breaches of the agreed arbitral procedure. As in the *TCL* case, a telltale sign of this was the fact that Cameron sought to re-argue why it should have been permitted to rely on the expert report in the arbitration. To have succumbed to the temptation of domesticity in this context

21 Commercial Arbitration Act 2011 (Vic) s 34(2)(a)(ii).

22 *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 (1 May 2015) [45].

23 *Commercial Arbitration Act 2011* (Vic) s 34(2)(a)(iv).

24 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.04.

would have meant considering these arguments on their merits, despite the tribunal having exercised its powers in a "considered and reasoned manner, in circumstances where there was no suggestion that the parties did not have a full or reasonable opportunity" to put those arguments to the tribunal.²⁵

At this point, I might add that invitations to intervene in the factual or legal merits of an arbitral award are not the only ways in which a court might be tempted by the comfort of domesticity. Indeed, temptation may present itself in circumstances where an award is yet to be rendered, or even where there is no arbitration on foot. Examples to which I will return later include applications seeking a stay of court proceedings and referral to arbitration, and applications for the issue of subpoenas to attend before or produce documents to an arbitral tribunal. Before exploring these examples though, I wish to turn to another enforcement application heard in the Arbitration List this time last year – the *Sauber* case.²⁶

B The Sauber Case

As some of you may have seen, the *Sauber* case concerned a Dutch Formula 1 race car driver seeking to be reinstated as a driver for the Sauber F1 Team. The applicant driver, Mr van der Garde, and the company set up to manage his interests sought enforcement in Victoria of a Swiss arbitral award. The critical dispositive provision of the award required Sauber to – refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers.

Two days after the rendering of the award, van der Garde's Australian representatives contacted my Associates in accordance with the *Arbitration Practice Note*. The matter was listed for the hearing of an urgent *ex parte* application the following day (a Thursday), at which van der Garde sought orders permitting substituted service of the Originating Application on Sauber in Switzerland. I made orders for substituted service and listed the substantive application for hearing on the following Monday, the Labour Day public holiday, less than a week before the first race of the season, the Australian Grand Prix at Albert Park in Melbourne.

At the hearing, Sauber sought to resist enforcement on public policy grounds arguing that the critical dispositive provision was too uncertain to constitute an order of the Court. In support of this submission, Sauber argued that the subject of an order of the court "must be able to ascertain in precise terms what it is that they must do, or

25 *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 (1 May 2015) [55].

26 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 792.

refrain from doing", where default may ground an action for contempt.²⁷ In addition to this uncertainty argument, Sauber submitted that enforcement would be futile because the award did not require Sauber to take any positive step to reinstate van der Garde as one of its drivers.

I delivered my judgment and written reasons one day after the hearing. In allowing the application and enforcing the award, I found that the critical dispositive provision was not too vague or uncertain, nor was enforcement futile; noting that the court was available to assist the parties in the event of any "doubt or difficulty" in this regard.²⁸

The Court of Appeal affirmed this approach, finding that "all concerned [were] well aware of the nature of the dispute and its resolution", and that there was "no demonstrated lack of utility in the award as to render it against public policy to enforce it as an order of the court".²⁹

Although not described explicitly as such, Sauber's submissions on uncertainty and futility appeared to draw directly on equitable principles – principles which, despite their intuitive appeal to the common lawyer, are not found in the Model Law, or the New York Convention. In this context, it is important to remember that these international instruments constitute an amalgam of common law and civil law concepts. Clearly, the application of principles peculiar to one legal system has the potential to hinder the uniformity project which the Model Law exists to serve and which Australia and New Zealand's arbitration regimes are unequivocally designed to support. A challenge for courts then is to identify the jurisprudential basis of submissions like those advanced by Sauber, before exercising restraint and, to the extent permitted by our parliaments, applying concepts found in these international instruments with reference to international jurisprudence.

