Articles

Two vexed issues in arbitration — The joinder of third parties and the arbitrability of indemnity issues

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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'.

Introduction

Arbitration, whether international[1] or domestic, was designed as a quick,

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1 The primary reason for the increasing popularity of international arbitration is the attraction of the assumed ease of enforcement in countries who are a party to the *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) as well as flexibility and expertise in the arbitral panel. Not only does arbitration provide a neutral forum for parties engaging in international commerce, the consensual nature of arbitration, the relaxation of the rules of evidence, the limited availability of cross-examination as well as the exchange of written submissions mean that arbitration should hypothetically offer a just, cheap and quick resolution to commercial disputes: see Laina Chan, 'International Disputes, the Execution of Foreign Arbitral Awards in the Asia Pacific and Two Case Studies' (2015) 28(2) *New York International Law Review* 1.

informal[2] and confidential mode of dispute resolution for commercial parties bound by an agreement to arbitrate their disputes. In many commercial contexts including construction disputes, parties appoint up to three experts to resolve their disputes. As the arbitration regime relies upon contract, the privity of contract rule prima facie applies so that non-privies cannot be compelled to participate in the arbitration. However, adopting recommendations in the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*'),[3] this rule has been modified by statute in Australia[4] and overseas[5] so that the definition of party is extended to include any 'person claiming through or under a party' to the arbitration agreement.

Unless non-privies fall within the extended definition of party to allow the joinder of all interested parties to the arbitration, inconvenience, multiple proceedings and increased costs can result. For example, at the conclusion of a construction project, a contractor may claim damages from the principal for delay and disruption to the construction program. By way of cross-claim, the principal may claim a setoff for damages for defective quality and liquidated damages. Interested parties to the arbitration may include non-privies like design consultants.

Other construction arbitrations may be recovery proceedings brought by insurers pursuant to their rights of subrogation. Errors or omissions by the sub-contractors may have caused third-party property damage or personal injury to third parties with the insurers of joint names professional indemnity or contractors all works policies indemnifying the head contractor for the loss and damage. Once this occurs, pursuant to the doctrine of subrogation, the insurers are subrogated to the rights of the head contractor. The insurers may exercise those rights to bring recovery proceedings by way of arbitration against the sub-contractors or consultants. Issues may arise in the arbitration as to whether the arbitration is maintainable as the insurers may have waived their rights of subrogation against the sub-contractors or consultants. In addition, the latter may seek an anti-suit injunction on the basis that they are

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2 The rules of evidence do not apply and cross-examination can be minimal.

3 *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) ('*Model Law*').

4 Australia is a federation of states and territories where uniform legislation throughout the federation is an unusual occurrence. Nevertheless, a Model Bill, consistent with the *Model Law*, has been implemented in the states and territories except the Australian Capital Territory. The intention behind the legislative scheme was to narrow the gap between domestic and international arbitration. See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA). There is no equivalent legislation enacted in the Australian Capital Territory. These Acts as currently amended are generally uniform though differences exist between the provisions in some cases.

5 See, eg, *Arbitration and Conciliation Act 1996* (India) ss 8, 45, 54; *International Arbitration Act 1974* (Cth) s 7(4) ('*International Arbitration Act*'); and note *Arbitration Act 1996* (UK) s 58(1) which provides:

> **58 Effect of award.**
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> (1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

an insured under the policies of insurance that the insurers have relied upon to commence the recovery action and that the insurers have waived their rights of subrogation against all joint insureds.

This article will look at the approach of Australian courts to the extended definition of party contained in the *International Arbitration Act 1974* (Cth) ('*International Arbitration Act*') and the domestic Commercial Arbitration Acts[6] 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* 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) ('*Insurance Contracts Act*') 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* and the domestic Commercial Arbitration Acts or under the principles of 'traditional stay jurisprudence'.

When a third party is claiming through or under a party to an arbitration agreement

The Australian High Court has had two opportunities to consider whether a third party to an arbitration agreement may properly be described as a 'person claiming through or under a party to the arbitration agreement'.

In *Tanning Research Laboratories Inc v O'Brien* ('*Tanning Research*'),[7] the High Court considered what 'claiming through or under a party' means in the context of s 7(4) of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) which said that '[f]or the purposes of sub-sections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.'[8] Tanning Research Laboratories had submitted a proof of debt to Mr O'Brien, a liquidator of the company. The substance of the controversy between Tanning Research Laboratories and the liquidator was as to the amount, if any, that was enforceable as a debt for goods sold and delivered by Tanning Research Laboratories to the company under the licence agreement.

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6 *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA). There is no equivalent legislation enacted in the Australian Capital Territory.

7 (1990) 169 CLR 332 ('*Tanning Research*').

8 The Act has been superseded by the *International Arbitration Act* (n 5).

Mr O'Brien sought to have the rejection reversed and commenced proceedings in the New South Wales Supreme Court. The High Court rejected an appeal from the New South Wales Court of Appeal which had ordered a stay of the proceedings on the basis that there was an arbitration agreement between the company and Tanning Research Laboratories and the dispute between Tanning Research Laboratories and the liquidator ought to be referred to arbitration.

