



# Force Majeure, Frustration and Contracting Complexities

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# Introduction

- Key Points for Consideration
- Force Majeure
- Frustration
- Practical Matters
- International Peculiarities



# Key Points

- Do you want to exit an agreement?
- Is the other party seeking to terminate/cancel?
- What rights of cancellation are there?
- What payments/liabilities could fall due?
- Is there a right of suspension?
- Reasonable endeavours Vs best endeavours

# Force Majeure

- Is there a force majeure provision?
  - If 'no' .....don't panic!
  - If 'yes' ....what does it cover?
    - Pandemic/epidemic?
    - Events outside of a party's reasonable control?
    - 'biological contamination'?
    - 'Including' or 'including but not limited to'
    - Act of God?

# Force Majeure

An Act of God is said to mean;

*“such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect”*

([\*Nugent v Smith \(1876\) 1 CPD 423\*](#); Cockburn CJ at paragraph 426)

# Force Majeure

- Who carries the burden of proof?
- Beyond the control of the affected party?
- Any reasonable steps to avoid or mitigate the event?
- Reasonably foreseeable?
- Process/consequence?

# Frustration



# Frustration

[Davis Contractors Ltd v Fareham UDC \[1956\] AC 696:](#)

*“frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”*

*(Lord Radcliffe at paragraph 729)*



# Frustration

When was the arrangement entered into?

# Frustration

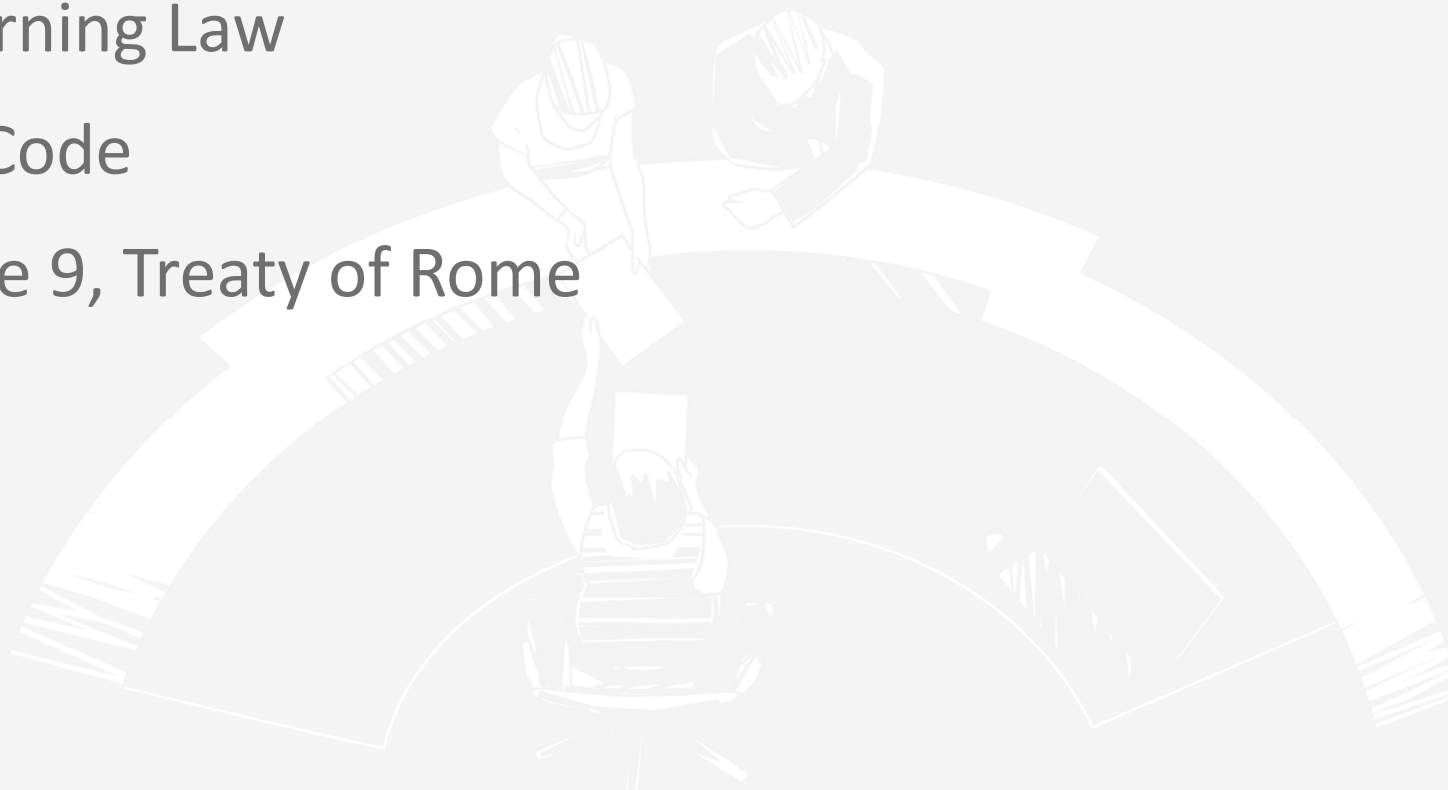
- Impossibility of performance
- Contract purpose is impossible
- Significant change to a mutually agreed state of affairs
- Allocation of risk

# Practical Matters

- Payment terms
- Advance payment/periodic payments
- Supply chain
- Insurance
- Liquidated damages/Service Credits?
- What is the desired result – short term & long term

# International Peculiarities

- Governing Law
- Civil Code
- Article 9, Treaty of Rome



# Contact details



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