

# The New Practice (TNP) - An Andersen Collaborating Firm



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## COVID-19, Force Majeure and Frustration

The coronavirus, COVID-19, which originated in Wuhan, China, is spreading around the world with such speed that the World Health Organization (WHO) has declared the outbreak a pandemic. In its wake, travel restrictions have been imposed by a number of countries, including Nigeria. Flights, hotel bookings, conferences, sports events and much more have been cancelled. Schools have been shut whilst some state governments have banned any religious gatherings with more than fifty worshippers. Global stock markets are crashing while central banks are lowering interest rates and taking measures reminiscent of the 2008 financial crisis.

The pandemic has also taken its toll on businesses and their ability to perform their contractual obligations. A lot of businesses are scampering to find out whether or not they will be held liable for non-performance caused by the pandemic.

Take, for example, Prof Appleby (not his real name), a renowned American economist and author, who has agreed to deliver the keynote speech at a conference being organized by a Nigerian Non-Governmental Organisation (NGO). The conference is to take place in Lagos in late March 2020. In line with the contract signed by both parties, Prof Appleby has been paid, in advance, \$30,000 as his fee for delivering the keynote address. It was also agreed that Prof Appleby would make his own travel arrangements and bear all associated costs. Consequently, he bought a return flight ticket from Los Angeles, where he is based, to Atlanta where the nearest Nigerian consulate is located so that he could obtain a Nigerian visa. He spent the night in Atlanta and therefore had to pay for a hotel room. He has also spent \$5,000 on a non-refundable flight ticket from Los Angeles to Lagos (via London). A few days before he was to depart Los Angeles, the Nigerian government imposed a thirty-day travel ban on travellers from certain countries seriously affected by the COVID-19 outbreak (including the United States). As a result of the travel ban, which will not be lifted until well after the conference has taken place, Prof Appleby has had to cancel his trip to Lagos. The Nigerian

NGO is unhappy about this development and has demanded a refund of the entire \$30,000 paid to Prof Appleby. The NGO has also threatened to sue him for breach of contract if he doesn't pay up within two weeks. What are the defences open to Prof Appleby?

The answer will depend on the provisions of their contract, particularly whether or not it contains *force majeure* provisions. This will relieve a party from the obligation to perform the contract if the non-performance is caused by the occurrence of an event that is beyond the control of the parties.

The typical *force majeure* provision would exclude liability for non-performance caused by specified events like fire, floods, strikes, riots, famine, explosions, earthquakes, armed conflict or events generally referred to as "acts of God".

The key points for Prof Appleby to note, with regard to *force majeure* provisions, are:

- *Force majeure* provisions are not implied. They must be expressly contained in a contract. Where a contract does not specifically provide for *force majeure*, then *force majeure* cannot be invoked.
- Because there is no generally accepted definition of *force majeure*, the words used in *force majeure* provisions are crucial, as Prof Appleby will only be relieved from performing the obligations specifically mentioned in the *force majeure* provision. In the case of COVID-19, Prof Appleby is more likely to successfully invoke a *force majeure* provision if it expressly covers the "outbreak of diseases", "epidemics" or "pandemics".
- The inability to perform the contractual obligation must be directly traceable to the *force majeure* event. In other words, a default that would have occurred even if the *force majeure* event never happened will not benefit from a *force majeure* provision.
- If the contract contains a procedure that must be followed in order to enjoy the relief provided by the *force majeure* provision, then Prof Appleby must follow that procedure scrupulously. Some contracts, for example, require the party seeking to rely on a *force majeure* provision to give written notice to the other party. Non-compliance with these requirements could become an obstacle to a successful claim for relief under the *force majeure* provisions.

- *Force majeure* provisions will usually place an obligation on the party affected by the *force majeure* event to take immediate steps to mitigate its losses. Mitigation, in this context, involves taking reasonable steps to reduce the loss occasioned by the *force majeure* event. If Prof Appleby fails to mitigate his losses, he may be barred from relying on the *force majeure* provisions.

Where the doctrine of frustration is successfully deployed, it would result in the termination of the contract. In such circumstances, Section 8(2) of the Law Reform (Contracts) Law of Lagos State<sup>1</sup> provides that all sums paid to a party in accordance with the contract shall be recoverable by the person who made the payment. However, Section 8(3) of the same law states that if the party to whom the payment was made has incurred expenses for the performance of the contract before the frustrating event occurred (just as Prof Appleby did), the court may, if it considers it just to do so, allow the retention of the portion of the sums paid to him or her that have been so expended.

"It is important to note that the doctrine of frustration, though similar in effect to the doctrine of *force majeure*, is more restrictive". Courts will generally not allow a party to use the doctrine of frustration as a tool to escape a bad bargain. The doctrine of frustration will also not relieve a party from performing a contractual obligation simply because the event complained of has made the performance more difficult or expensive. Economic hardship is not a ground for invoking the doctrine of frustration.

In addition to the protection that *force majeure* provisions and the doctrine of frustration may provide, some statutes provide protection to parties who may find themselves on the wrong end of a consumer contract because of unforeseen events like an outbreak of COVID-19. An example is Section 120 of the recently enacted Federal Competition and Consumer Protection Act, which grants a consumer the right to "cancel any advance booking, reservation or order for any goods and services, subject to a reasonable charge for cancellation of the order or the reservation by the supplier or service provider." A charge will be considered to be unreasonable if it "exceeds a fair amount" having regard to the nature of the goods and services ordered, booked, or reserved, and the length of the notice of cancellation given by the consumer, amongst others.

It is crucial that businesses and consumers are aware of their rights under the contracts they have entered into, under the common law and under statute so that they are prepared when confronted with an inability to perform their contractual obligations as a result of COVID-19. Of course, it is always advisable to seek the advice of a lawyer in such circumstances.

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All hope is however, not lost for Prof Appleby if the contract does not contain *force majeure* provisions as he may nevertheless be able to rely on the common law doctrine of frustration of contract. The doctrine will apply where an unforeseen event either renders a contract impossible to perform or makes the outcome of the performance radically different from what was envisaged by the parties at the time the contract was formed.

<sup>1</sup> Lagos State law will apply to our hypothetical case as the conference/contract was to be performed in Lagos.

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