Brennan and Dawson JJ said that

> the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt.[9]

Brennan and Dawson JJ said that as the liquidator was relying upon ground of defence available to the company in rejecting the proof of debt, the liquidator was claiming 'through or under' the company. The liquidator's defence was not relying upon a ground of defence that was available to the liquidator alone.[10]

The Victorian Court of Appeal in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd*[11] carried out a detailed analysis of the principles in *Tanning Research* and applied it to find that a parent company was a party to an arbitration agreement between its subsidiary and a third party.[12] The case involved a contract, which contained an arbitration agreement, for the supply of ink by Flint Ink to Huhtamaki New Zealand Ltd ('Huhtamaki NZ'). The arbitration clause provided: 'Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or validity thereof shall be finally settled by arbitration in accordance with the *Arbitration Act 1996* [(NZ)].'

Huhtamaki NZ used the ink supplied by Flint Ink in the manufacture of allegedly defective packaging that was supplied to Huhtamaki Australia which in turn supplied the packaging to Lion-Dairy & Drinks Pty Ltd ('Lion-Dairy'), a producer of dairy products. Lion-Dairy sued Huhtamaki Australia in the Supreme Court of Victoria for loss and damage arising from the supply of defective packaging which had resulted in the recall of some of the yoghurt products of Lion-Dairy. Huhtamaki Australia joined Flint Ink as a third party to the proceedings. Flint Ink sought to have the proceedings stayed on the

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9 *Tanning Research* (n 7) 342.

10 Ibid 343. See also at 353, (Deane and Gaudron JJ), 354 (Toohey J). It is the opinion of the author that there is no difference in principle between the approach of Brennan and Dawson JJ and the approach of Deane and Gaudron JJ. This analysis is consistent with the opinion of Mandie JA in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64, 110 [146] ('*Flint Ink*').

11 *Flint Ink* (n 10).

12 *Tanning Research* (n 7) 342.

basis of s 7 of the *International Arbitration Act*. One of the issues was whether Huhtamaki Australia was a party to the arbitration agreement between Flint Ink and Huhtamaki NZ on the basis that Huhtamaki Australia was a party claiming through or under Huhtamaki NZ.

Warren CJ rejected an argument that 'the meaning of "through or under" requires "standing in the same position" as the party to the agreement and is thus restricted to privies whose rights were derived from the party via an assignment or other process of law'.[13] Warren CJ said that

> [w]hilst the reasoning of Brennan and Dawson JJ refers to examples from the authorities of a trustee of a bankrupt's estate, an assignee and a company in a parent-subsidiary relationship, I do not consider that Brennan and Dawson JJ sought to confine the meaning of 'through or under a party' to the circumstances obtaining in these examples. On the contrary, their Honours explicitly state that the meaning of the phrase 'through or under a party' must be ascertained by reference to the text and context ...[14]

Warren CJ also said that it is unnecessary to establish that it is the cause of action or defence as a whole that must be vested in or exercisable by the third party. Instead, it is sufficient if an element of the cause of action or defence is vested in the third party.[15]

Nettle JA also referred to *Roussel-Uclaf v GD Searle & Co Ltd*[16] and *JJ Ryan & Sons v Rhone Poulenc Textiles SA*[17] as support for not adopting a narrow interpretation of 'through or under'.[18] Nettle JA approved the ratio in the latter case that 'the question whether an arbitration agreement encompasses a dispute depends on whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim'.[19] Nettle JA said that

> an arbitration clause which provided for the reference to arbitration of 'all disputes arising in connection with [a] contract' embraced every dispute having a significant relationship to the contract regardless of the label attached to it. It followed that, where charges against a parent company and its subsidiary were based on the same facts and were inherently inseparable, the court could refer claims against the parent to arbitration even though the parent was not formally a party to the arbitration agreement.[20]

The question of whether the claim by Huhtamaki Australia in the third party proceeding is a claim made 'through or under' Huhtamaki NZ was determined by reference to the facts available and the content of the amended statement

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13 *Flint Ink* (n 10) 70 [18].

14 Ibid 70 [19].

15 Ibid 70–1 [18]–[20]. Nettle JA agreed in principle in a separate judgment at 79 [60]–[61], 82–3 [72]–[73] although for Nettle JA, it was sufficient if an essential element of the cause of action was vested in or exercisable by the party. In the opinion of the author, there is no difference in approach between Warren CJ and Nettle JA. All elements of a cause of action are by their nature essential.

16 [1978] 1 Lloyd's Rep 225 ('*Roussel-Uclaf*'). This case, the correctness of which has been questioned in the UK, is discussed below.

17 863 F 2d 315 (4th Cir, 1988).

18 *Flint Ink* (n 10) 79–81 [61]–[67].

