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Articles

This article will look at the approach of Australian courts to the extended definition of 'party' contained in the International Arbitration Act 1974 (Cth) and the domestic Commercial Arbitration Acts in which a party is defined to include parties claiming 'through or under' the named party to the arbitration agreement. An insurer exercising a subrogated right of recovery pursuant to a joint names policy of insurance by bringing a recovery action by way of arbitration falls within the extended definition of party to the arbitration agreement in the International Arbitration Act 1974 (Cth) and the domestic Commercial Arbitration Acts. The defendant, by way of defence to the arbitration, may assert that the recovery proceedings are not maintainable as the defendant is also an insured under the joint names insurance pursuant to which the insurer is exercising its right of subrogation. The article will consider whether this can lead to a potential contravention of ss 43 and 52 of the Insurance Contracts Act 1984 (Cth) which preclude the referral of disputes in connection with a policy of insurance to arbitration. As the defendant to the arbitration may commence court proceedings to seek an anti-suit injunction of the arbitration on the basis that it is also an insured under the joint names policy of insurance, this article will explore the issues that can arise as to whether the court proceedings ought to be stayed pursuant to the International Arbitration Act 1974 (Cth) and the domestic Commercial Arbitration Acts or under the principles of 'traditional stay jurisprudence'.

Liability insurance disputes, almost by definition, involve three actors: a third party plaintiff, the insured and its insurer. Ordinarily, the suit is initiated by the third party plaintiff only against the insured. The suit, so constituted, may take place without the insurer. After resolution of that litigation, questions arise as to whether relitigation should be permitted. But the law does not usually entertain profligate relitigation of the same matter, even by a non-party to the prior litigation. How, and when, should relitigation be avoided in liability insurance disputes? In this article, I examine just three basic scenarios for the purpose of focusing on who is seeking to relitigate: the insured, insurer or third party. Ultimately, I draw conclusions as to when liability insurance disputes can be justifiably relitigated and when they cannot.

An insurer seeking a negative declaration to the effect that it is not liable to indemnify an insured under its policy instead of waiting for its insured to commence and progress a coercive action to a settlement or trial might be worthwhile in the case of an insurance dispute about the operation of: (a) a first party insurance policy if it might: (i) save the parties the cost of engaging experts to advise on the amount of a loss or how to go about assessing it; and (ii) avoid the prospect of an insurer having to pay damages for a failure to promptly pay a claim; and (b) a liability insurance policy if it might avoid an insurer getting involved, or continuing to be involved, in an insured's defence of a third party claim. This article is intended to outline the circumstances in which an insured or an insurer might consider applying to a court for a declaration of rights instead of waiting for the other side to make the first move: 'How professional men like these ... can have put their names to such a farrago of nonsense as this document passes my comprehension ... it does not make sense at all. But now each party seeks from the court a declaration as to the true interpretation of this nonsensical affair. It is not said that either of them has either broken any of its provisions or seeks to break them; it is not suggested that there are any facts whatever to be considered; and we are to make what in my younger days [is] used to be called a declaration "in the air". That is against the principles of the Court of Chancery as I understand them.'

Case Notes

On 15 September 2020, the UK High Court delivered judgment in a significant test case regarding the construction of business interruption policy wordings underwritten by eight defendant insurers with a significant presence in the UK's insurance market. The test case was brought by the Financial Conduct Authority in the context of the COVID-19 pandemic and consequent nationwide restrictions introduced by the UK Government in February and March 2020 to combat the spread of the virus. Given its comprehensive consideration of a wide range of policy wordings, it is likely the Court's reasoning will be carefully considered by Australian courts, following similar restrictions imposed by state governments around Australia. Significantly, the Court reaffirmed the importance of the principles of contractual construction with respect to the determination of the scope of coverage, as well as their importance in resolving difficult issues of causation that may arise.