Proportionate liability, arbitration & insurance cover – can we have it all?

BACKGROUND

There is now a series of authorities which endorse the following propositions:

- in the States that permit contracting out of proportionate liability (NSW, Tasmania & Western Australia), contractual indemnities, and certain dispute resolution clauses, can imply an intent on the part of the parties to contract out of the proportionate liability legislation; and

- private arbitrations and independent tribunals may not be "Courts" for the purposes of proportionate liability legislation and therefore cannot apply the legislation.

The Standing Committee for Attorney Generals **(SCAG)** has been considering reform to the various State proportionate liability legislation since 2007. In October 2013, SCAG released some revised model provisions together with an impact statement.

The model provisions were drafted such that proportionate liability would apply to arbitration and external dispute resolution **(EDR)** schemes by defining the concept of a "Court" to include a "tribunal, arbitrator, and any other entity able to make a binding determination about liability".

There are compelling arguments both for and against the application of proportionate liability to arbitration/EDR proceedings.

On the "for" side of the argument, it is desirable to have a consistent application of proportionate liability in both arbitration and litigation, such that neither forum provides a detriment or benefit in the resolution of a dispute. Further, application of proportionate liability to arbitration/EDR may ensure that arbitration doesn't become a haven for those seeking to avoid proportionate liability which might occur particularly when parties to a contract don't enjoy equal bargaining positions.

Lastly, the application of proportionate liability to arbitration/EDR would solve the potentially messy gap in insurance cover that can result from a party being ordered to meet a greater liability at arbitration than it might otherwise have been exposed to in litigation.

On the "against" side of the argument, it is suggested that claimants would be disadvantaged because they are incapable of joining concurrent wrongdoers to the arbitration or EDR proceedings and thus unable to recover the full measure of their loss which is inconsistent with the contractual bargain they have struck.

Such claimants would then need to consider commencing separate Court proceedings to recover the balance of their loss which is costly and may generate an inconsistent outcome to that achieved at arbitration. That problem may in turn lead to a trend away from adopting arbitration/EDR processes over litigation. That outcome would seem inconsistent with the recent efforts to reform domestic arbitration as a viable alternative to litigation.

HOW DOES THIS AFFECT INSURANCE COVER?

Many policies of insurance contain an exclusion in respect of liabilities contractually acquired by an insured over and above the liability they would otherwise have at law. If proportionate liability doesn't apply to arbitrations, any party that has contractually agreed to resolve its dispute by arbitration has potentially acquired a greater liability than it would have at law. That may give rise to an entitlement in the insurer to reduce the extent to which it indemnifies the insured to the same extent as represents the insured's culpability under proportionate liability. Quantifying this prejudice is an area ripe for dispute.

Some insurers are now offering "gap" cover to deal with this problem. In this highly competitive or soft insurance market, this represents a good solution. In a harder market this product might well become unaffordable for many particularly in the SME sector.

CONCLUSION

As matters presently stand, SCAG appears to be proposing model provisions that permit individual jurisdictions to elect whether or not proportionate liability is to apply to arbitrations. No matter which side of the argument you are on, each camp would probably agree that uniformity one way or the other is preferable to disunity.

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