19 Ibid 80 [64].

20 Ibid (citations omitted).

of claim.[21] An analysis of the text and context of the claim in negligence by Huhtamaki Australia against Flint Ink showed that every circumstance giving rising to the claim of Huhtamaki Australia 'necessarily concerns and originates with Huhtamaki NZ'.[22] It was said that as Flint Ink owed Huhtamaki NZ a concurrent duty of care arising out of the agreement between Huhtamaki NZ and Flint Ink, Flint Ink also owed Huhtamaki Australia a duty of care. As Flint Ink had allegedly breached its duty of care to Huhtamaki NZ, so too had it breached its duty of care to Huhtamaki Australia.[23] This provided strong support that Huhtamaki Australia was claiming through or under Huhtamaki NZ.[24]

Nettle JA said that Huhtamaki Australia was said to be claiming through or under Huhtamaki NZ because

> essential elements of its cause of action against Flint Ink are that Flint Ink breached its agreement with Huhtamaki NZ or breached a duty of care to Huhtamaki NZ which [was] alleged to have arisen out of the agreement. Equally, in terms of the test favoured by Deane and Gaudron JJ, Huhtamaki Australia [was said to be] claiming through or under Huhtamaki NZ because the matter principally in controversy between Huhtamaki Australia and Flint Ink [was] whether Flint Ink breached its agreement with Huhtamaki NZ or breached its alleged duty of care to Huhtamaki NZ. So, too, in terms of Graham J's analysis in *Roussel-Uclaf*, Huhtamaki Australia [was] claiming through or under Huhtamaki NZ because, on the facts of the case, Huhtamaki Australia's rights against Flint Ink are so closely related to Huhtamaki NZ's rights against Flint Ink that [it] is right to hold that Huhtamaki Australia is 'claiming through or under' Huhtamaki NZ.[25]

In *Rinehart v Hancock Prospecting Pty Ltd* ('*Rinehart*'),[26] the High Court clarified what 'claiming through or under a party' means in the definition of party in s 2 of the *Commercial Arbitration Act 2012* (WA), the wording of which is identical to that in s 7(4) of the *International Arbitration Act*. In that case, one of the issues was whether some third party companies had received some mining tenements as a knowing participant in Mrs Rinehart's alleged fraudulent and dishonest design, breaches of trust and breaches of fiduciary duty. Mrs Rinehart had initially transferred those mining tenements to two companies (Hancock Prospecting Pty Ltd ('HPPL') and Hancock Resources Ltd ('HRL')) that had subsequently transferred the tenements to the third party

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21 Ibid 110 [147] (Mandie JA).

22 Ibid 71 [25] (Warren CJ), 81–2 [68]–[69] (Nettle JA). See at 110–11 [148] where Mandie JA set out the relevant facts.

23 Ibid 82 [69].

24 Ibid 71 [25]–[26].

25 Ibid 83 [75]. See also the judgment of Martin CJ of the Western Australian Supreme Court in *KNM Process Systems Sdn Bhd v Mission NewEnergy Ltd* [2014] WASC 437, [51] ('*KNM*') where the Court concluded that a parent company who had guaranteed the performance of its subsidiary company in respect of the provision of letters of credit was a party claiming through or under its subsidiary for the purposes of *International Arbitration Act* (n 5) s 7(4). In *Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635, 654 [78] ('*Rinehart*'), the majority left the question open as to whether the principles in *Tanning Research* (n 7) applied to a guarantor as this issue had not been the subject of argument before them. Edelman J, in the minority, said that the principles did not apply: *Rinehart* (n 25) 662–3 [103].

26 *Rinehart* (n 25).

companies. The third party companies contended that they were claiming through or under HPPL and HRL and were therefore parties to the arbitration agreement HPPL and HRL embodied in the Hope Downs Deed on the one hand and Mrs Rinehart on the other, on the basis that it was an essential element of their defence that HPPL and HRL were beneficially entitled to the tenements. Further or alternatively, that HPPL and HRL had obtained releases under the Hope Downs Deed, to the benefit of which the third party companies were entitled as assignees of the tenements.[27]

The plurality noted that the leading authority in Australia as to the meaning of 'through or under' was *Tanning Research*.[28] They said that

> it should be understood that, although Brennan and Dawson JJ stated at one point in their reasons in *Tanning Research* that 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, their Honours' ultimate formulation of the test was, relevantly, whether an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement. That accorded to the protean quality of the phrase 'through or under' and their Honours' view that its meaning was to be 'ascertained not by reference to authority but by reference to the text and context of' the provision in which it appeared. ... the statutory conception of 'claiming through or under' applies to an alleged knowing recipient of trust property who invokes as an essential element of its defence that the alleged trustee was beneficially entitled to the subject property.[29]

It is unnecessary that the issues that the defence puts into controversy in the proceedings be limited to the matter capable of settlement by arbitration. It is sufficient that the defence puts in issue, among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy.[30]

In *Rinehart*,[31] the plurality was satisfied that the third party companies were claiming through or under HPPL and HRL. Whether the third party companies had taken the tenements with knowledge that the tenements had been assigned to HPPL or HRL in breach of trust was dependent in part upon whether HPPL and HRL were beneficially entitled to the mining tenements and were free to assign the mining tenements to the third party companies without breach of trust. This was a discrete matter of controversy capable of settlement by arbitration under the arbitration agreement and had in fact been referred to arbitration.[32] Further, the third party companies had raised these matters in their defence even though the defences had not yet been filed in the proceedings for procedural reasons.[33] The plurality applied *Tanning Research* by analogy and said that

> where an assignee of mining tenements is alleged to have taken the assignment with knowledge that the tenements were held by the assignor upon trust for the claimant and assigned to the assignee in breach of trust, and the assignee contests the claim

27 Ibid 647 [58].
28 Ibid 648 [61].
29 Ibid 649–50 [66] (citations omitted). The plurality confirmed that the reasoning of Deane and Gaudron JJ in *Tanning Research* (n 7) had been to similar effect: ibid 650 [67].
30 *Rinehart* (n 25) 650 [68], affirming *Tanning Research* (n 7) 351–2 (Deane and Gaudron JJ).
31 Rinehart (n 25).
32 Ibid 651 [69].
33 Ibid 651–2 [71].