IV SUPPORTING ARBITRAL PROCESSES

I turn now to consider how the temptation of domesticity manifests itself in applications other than enforcement or setting aside proceedings, before returning to another high-profile enforcement proceeding – the *Gutnick* case.³⁰ As will become apparent, there is nothing special about the role of the court in enforcement or setting

27 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 732, 795 [7].

28 *Giedo van der Garde BV v Sauber Motorsport AG* (2015) 317 ALR 732, 797 [22].

29 *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789–90 [12]–[13].

30 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (22 December 2015); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016).

aside applications when compared with applications for some kind of intervention in the arbitral process itself. Indeed, the international provenance of our respective arbitration regimes is equally as relevant.

A Stay and Referral to Arbitration

I move first to consider applications to stay court proceedings and refer the parties to arbitration. In June of last year, in the case of *Robotunits Pty Ltd v Mennel*, the defendant, Mr Mennel, sought orders that proceedings commenced by the plaintiff, Robotunits Pty Ltd, be stayed and that the parties be referred to arbitration.³¹ The proceedings in question involved a claim for the return of money which Robotunits claimed that Mennel, its former managing director, had wrongly caused it to pay to his bank account. Mennel sought a stay and referral to arbitration in reliance on an arbitration agreement contained in a shareholders agreement to which he and Robotunits were parties. Mennel claimed that he was entitled to make the bulk of the payments under the shareholders agreement, and that therefore the proceeding involved the "determination of a matter that, in pursuance of the [arbitration] agreement, [was] capable of settlement by arbitration", and so was required to be stayed under the International Arbitration Act.³²

In resisting the application, Robotunits submitted that, in order to constitute a "matter" under that section, the assertions giving rise to the dispute between the parties must be "sustainable", in that they must have a reasonable prospect of success. Robotunits argued that Mennel's assertion that the shareholders agreement authorised some or all of the payments did not meet this sustainability requirement and so there was no matter – or dispute – to which the arbitration agreement could apply. Upon reviewing the authorities, including from Hong Kong, Singapore and the UK, I found that neither the Act, nor the equivalent article in the Model Law – article 8 – imposed a threshold requirement of this kind. I noted that:³³

to find otherwise would be to succumb to the temptation of "domesticity" ... by allowing the determination of whether to stay proceedings and refer the parties to arbitration to be coloured by the merits of the case.

Moreover, in relation to the role of the courts in applications of this kind, I observed that:³⁴

31 (2015) 297 FLR 300.

32 International Arbitration Act 1974 (Cth) s 7(2).

33 *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 321 [42].

34 *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300, 306 [14].

Even though the merits of the case are necessarily yet to be canvassed by an arbitration tribunal, courts are no more entitled to delve into the merits of the case in the context of a stay application, than they are in the context of enforcement or setting-aside proceedings.

Before moving on, I should note that the wording of the corresponding provision in the New Zealand Arbitration Act is different to its Australian counterpart – and, for that matter, article 8 of the Model Law – although the New Zealand provision has been given a narrow reading by the Supreme Court in Wellington.³⁵

B Subpoenas

I turn now to consider applications for the issue of subpoenas to attend before, or produce documents to an arbitral tribunal. In Australia, as in New Zealand, applications of this kind may only be made with the permission of the arbitral tribunal.³⁶

In another matter heard in the Arbitration List in 2015 – *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* – Esposito applied for the issue of subpoenas to a number of corporate entities in relation to a domestic arbitration.³⁷ Before setting out the applicable principles, I reiterated the view that I had expressed in the *ASADA* case,³⁸ namely that it is:³⁹

clearly inappropriate for the Court, in an application ... by a party to obtain subpoenas, to embark upon a process which would, in effect, "second guess" the arbitral tribunal which has already given permission for the application to obtain a subpoena

35 See *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188 (19 December 2014) [4], [52]. Arbitration Act 1996 (NZ) sch 1, s 8(1) provides (emphasis added):

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

36 International Arbitration Act 1974 (Cth) s 23; Arbitration Act 1996 (NZ) s 27. See also Commercial Arbitration Act 2011 (Vic) s 27A.

