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Force Majeure Definition

Look to the contract

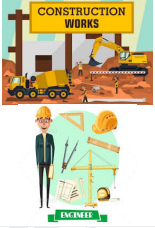
A force majeure event means an Act of God, war, riot or invasion, national emergency, government action including strikes, terrorism or the imposition of embargo, extreme weather events, epidemics and pandemics.


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Performance of the contract

Does the force majeure event actually prevent performance of the contract?






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Process to exercising rights

Follow the contract


- Notice obligations?
- Time limits?
- If the party fails to send the notice on time, is the force majeure right void/waived or is it a breach?



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Effect on Contract



- Affected obligation suspended
- What about completed obligations?
- How long for? Indefinitely?
- Does a termination right arise – when / how?
 - What if long term Force Majeure but termination not appropriate?

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Frustration


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Frustration

Common law doctrine

- What is the common law doctrine of frustration?
- Force majeure = a codification of the doctrine of frustration
- Can you rely on both principles?



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Elements of frustration

What do you need to establish frustration?

- For a contract to be frustrated:
 - the nature of its performance must be radically changed since it was agreed so that it has become impossible to perform
 - merely making performance more difficult or costly is insufficient



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Key questions

High Court in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24

- What was the substance of the contract, being the assumption or condition or state of things which was necessary for the fulfilment of the contract?
- Was that condition or state of things prevented?
- Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties?
- Was the change so unexpected that, if performed, the contract would be radically different from that which was contracted?



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Remedies and losses

If frustration is established, what then?

- Only remedy available is the termination of the contract
- Losses will usually "lie where they fall"




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Effect of statute

Modification of the common law position

- *Frustrated Contracts Act 1978 (NSW)*
- *Australian Consumer Law and Fair Trading Act 2012 (Vic)*
- *Frustrated Contracts Act 1988 (SA)*

- More fair and equitable approach
- Gives the Court wide discretionary powers to make just and equitable orders in a number of contractual situations
- Certain contracts are excluded from the operation of the Acts e.g. contracts of insurance



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Other contractual relief




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Suspension

Contractual right of suspension

- Look to contract
- Unilateral or reciprocal right?
- Notice obligations?
- Time limits / Bars?
- Cost implications?




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Extension of Time

Contractual right to claim EOT



- Look to contract
- Definition – Qualifying cause of delay ?
- Notice obligations?
- Time limits / Bars?
- Cost implications?




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Variation

<p>Unilateral variation</p> <ul style="list-style-type: none"> ▪ Contractual right for one party ▪ Follow contract process 	<p>Variation by agreement</p> <ul style="list-style-type: none"> ▪ Reciprocal express variation contractual right <ul style="list-style-type: none"> ○ Follow contract process ○ Be commercial... win/ win ▪ No express right <ul style="list-style-type: none"> ○ Deed of variation 
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Termination for convenience

Contractual right of termination

- Usually can be exercised at any time and for any reason
- Usually unilateral (Government contracts)
- Notice obligations
- Cost implications
- Limitations?




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Termination for breach

Contractual right of termination

- What if unactioned breach...?
- Look to contract for:
 - Steps to take in relation to breach... ie show cause
- Issue that if declared – likely contractor would:
 - Declare force majeure / frustration immediately
 - Argue not a valid termination and argue for repudiation and damages



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Workplace Relations


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Workplace relations

Options to keep the lights on...

- Stand down
- Leave without pay by negotiation and agreement
- Reduction in pay by agreement – careful re: award
- Enforced leave
- Moving people to part time
- Redundancy
- Termination for performance
- Termination within probation period
 - Usually 6 months
 - 12 months for a business with less than 15 people

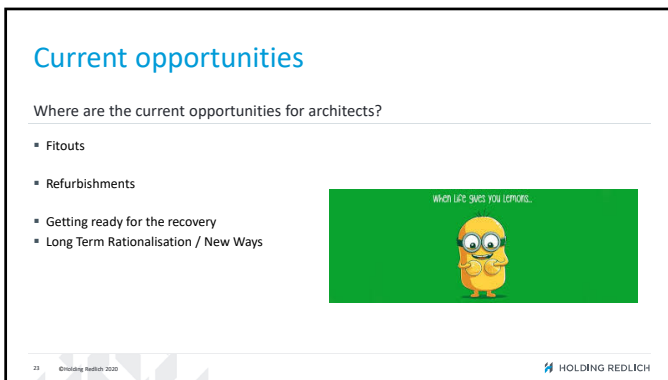


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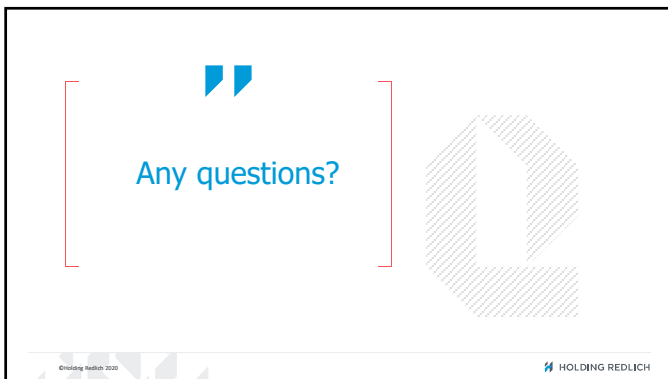
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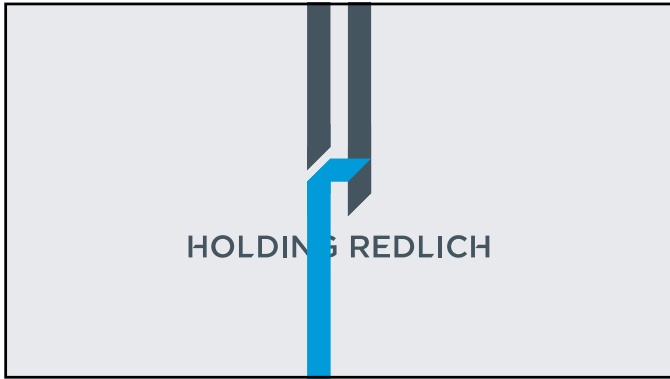
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