> on the ground that there was no breach of trust or if there were that, by reason of a deed of settlement, the assignor was absolved of responsibility for the breach of trust, the assignee takes its stand upon a ground which is available to the assignor and stands in the same position vis-à-vis the claimant as the assignor.[34]

The plurality was also fortified in their conclusion because they could not see any good reason for not reaching that conclusion. They said that to exclude from the scope of the arbitration agreement binding on the assignor matters between the other party to that agreement and the assignee would give the arbitration agreement an uncertain operation. It would jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to which matters of controversy are to be determined by litigation and which by arbitration. Ultimately it would frustrate the evident purpose of the statutory definition.[35]

The conclusion reached by the plurality has not found universal acceptance. The learned authors of *Nygh's Conflict of Laws in Australia*[36] describe the outcome in *Rinehart* as a 'radical expansion' and highlighted the 'forceful dissent' of Edelman J. Edelman J was emphatic that 'the Parliament of New South Wales did not intend to depart from the principle of privity of contract by the use of the century-old formula concerning "claiming through or under a party", which had a long-standing meaning consistent with privity'.[37] Edelman J was satisfied that the extended definition of party 'is not an exception to privity of contract, because if a third party's claim relies upon or resists a right of the party to the arbitration agreement, then the third party is agitating the right of a party and not agitating its own right'.[38] According to Edelman J, a third party claim based upon assignment or novation of the rights of the party to the arbitration agreement, where the third party claim asserts those rights as the principal of the party or where the third party is the trustee asserting the rights of a bankrupt estate are all claims that could equally be introduced pursuant to traditional contract law theories.[39] Edelman J said that

> [h]owever laudable may be the pragmatic considerations of reducing expense and increasing convenience, there is no basis for an extended meaning of 'party' in s 2(1) that would compel a third party to submit its independent claim or defence to arbitration, without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented in the exercise of its own 'voice in the choosing of the arbitrators', and possibly by a reference to a legal system that would not have been chosen by and would not otherwise have applied to the third party.[40]

Edelman J agreed with the Full Federal Court[41] that the claims against the third parties were assertions of direct liability[42] and that the defences of the

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34 Ibid 652 [73].
35 Ibid.
36 Martin Davies et al, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis, 2019) 186–7 [7.78].
37 Rinehart (n 25) 656 [84].
38 Ibid 657 [88].
39 Ibid 657–8 [88] (citations omitted).
40 Ibid 656–7 [86] (citations omitted).
41 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 521–2 [316]–[318].
42 *Rinehart* (n 25) 661 [98], 662 [102].

third parties were not derivative in that the third parties were relying upon their own rights.[43] Edelman J drew an analogy with the rights of a guarantor defending a claim brought pursuant to the guarantee. In his opinion, the rights of the guarantor are not derivative but direct.[44] The authors of *Nygh's Conflict of Laws in Australia* were also not attracted to the possibility 'that a party to a contract with an arbitration clause who wished to sue a tortfeasor for inducing breach of contract could commence arbitration proceedings against that party'. For them this would, 'with respect, appear to be a surprising and perhaps unintended consequence'.[45]

The *Tanning Research* test

In Australia, the jurisprudence on whether a third party is claiming 'through or under a party' to an arbitration agreement requires a demonstration that an essential element of the claim or defence of the third party was or is vested or is exercisable by the party to the arbitration agreement. This, in turn, requires the following analytical steps to be undertaken:

1) identification of the subject matter of the controversy which falls for determination in the proceedings;[46] and
2) determining whether the claim or defence puts in issue, amongst other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy.[47] A construction of the ambit of the arbitration agreement has to be carried out to see if the subject matter of the controversy falls within the ambit of the arbitration agreement.

State supreme courts in Australia have construed the test in *Tanning Research*[48] as tantamount to requiring the following two questions to be answered:

- whether there is a relationship of sufficient proximity between the party to the arbitration agreement and the third party.[49] This requires a review of the substance of the claim against the party to the arbitration agreement.[50] In *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* ,[51] the Western Australian Court of Appeal referred to the concept of the third party not being a 'true stranger' of the arbitration agreement; and

43 Ibid 661 [99], 662 [102].
44 Ibid 662 [103].
45 Davies et al (n 36) 187 [7.78].
46 *Rinehart* (n 25) 650 [67].
47 Ibid 650 [68].
48 *Tanning Research* (n 7).
49 KNM (n 25) [45]–[47], applying BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (2008) 168 FCR 169, 177 [15] (Finkelstein J) ('BHPB').
50 *Tanning Research* (n 7) 342 (Brennan and Dawson JJ, Toohey J agreeing), 353 (Deane and Gaudron JJ); *BHPB* (n 49) 179 [27]; *Flint Ink* (n 10) 71 [21] (Warren CJ), 85 [84], 86 [88], 87 [94] (Nettle JA), 110 [147] (Mandie JA).
51 (2020) 55 WAR 435, 465–6 [156]–[162].