37 [2015] VSC 183 (8 May 2015).

38 *Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 Players* [2014] VSC 635 (19 December 2014).

39 *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183 (8 May 2015) [5] ("the *Esposito* case") citing *Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 Players* [2014] VSC 635 (19 December 2014) [63].

In ordering that the proposed subpoenas be issued in the *Esposito* case, I noted that the principles applicable to the question of whether an arbitral tribunal should grant permission to a party to apply to the courts for the issue of a subpoena are not necessarily the same as the principles which the courts apply in deciding whether to issue a subpoena. Nevertheless, I remarked that there is "every reason why an arbitral tribunal should not grant permission in circumstances where it is reasonably clear that the court will ... not issue the subpoena".⁴⁰

In relation to the court's role in this kind of application, practitioners and counsel ought be reminded that courts are not a mere rubber stamp on the determination of an arbitral tribunal to permit a party to apply to the court. Under the Australian regime, courts retain a discretion whether to issue the subpoena and it is for the court, not the arbitral tribunal, to determine whether the coercive powers of the state to compel a person to do something should be exercised. This gives rise to a relatively delicate balancing act whereby the court must exercise its discretion without "second guessing" the tribunal's decision to allow the application to be made, or otherwise interfering with the substantive or procedural issues in the arbitration, or otherwise succumbing to the temptation of domesticity. In light of this, it was particularly helpful in the *Esposito* case that the tribunal had furnished detailed reasons for its decision to permit the application for the issue of subpoenas to be made to the court. As such, I was able to see that the tribunal appeared to have accorded procedural fairness to the parties and that the principles applicable to the issue of subpoenas had been considered and applied.

V THE GUTNICK CASE

Finally, I turn to another high-profile case heard in the Arbitration List late last year – an appeal from which was heard and determined by the Court of Appeal less than a month ago – the *Gutnick* case.⁴¹ This case raised some particularly interesting issues relevant to my paper this morning – issues which necessitated extended discussion in the judgment of the proper judicial approach to be taken.

By way of factual background, the applicants – Indian Farmers Fertiliser Cooperative Ltd, or IFFCo, and its subsidiary, Kisan International Trading Fze – sought enforcement in Australia of an arbitral award rendered under the SIAC

40 *Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd* [2015] VSC 183 (8 May 2015) [7].

41 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (22 December 2015); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016).

Rules.⁴² In the arbitration, the respondents, Joseph Gutnick, and Legend International Holdings, Inc, were found by a three member tribunal to have induced, by fraudulent misrepresentation, the purchase of certain shares in Legend. Among other awards and orders, the tribunal made a declaration that the relevant agreements "are rescinded". The tribunal also made express orders that the respondents pay the applicants the purchase price of the shares with interest. The juridical seat and venue of the arbitration was Singapore, and the governing law of the agreements was that of England – a position which gave rise to a somewhat unusual state of affairs to which I now turn.

Before me, the respondents sought to resist enforcement of the award on public policy grounds. Specifically, the respondents argued that the tribunal's awards and orders entitled the applicants to have their money back and yet keep the shares. As a consequence, it was argued that the award offended a "universal' and 'cardinal' principle that a plaintiff is not to be compensated for more than their loss", and therefore that enforcement would be "contrary to a universal bedrock principle of justice and morality."⁴³ In other words, it was argued that enforcement would be contrary to public policy because the award allowed for double recovery by the applicants. In line with the respondents' submissions, I was prepared to accept that enforcement of an award which allows for double recovery would likely be contrary to public policy.⁴⁴ However, I found that the award did not in fact allow for double recovery and so I enforced the award and entered judgment against the respondents in the sum of US\$40.4 million with interest.

