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Update Summary

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COMMERCIAL CONTRACT CLAUSES

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Update Summary

Joshua Thomson SC, Leigh Warnick SC and Kenneth Martin KC have provided updated commentary. Highlights include the following.

Construction and interpretation of commercial contracts

Evident error

An error in a contract may be corrected by constructing it in order to resolve an absurd result, even where the error is conceptual and not merely typographical: *QBT Pty Ltd v Wilson* [2024] NSWCA 114. See [1370].

The use and extent of discretion

When a court interprets a contract there may be a difference between a contractual power which arises based upon a breach by the other party, and a contractual power to terminate for other reasons. Where a question of preceding breach enlivens the power, a standard of objective reasonableness may apply to whether the power arises; but if it depends on an opinion of the grantor of the power about the future, all that is required is that the power be exercised for the purpose for which it was granted and in good faith, and the other party's interests need not be considered: *United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd* [2024] NSWCA 97. See [1610].

Operation of deeds

Defective “deed” may still be an enforceable agreement

A written instrument prepared following a mediation as an attempted “deed of release” may fail to meet the signature and witnessing requirements of relevant legislation, but still be an enforceable agreement: *Sinclair v Balanian* [2024] NSWCA 144. See [5450].

Joint, several and proportionate liability

Proportionate liability in arbitration proceedings

In a commercial arbitration where the laws governing the substance of the dispute were the laws of South Australia, those laws included the proportionate liability provisions in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and Pt VIA of the *Competition and Consumer Act 2010* (Cth): *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24. See [25700]-[25703].

Exclusions from proportionate liability – specific exclusions

Each jurisdiction has a number of specific exclusions from proportionate liability. Many relate to particular Acts or regulations of the relevant jurisdiction. The defence of proportionate liability under Pt 4 of the *Civil Liability Act 2002* (NSW) is not available to a defendant was sued for breach of a non-delegable statutory duty. The purpose of

the proportionate liability provisions was to reduce a defendant's liability to reflect the degree of its responsibility for the damage suffered by the plaintiff. It is neither unjust nor contrary to public policy for a wrongdoer breaching a non-delegable duty to be liable for the whole of the loss; that is the purpose and effect of a non-delegable duty: *Owners of Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301. See [26430].

Contracting out of provisions in the proportionate liability

Under the law of jurisdictions other than Victoria, proportionate liability applies in arbitration. Parties wishing to contract out must do so expressly if the governing law of the contract permits contracting out: *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24. See [26730].

Consent clauses

Analysis of purpose cases

A consent power which does not relate to proprietary interests must be exercised for the purposes for which it was conferred, having regard to the proper construction of contractual objectives. The reason for withholding consent must be to protect a legitimate interest that the provision for consent is intended to protect. Regard must be had to the subject matter of the contract forming the relationship, and the subject matter of the consent provisions: *Impact Healthcare Pty Ltd v St Vincent's Private Hospitals Ltd* [2024] QSC 62. See [35470].

Good faith clauses

Fluctuating fortunes of the implied obligation

The implied obligation of good faith and reasonableness is subject to strict limits. It is not a standard of objective reasonableness. It precludes capricious or arbitrary decision-making, and requires contractual powers to be exercised in accordance with the purpose for which they were included in the contract: *United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd* [2024] NSWCA 97 See [60530].

Force majeure clauses

No implied force majeure

Since a force majeure clause is an agreed mechanism for allocation of contractual risk between the parties, the concept is incompatible with the principles applying to implication as a matter of fact. *TA Private Capital Security Agent Ltd v Kamath* [2023] WASC 315. See [70055].

Specific events

The imposition of Australian Government sanctions against Russia as a result of its invasion of Ukraine may be considered to be an event of force majeure relieving a defendant from its obligations to deliver alumina to the Russian-controlled plaintiff: *Alumina and Bauxite Company Ltd v Queensland Alumina Ltd* [2024] FCA 43. See [70580].

Expert and alternative dispute resolution clauses

Contractual requirements for valid determination or certificate – unreviewable and “manifest” errors

An error of law in construing a contract need only be an error apparent on the face of the expert’s award to qualify as a “manifest error”: *Bagata Pty Ltd v Sunstorm Pty Ltd* [2024] QCA 17. See [80670].

Penalty and forfeiture clauses

Application of the penalty doctrine after *Paciocco*

Clauses imposing a higher rate of interest, but granting the concession of a lower rate of interest in the absence of default, are outside the scope of the penalty doctrine: *Commercial N Pty Ltd v Huang* [2024] NSWSC 23. See [105361].