- whether the claim or defence of the third party is derived from the party to the arbitration agreement.[52]

This restatement or expansion of the test in *Tanning Research* was not referred to or overruled by the plurality in *Rinehart*.[53]

Nevertheless, despite the assistance provided by the High Court and state appellate courts, determining whether the claim or defence of the third party is derived through the party to the arbitration agreement may be a very difficult exercise. Intermediate courts appear to be reluctant to extend the ambit of the arbitration agreement to non-privies even though the writer suggests that this was the intention behind the definition of party in the *Model Law* which has subsequently been adopted and reflected in various domestic arbitration Acts[54] and international arbitration Acts.[55] There would otherwise be no work for the extended definition of party to do.

A case on point is the decision of *Trade Practices Commission v Collings Construction Co Pty Ltd*.[56] In that case, the Court said that actions taken by the Trade Practices Commission on behalf of consumers who had a right to be a party to the arbitration did not necessarily have the effect of making the Commission 'a person who [was claiming] through or under a party [to an arbitration agreement]' despite the fact that any damages recovered by the Commission against the respondents would be passed onto the consumers. The Court said that the characterisation of the proceedings as an action on behalf of the consumers did not mean that it was an action brought by the Commission 'which has acquired some title from an owner as a party to an arbitration agreement' because the action in no way gave rise to remedies or rights in the Commission.[57] This is an unduly restrictive construction of a person claiming through or under a party to an arbitration agreement. It is clear that the Commission was enforcing the rights of the consumers and was in the relevant sense claiming through or under the consumers. Given the decision of the Australian High Court in *Rinehart*, the writer suggests that the conclusion reached by the Supreme Court is no longer sound.

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52 KNM (n 25) [45]–[47], applying BHPB (n 49) 177 [15] (Finkelstein J) and Tanning Research (n 7) 342 (Brennan and Dawson JJ, Toohey J agreeing), 353 (Deane and Gaudron JJ).

53 *Rinehart* (n 25). See the Full Federal Court decision in *Hancock Prospecting Pty Ltd v Rinehart* (n 41) 519 [308].

54 See *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA). There is no equivalent legislation enacted in the Australian Capital Territory. These Acts as currently amended are generally uniform though differences exist between the provisions in some cases.

55 See, eg, *Arbitration and Conciliation Act 1996* (India) ss 8, 45, 54; *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 6(5); *Arbitration Act 1996* (UK) s 82(2); *International Arbitration Act* (n 5) s 7(4).

56 (1996) 142 ALR 43.

57 Ibid 52.

Cases in which third parties have claimed through or under a party to an arbitration agreement

Cases in which courts have extended the meaning of party to include third parties to the arbitration agreement include:

- the trustee of a bankrupt estate or liquidator advancing a claim or defence available to the bankrupt or the company in liquidation;[58]
- the parent company of a subsidiary who is a party to an arbitration agreement when claims are made against both arising out of the same facts, noting that a simple parent/subsidiary relationship in itself will not be sufficient;[59] and
- assignees of a contract containing an arbitration clause. This can include insurers who are assigned the rights of the insured.[60]

Waivers of subrogation and indemnity issues

The doctrine of subrogation comes into operation when the insurer meets its liability under the policy by making payment to the insured in respect of its loss.[61] Insurance companies who are subrogated to the rights of their insured pursuant to the doctrine of subrogation are bound by both the benefit and the burden of the contract. Any contractual rights acquired by the insurance company are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain, if it can, an award in its favour from the arbitrators, and enforce the contractual

58 *Roussel-Uclaf* (n 16) 230; and *Tanning Research* (n 7), respectively.

59 *McHutchison v Western Research and Development Ltd* [2004] FCA 419. However, see *Roussel-Uclaf* (n 16) 231 (Graham J) where a third party subsidiary was held to be claiming through or under its parent company. This judgment has been overruled by *Sancheti v City of London* [2009] 1 Lloyd's Rep 117. However, in Australia, the plurality in *Rinehart* (n 25) relied upon the reasoning in *Roussel-Uclaf* (n 16) to reach the conclusion that it did.

60 See *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279, 286 (Hobhouse LJ, Morritt LJ and Scott V-C agreeing at 291). This case proceeded upon the basis that the rights of the insured had been assigned to the insurer. While the rights of subrogation may be the subject of an express assignment, this is not strictly necessary. The doctrine of subrogation, which operates once the insured has been fully indemnified under the policy for its loss (in *Francis v Powercor Australia Ltd* [2020] VSC 836, [71] Nichols J noted in passing that it is still an open question in Australia whether an insurer can exercise subrogation rights after it has indemnified the insured as required by the policy, or only after it has indemnified the insured for the whole of its loss), places the insurer in the shoes of the insured. See also *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd* [2005] 1 All ER (Comm) 715, [60], [63], affirming the decision of *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 2 Lloyd's Rep 378, 385 [22], 386–7 [25]–[30] that the insurers were parties to the arbitration agreement in that they were claiming through and under their insured albeit they were not a party to the arbitration agreement in the full sense. In enforcing the rights that it has gained, the insurer is bound by both the benefit and the burden of the contract, namely the arbitration agreement. See also *London Steamship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* [2015] 2 Lloyd's Rep 33, 46 [69]; *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS* [2016] 3 All ER 697, 717 [55] to the same effect.

