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Update Summary

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UPDATE 43

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COMMERCIAL CONTRACT CLAUSES

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Update Summary

Kenneth Martin KC has provided updated commentary. Highlights include the following.

Operation of deeds

Deeds, formalities and terminology

If an agreement fails to meet the common law requirements to be assessed as a deed (by reason of deficiencies in terms of its execution and a lack of sealing), it may still be assessed as an instrument “expressed to be a deed”. It may accordingly meet the requirements of the *Corporations Act 2001*(Cth), and so, is treated as a validly executed deed pursuant to that Act: *Ferngrove Pharmaceuticals Pty Ltd v Betterway Health Care International Group* (2022) 140 SASR 358; [2022] SASCA 31. See [5120].

Conditions to be satisfied for estoppel by deed

For a useful restatement of core principles underlying the operation of the common law rules and equitable principles concerning estoppels by deed, see *Data Transfer Services Pty Ltd v White* (2023) 111 NSWLR 25; [2023] NSWCA 16. See [5540].

Further agreement or subject to contract clauses

Outcomes of binding agreement

An “agreement” verbally expressed at the end of a mediation hearing may nonetheless be binding and enforceable where the negotiating parties have reached an accord over key issues that had been in dispute between them, such that what remains to be worked out are essentially matters “procedural and facilitative” in nature: *Sully v Englisch (t/as Alpine Property)* [2022] VSCA 184. See [45700].

Conditional contracts: qualified performance obligations post agreement

Terminology

A clause in a supply agreement specifying a time period to give notice for a price review is essential and not merely a machinery provision: *Chevron (TAPL) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* (2021) 59 WAR 102; [2021] WASCA 193. See [50175].

Choice of law and forum

Application of the Voth test

An undertaking given to a court an overseas party may be a significant factor. If the Australian application of rules is accepted, the risk of Australian law not being followed by foreign arbitrators is remote, and the arbitral proceedings may not be stayed: *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2024) 98 ALJR 445; [2024] HCA 4. See [85550].

Failure scenarios

An exclusive choice of forum expressed in a contract may not be enforced. A class action waiver clause within a contract may be assessed as an unfair term and consequently void: *Karpic v Carnival plc* (2023) 98 ALJR 45; [2023] HCA 39. See [86060].

Termination clauses

The terminator’s own house must be in order

Where a purchaser fails to complete a contract, and is therefore in breach, they afford the vendor the right to terminate the sale agreement and then to sue the purchaser for breach damages: *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (2023) 276 CLR 500; 97 ALJR 194; [2023] HCA 6. See [100860]. Ratepayers who have paid over the levy under an accepted mistake of law as to their legal obligation to do so are entitled to have their levy funds fully refunded: *Redland City Council v Kozik* (2024) 98 ALJR 544; [2024] HCA 7. See [100910].