The Court of Appeal, comprising the Chief Justice, Santamaria and Beach JJA, refused leave to appeal, upholding my decision and finding that:⁴⁵

When the tribunal made its award declaring that the agreements had been rescinded, it did not declare that the respondents were entitled to retain ownership of the shares; nor did it say anything that implied such an entitlement. It is plain from the award that the respondents' case was a conventional claim for rescission involving the return of what was purchased with a refund of the purchase price. The arbitral tribunal accepted those claims and made an award and order accordingly. As the judge put it, "the declaration of rescission in the award necessarily entails the avoidance of

42 *Arbitration Rules of the Singapore International Arbitration Centre* (4th ed, 2010) ("the SIAC Rules").

43 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [100].

44 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [39], [105].

45 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016) [30].

the transactions from the beginning and the restoration of the parties to their previous positions". With respect, we agree. Far from being contrary to public policy, we consider that the award conforms with the public policy of Australia.

In the course of its judgment, the Court of Appeal referred to my characterisation of the proper approach to be taken by the Court to the consideration of the parties' submissions and noted that the parties had accepted that approach.⁴⁶ The question of the proper approach to be taken was particularly interesting and somewhat unusual because the relevant aspects of the governing law of the contract happened to align with the domestic law of the enforcement jurisdiction. Moreover, the governing law, being English law, was informed by Australian case law with respect to rescission and the converse was also true. Indeed, the relevant aspects of the governing law also happened to align with the domestic law of the seat of the arbitration, namely Singapore.⁴⁷

This state of affairs made it particularly important to clearly define the Court's role in order to explain why a significant portion of the judgment discusses rescission – a domestic, common law doctrine not found in the Model Law or the New York Convention. As I explain in the judgment, this discussion was a consequence of the need to "read and understand the award ... in the context of its governing law."⁴⁸ In the context of this case, this was necessary in order to "determine what effect the award may or may not have" had, and, more specifically, "in order to ascertain whether the [award allowed] for double recovery".⁴⁹

As a result, my consideration of the operation of the doctrine of rescission in English law does not demonstrate that I succumbed to the temptation of domesticity because these references were made *only* – and for that matter, *necessarily* – by way of understanding the tribunal's declaration that the agreements were rescinded. Accordingly, this detailed discussion of rescission does not inform the question of whether enforcement would have been contrary to public policy – it only goes to the question of whether the award provided for double recovery. To help demonstrate the point, it may be noted that this discussion does not canvass whether

46 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016) [20].

47 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [47].

48 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [44].

49 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [44].

the tribunal correctly applied the relevant legal doctrine, as reasoning of that kind would have constituted an impermissible interference with the determination of the tribunal.

A Residual Discretion to Enforce

Another interesting issue raised by the *Gutnick* case was whether a court can enforce an award even if to do so would be contrary to public policy.⁵⁰ Although it was not necessary for me to decide this point, I expressed the view that under the New York Convention and the Model Law enforcement is discretionary, not mandatory. However, I observed, as others have done, that "given the nature of the public policy ground for refusing enforcement ... this discretion would only fall to be exercised in favour of enforcement in the most exceptional of cases."⁵¹ That is, it is only in the most exceptional of cases that a court would find that enforcement would be contrary to public policy but then go ahead and enforce the award anyway.

This case did not meet this description and I was not satisfied that the fact that the award had already been enforced in Singapore, or that the SIAC Rules may or may not have allowed for recourse to be had to the tribunal to request an interpretation of the award, would have been relevant discretionary considerations in the circumstances.⁵² Further, I gave as an example of "domesticity" an alternative submission of the applicants that the Court could "ameliorate the effects of any conflict with public policy by making enforcement conditional upon the return of the shares, and that, therefore, the Court should exercise its discretion to enforce the [award]."⁵³ Indeed, I noted that:⁵⁴

it is difficult to see how a court would be enforcing a foreign award ... in a manner consistent with authority if enforcement were made conditional on some extraneous matter not contemplated by, or not provided for by the arbitral tribunal. IFFCo and Kisan pursued this point on appeal by way of a notice of contention; however, given the Court of Appeal's conclusion that enforcement was not contrary to public policy, it was not necessary for it to rule on the notice and it declined to do so.⁵⁵

50 See *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [108]–[121].

51 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [111].