61 *AFG Insurances Ltd v City of Brighton* (1972) 126 CLR 655, 663.

obligations of the other party to pay that award. However, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. If one of the terms of the contract is that, in the event of the dispute, the claim must be referred to arbitration, then the insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate.

Insurers who commence subrogated recovery proceedings by way of arbitration in the name of the insured are not named parties to the arbitration. Such insurers do not have an independent cause of action against the wrongdoer. Instead, the insurers stand in the shoes of the insured and claim 'through or under' the insured within the extended meaning of party.

In defending the subrogated proceedings, in addition to the substantive defences to liability, the wrongdoer may challenge the right of the insurer to bring the subrogated claim whether because of waiver or otherwise.[62] The practice has arisen whereby these defences are raised in the absence of the joinder of insurers as named parties to the subrogated proceedings.

In *Tensioned Concrete Pty Ltd v Munich Re* ('*Tensioned Concrete*'),[63] the plaintiff had commenced proceedings in the Supreme Court of Western Australia seeking declarations it was an insured under two policies of insurance.[64] Those policies contained jurisdiction clauses which vested exclusive jurisdiction in the courts of Australia.[65] The insurers successfully brought an application to stay the litigation upon the basis of s 8 of the *Commercial Arbitration Act 2012* (WA). In obiter, Kenneth Martin J said that the inherent power of the court to control its own proceedings would have been an alternative basis for the stay.[66]

The insurers had commenced subrogated recovery proceedings by way of arbitration against Tensioned Concrete for defective design occasioning pure economic loss. Part of the defences that Tensioned Concrete raised in the arbitration included an assertion that the arbitration was not maintainable because Tensioned Concrete was a joint insured with the main contractor under the two policies of insurance and therefore the beneficiary of the waiver of subrogation clauses contained in the two policies of insurance as well as in the sub-contract between Tensioned Concrete and the main contractor.

Kenneth Martin J observed that common issues were raised in the arbitration and in the Supreme Court proceedings.[67] The insurers were parties to the arbitration agreement by reason of the extended definition of parties in s 2(1) of the *Commercial Arbitration Act 2012* (WA). Given the doctrine of subrogation and in light of the principles applicable to the extended definition of party, this finding is uncontroversial. However, what is the effect of the operation of the *Insurance Contracts Act* upon the arbitration agreement

62 Robert Merkin and Ian Enright, Thomson Reuters, *Sutton on Insurance Law* (online at 30 November 2020) [18.200].

63 [2020] WASC 431 ('*Tensioned Concrete*'). The writer appeared for the plaintiff in the proceedings. The plaintiff appealed the judgment of Kenneth Martin J, but the parties resolved the entirety of their disputes including the arbitration via a negotiated outcome prior to the hearing of the appeal.

64 Ibid [74].

65 This was not the subject of an express finding.

66 *Tensioned Concrete* (n 63) [78].

67 Ibid [73].

whose ambit was prima facie wide enough to cover the substantive issues in the Supreme Court proceedings? Further, how much weight ought to be given to the exclusive jurisdiction clauses in the two policies of insurance and the fact that there were common issues being raised in the arbitration albeit that the insurers were not named parties to the arbitration even though the insurers were effectively bound by any findings in the arbitration?[68]

The *Insurance Contracts Act 1984* (Cth)

Section 43 of the *Insurance Contracts Act*[69] provides:

> **43 Arbitration provisions**
>
> (1) Where a provision included in a contract of insurance has the effect of:
>
> (a) requiring, authorizing or otherwise providing for differences or disputes in connection with the contract to be referred to arbitration; or
>
> (b) limiting the rights otherwise conferred by the contract on the insured by reference to an agreement to submit a difference or dispute to arbitration;
>
> the provision is void.
>
> (2) Subsection (1) does not affect an agreement to submit a dispute or difference to arbitration if the agreement was made after the dispute or difference arose.

Section 52 of the *Insurance Contracts Act*[70] prevents a party from contracting out of the effect of s 43. It provides:

> **52 'Contracting out' prohibited**
>
> (1) Where a provision of a contract of insurance (including a provision that is not set out in the contract but is incorporated in the contract by another provision of the contract) purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.
>
> (2) Subsection (1) does not apply to or in relation to a provision the inclusion of which in the contract is expressly authorized by this Act.

Discretionary considerations

In *Oceanic Sun Line Special Shipping Co Inc v Fay* ('*Oceanic Sun Line*'), Brennan J said, in obiter, that

> [w]here the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or out of its performance, the courts of this country regard that agreement as a submission of such disputes to arbitration [sic] and will, in the absence of countervailing reasons, stay proceedings brought here to decide those disputes ...[71]

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68 Ibid [71].

69 Submissions were put to the Court in relation to *Insurance Contracts Act 1984* (Cth) s 43 ('*Insurance Contracts Act*') but were not addressed in the judgment.

70 *Insurance Contracts Act* (n 69) s 52 was not the subject of submissions to the Court in the stay application.

71 (1988) 165 CLR 197, 224 ('*Oceanic Sun Line*'). Deane J did not find it necessary to

Gaudron J said words in the same vein that 'there is a "strong bias" in favour of granting a stay of proceedings in the event that there has been a submission to the exclusive jurisdiction of a foreign forum'.[72]

In *Akai Pty Ltd v People's Insurance Co Ltd* ('*Akai*'),[73] Toohey, Gaudron and Gummow JJ had to consider whether proceedings in Australia should be stayed in favour of court proceedings in the UK pursuant to a jurisdiction clause. The application was made on the basis that a UK court would not be obliged to apply the provisions of the *Insurance Contracts Act*.[74] Akai had relied upon s 54 of the Act to respond to the denial of liability by People's Insurance. The plurality said:

> The question arises as to whether, upon an application to stay the exercise of its jurisdiction, a court constitutionally bound by all laws made by the Parliament (covering cl 5) should, or is required to, give decisive weight to the effective operation of the Act. The present application is to be dealt with on the footing that an English court would not apply the Act as part of the lex causae. The grant of a stay would involve the State court so exercising its discretion as to stay its process in favour of an action in a court where the statute would not be enforced. This stay would be granted on the basis that in so doing a contractual obligation would be implemented. But the policy of the Act, evinced by s 8, is against the use of private engagements to circumvent its remedial provisions. To grant a stay in the present case would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay. The policy of the law and of the *Constitution* militates against a stay.
>
> In the event, it is unnecessary to decide the case solely upon this basis. That is because the Act itself provides, in s 52, a direct answer. ... The section operates to render void a provision of the Policy which would, but for s 52(1) , have the effect of excluding, restricting or modifying, to the prejudice of Akai, the operation of the Act. The phrase 'the operation of this Act' includes the operation, to the advantage of Akai, of s 54.[75]

In *Wigmans v AMP Ltd*,[76] the High Court considered the principles upon which it ought to be determined whether more than one representative proceedings may proceed against AMP Ltd. At one stage, five open class representative proceedings had been on foot. The proceedings led by Ms Wigmans had been the first off the mark. Kiefel CJ and Keane J made it clear that 'traditional stay jurisprudence' ought to be applied in order to determine which proceedings ought to be stayed.[77] The High Court was

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determine this issue as the contract under consideration in the proceedings did not contain an exclusive jurisdiction clause: at 256.

72 Ibid 261. See also the discussion as to the discretionary considerations in Davies et al (n 36) 187–95 [7.79]–[7.93].

73 (1996) 188 CLR 418, 445 ('*Akai*').

74 Cf this to the approach of the Federal Court in *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 where the Court accepted that the *Insurance Contracts Act* (n 69) would apply in a Californian arbitration.

75 *Akai* (n 73) 447.

76 [2021] HCA 7.

77 Ibid [43]. While there is no rule that the first in time proceeding prevails, the order of filing has been and remains a relevant consideration: at [52], [105], [107]–[108] (Gageler, Gordon and Edelman JJ).

unanimous that if there are multiple proceedings on foot between the same parties, the proceedings that are first in time are not necessarily to be preferred on that basis alone. The issue is whether any of the proceedings enjoy a juridical advantage over the others.[78] If the proceedings first in time are deficient in that it may be a collusive action, the later action may embrace further relief than another, the later action may be better framed than the first to raise the questions in dispute, the later action may be more perfect as to parties than another or the later action may have a solvent plaintiff so that costs may be answered then the first action will be stayed in deference to the later-in-time proceeding.[79]

In *Tensioned Concrete*, there had not been any impermissible contracting out of the operation of the *Insurance Contracts Act* and no attempt by Tensioned Concrete to avoid the effect of that Act. Instead, the insurers had all unconditionally submitted to the exclusive jurisdiction of Australian courts.[80] Given the application of ss 43 and 52 of the *Insurance Contracts Act* to the two policies of insurance, ought the Court have, in the circumstances, stayed the proceedings upon the basis of either the *Commercial Arbitration Act 2012* (WA) or the inherent power of the Court and forced the dispute to arbitration? Kenneth Martin J was comfortable that the Court had the requisite power to stay the proceedings on either bases. However, this conclusion effectively circumvented the operation of ss 43 and 52 of the *Insurance Contracts Act* and subverted the intent and effect of exclusive jurisdiction clauses in the two policies of insurance.