52 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [121].

53 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [120].

54 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 (21 December 2015) [120].

55 *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5 (9 February 2016) [33].

B Stay of Enforcement Judgment

Finally, as part of the Gutnick enforcement proceedings, I also had cause to consider the applicable principles to the grant of a stay of execution of a judgment enforcing an arbitral award. The respondents sought a stay on the basis that a proposed appeal would be rendered nugatory unless a stay were granted. The stay application was heard and written reasons were published on 22 December 2015, the day after I had handed down the enforcement judgment.

In support of the application, the respondents relied on the relevant provision of the Supreme Court Rules which allows the court to stay execution of a judgment, and submitted that the same principles were applicable as in any other application for a stay pending appeal.⁵⁶ This argument gives rise to an interesting conundrum in light of the challenge that I have been discussing this morning. The whole point of enforcement is that an arbitral award can be enforced as an order of the court. Accordingly, the court should be entitled to stay execution of those orders if appropriate, pursuant to the usual principles. However, on face value, the application of these principles appears to be indicative of domesticity in the sense that provision is not made for the grant of stay of execution in either the New York Convention or the Model Law. Indeed, as Allsop CJ put it in the case of *Elders International Australia Pty Ltd v Beijing Be Green Import & Export Co Ltd*:⁵⁷

A clear, express and demonstrated public policy of the Australian Parliament is contained within the Act for the facilitation of the enforcement of international arbitral awards. That facilitation means their proper, efficient and timeous facilitation and recognition. To grant a stay would delay enforcement.

After referring to this passage and other authorities, including from Singapore, I found that "the policy underlying the [International Arbitration] Act speaks strongly against staying execution of a judgment enforcing a foreign arbitral award."⁵⁸ As the Chief Justice went on to say in *Elders* though, this does not mean that "a stay of a judgment based on an international arbitration award should never be given".⁵⁹

56 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 66.16.

57 (2014) 324 ALR 194, 198 [14] (*Elders*).

58 *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (22 December 2015) [18].

59 *Elders International Australia Pty Ltd v Beijing Be Green Import & Export Co Ltd* (2014) 324 ALR 194, 198 [14].

However, in my view, this does suggest that the court must exercise its discretion to grant a stay sparingly.

In the circumstances of the *Gutnick* case, I was prepared to grant an interim stay of no more than five court days during a Law Term, subject to the direction of the Court of Appeal.⁶⁰ Given the time of year, this meant that the respondents obtained a stay of execution of the judgment until the first week of February this year. The application for leave to appeal was filed promptly following the grant of the stay, and the Court of Appeal heard that application and the appeal (as if leave had been granted) on the final day of the stay, which was a Friday. As I have already mentioned, the Court of Appeal refused leave to appeal and delivered its judgment the following Tuesday. Once again, upon judgment *Gutnick* and *Legend* indicated their intention to appeal and sought an extension of the stay. *IFFCo* and *Kisan* opposed this application but ultimately conceded that there would be no prejudice to them should the stay be extended to the end of that week. As a result, the Court of Appeal made orders extending the stay to 12 February, or until such other time as might otherwise be ordered by it or the High Court of Australia. To date, I have not been made aware of any application for special leave to appeal to the High Court, or to extend the stay further.

VI CONCLUSION

In closing, and as I have discussed this morning, the challenge of resisting the temptation of domesticity is significant. Practitioners and courts alike must remain vigilant in order to ensure that due regard is had to the international provenance of domestic legislation based on the New York Convention and the Model Law, and in order to promote international uniformity in international commercial arbitration practice.

⁶⁰ *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770 (22 December 2015) [18], [22]–[23].