The stay pursuant to s 8 of the *Commercial Arbitration Act 2012* (WA) was premised upon the finding of the court that the insurers were parties to the arbitration agreement in the extended sense. The Court ought to have applied s 52 of the *Insurance Contracts Act* to render that aspect of the arbitration agreement void. Otherwise, the insurers would effectively achieve via the back door an outcome expressly precluded by the *Insurance Contracts Act*. While Kenneth Martin J had been satisfied that the inherent jurisdiction of the Court to control its own proceedings would also have provided a sufficient basis to stay the proceedings pending the outcome of the arbitration, in the absence of any indication that the court proceedings were vexatious or oppressive or otherwise constituted an abuse of process, was there in law, any basis for a stay? In the absence of this threshold issue being met and

78 Ibid [14], [43] (Kiefel CJ and Keane J), [94], [104] (Gageler, Gordon and Edelman JJ).

79 Ibid [39]–[40] (Kiefel CJ and Keane J).

80 This was not the subject of an express finding of the Court. Kenneth Martin J did not see the issue as one of jurisdiction. Instead, Kenneth Martin J said that the Court

> undoubtedly now holds in personam jurisdiction over all eight defendants who have all entered appearances unconditionally submitting to this court's jurisdiction in CIV 1721 of 2020. But the question is not whether this court holds jurisdiction over those parties. Plainly, it does.
>
> The true question is only whether in exercising its undoubted jurisdiction this court is either obliged by s 5 of the [*Commercial Arbitration Act 2012* (WA)], or should, as a matter of discretion, to stay its hand, in terms of the progress of the litigation — so as to allow for the pending arbitration proceedings under way to proceed to their March 2021 determination ...

Tensioned Concrete (n 63) [82]–[83] (emphasis added).

consistently with the principles set out in *Oceanic Sun Line*,[81] *Akai*[82] and *Wigmans v AMP Ltd*,[83] there was no call for the court to undertake a balancing exercise of considerations[84] invoked in 'traditional stay jurisprudence'. In the words of the plurality in *Akai*, the *Insurance Contracts Act* provided a direct answer to the application for a stay. A further point of interest is whether the arbitrator has any jurisdiction to consider the waiver of subrogation defences raised by Tensioned Concrete in the arbitration. It is suggested that the arbitrator did not — even though the insurers were not named parties in the arbitration by reason of the practice that has arisen whereby waiver of subrogation defences may be raised without the joinder of the insurers to the proceedings. Any other outcome would undermine the operation of ss 43 and 52 of the *Insurance Contracts Act*.

Conclusion

The joinder of third parties to arbitrations will continue to be a difficult question for arbitral tribunals and courts to grapple with. The fact that the leading authorities in Australia are at appellate level[85] is indicative of the controversy surrounding this issue. As suggested above, this controversy appears to arise from the fundamental reluctance of contract lawyers to embrace the literal meaning of claiming 'through or under'. Although the definition of party does not limit its application to third parties who are privies to the arbitration agreement, courts appear to find it conceptually difficult to accept that there is no such inherent limitation built into the definition of party. This is understandable in terms of traditional contract theory pursuant to which only a privy to a contract is typically bound by the obligations in the contract. By their very nature, a third party is not a party to the arbitration agreement and typically ought not to be bound by contractual arrangements that it had not adopted. It is true that the essence of arbitration is its voluntary nature. However, the *Model Law* appears to have been designed to overcome the lack of privity of contract to extend the reach of the arbitration clauses to third parties. In certain cases, where the factual matrix of the claim or defence is identical to the factual matrix which is the subject of the arbitration, it can make a lot of sense to join the third party to the proceedings. Not only would this avoid a multiplicity of proceedings and inconsistent findings, but it would also lead to a saving in terms of both time and cost. While this should not be a determining factor as asserted by Edelman J in *Rinehart*, if third party claims relying upon the extended definition of party also need to be capable of being framed 'pursuant to traditional contract law theories', then the extended definition of party would have no work to do.[86]

At the end of the day, one of the purposes of arbitration is to provide an efficient and cost-effective method of dispute resolution. The criteria of a

81 *Oceanic Sun Line* (n 71).
82 *Akai* (n 73).
83 *Wigmans v AMP Ltd* (n 76).
84 See ibid [14] (Kiefel CJ and Keane J), [105]–[109] (Gageler, Gordon and Edelman JJ).
85 See the High Court cases of *Tanning Research* (n 7); *Rinehart* (n 25); and the state appellate decisions of *Flint Ink* (n 10); *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (n 51).
86 *Rinehart* (n 25) 658 [88] (citations omitted).

party claiming 'through or under' a party to an arbitration agreement should not be given an unduly restrictive meaning that is not justified by the literal construction of the phrase. Instead, the concept of a party 'claiming through or under a party' to an arbitration agreement should be embraced in its full glory — particularly where it leads to an efficient allocation of economic resources by avoiding a multiplicity of proceedings which can in turn lead to inconsistent factual findings. However, this robust approach may have to be tempered from time to time, for example in the context of an insurer exercising its right of subrogation pursuant to the doctrine of subrogation in circumstances where the alleged wrongdoer raises defences of waiver in the recovery proceedings. If the wrongdoer asserts that it is a joint insured with the insured and seeks a declaration in court to this effect, then ought not the wrongdoer be able to have its claim for indemnity under the policies of insurance determined in a court consistently with the policy of ss 43 and 52 of the *Insurance Contracts Act*? An insured ought to be able to enjoy the procedural advantages of court proceedings[87] rather than have complex legal issues determined by technical experts in an arbitration. Can issues of efficiency and the desirability of avoiding a multiplicity of proceedings be allowed to trump the operation of the *Insurance Contracts Act*? It is suggested that an affirmative answer to this question ought not arise from a proper application of 'traditional stay jurisprudence'.

87 Procedural advantages include rights of appeal to the Court of Appeal and potentially the High Court of Australia.