NOTE

ELIMINATING THE COMMON LAW LIMITATIONS ON FORCE MAJEURE CLAUSES

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INTRODUCTION

The 2018 Texas Court of Appeals case *TEC Olmos, LLC v. ConocoPhillips Co.* contains a standard application of contractual interpretation principles and common-law contractual defenses.[1] The two parties had entered into an oil drilling contract that allowed for suspension of contractual performance "by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war *or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected*."[2] When TEC Olmos (hereinafter "Olmos") lost financing to perform the contract due to a drop in oil prices, Olmos attempted to invoke the "catch-all" provision in the force majeure clause.[3]

The majority ruled against Olmos for two reasons. First, the court read an "unforeseeability" requirement into the contractual force majeure clause.[4] The court argued that since Olmos could have anticipated the drop in oil prices and contracted around it, Olmos could not invoke force majeure.[5] Second, the court invoked *ejusdem generis* to further limit the catch-all provision.[6] Since a drop of oil prices is not similar to the listed terms in the force majeure clause, it could not be included in the catch-all provision.[7]

However, Judge Harvey Brown made an interesting and novel argument in his dissent. He reasoned that the majority had "read-in" terms of the contract that did not exist, and thus artificially limited the scope of the contract both parties had negotiated.[8] Under Judge Brown's view, if the parties wanted to limit the scope of the force majeure clause, they could have written in the contract that the events that can invoke force

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1 *See* 555 S.W.3d 176, 181–86 (Tex. App. 2018).

2 *Id.* at 179 (emphasis added).

3 *Id.* at 180.

4 *Id.* at 181.

5 *Id.* at 185.

6 *Id.* at 185–86.

7 *Id.* at 186.

8 *Id.* at 189–90 (Brown, J., dissenting).

majeure must be unforeseeable.[9] Were more states to adopt a more expansive view towards catch-all provisions in force majeure clauses like the kind espoused by Judge Brown, it would significantly strengthen the right to contractual force majeure and give parties greater ability to excuse performance based on external events.

This Note will argue that as a matter of law, courts should not apply common law limitations when interpreting catch-all provisions in contractual force majeure clauses. Instead, to properly limit the potential all-encompassing scope of force majeure catch-alls, courts should rely on the more general principles of contract interpretation. Part I of this Note will discuss the common law doctrine of impracticability and how this doctrine became the contractual force majeure clause. This Note will then discuss the elements of a force majeure clause before diving into the catch-all provision. After that, this Note will discuss the limitations courts have placed on force majeure clauses and their catch-all provisions. First, this Note will explain why courts apply the common law limitations of unforeseeability and "control." Second, this Note will explain the limitations courts have placed on force majeure clauses through the interpretive canons. This Note will focus on two canons: the *ejusdem generis* doctrine and the doctrine of interpreting contracts as a whole. In Part III, this Note will analyze why limiting the catch-all provision of force majeure clauses through the common law rules of impracticability runs inconsistent with the written intent of the parties. This Note will then formulate new rules on limiting force majeure catch-all provisions by applying the interpretive canons. Lastly, the Note will discuss the implications of changing the rules by looking at two cases, including *TEC Olmos*, as hypotheticals.

I
BACKGROUND

A. Understanding Common Law Impracticability

Impracticability is a common law doctrine that excuses contractual performance when performance has been made impossible or extremely burdensome because of an external event which was unforeseeable and outside the control of the parties.[10]

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9 *Id.* at 190.

10 RESTATEMENT (SECOND) OF CONTS. ch. 11, § 261 (AM. L. INST. 1981).

The doctrine of impracticability originated from the English case *Taylor v. Caldwell*.[11] In that case, Caldwell had contracted with Taylor to rent a music hall to host four summer concerts, but the music hall had burned down (due to no fault of either party) before the first rental payment was due.[12] While the court recognized the principle that parties ought to perform their written contractual duties no matter what,[13] the court decided to adopt the French civil law principle that an obligation "is extinguished when the thing ceases to exist."[14] This rule from *Taylor v. Caldwell* became known as the doctrine of impossibility.[15] In the early twentieth century, American courts expanded this defense of impossibility to include situations of impracticability, where an external event did not make performance of the contract impossible but rather made performance extremely burdensome.[16]

While a party can raise those common law defenses regardless of any written provision in the contract, courts rarely grant them. Instead, courts favor enforcing contracts as they are written, under the assumption that parties agreed to persevere through unexpected difficulties to perform their contractual duties.[17]

To satisfy an impracticability defense, a party generally must show that (1) an external event rendered contractual performance impossible or extremely difficult and (2) the

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11 122 Eng. Rep. 309 (Q.B. 1863).

12 *Id.* at 310.

13 *Id.* at 312 ("There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.").

14 *Id.* at 314.

15 *See* Danielle Kie Hart, *If Past Is Prologue, Then the Future Is Bleak: Contracts, Covid-19, and the Changed Circumstances Doctrines*, 9 TEX. A&M L. REV. 347, 358 (2022).

16 Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916); *see* Hart, *supra* note 15, at 358–59 (2022) (explaining that the shift from impossibility to impracticability came as courts recognized that litigants need not prove "[l]iteral impossibility" to excuse performance, but rather that performance of a contract would come "only with extreme and unanticipated difficulty or cost").

17 *See* Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) ("Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome."); Opera Co. of Bos., Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1105 (4th Cir. 1987) (McMillan, J., dissenting) (explaining that the parties could have foreseen a power outage that could have hindered contractual performance, stating that "I do not think we should write for the defendant a defense it did not write for itself").

nonoccurrence of the external event was a "basic assumption" of the contract.[18] To determine the basic assumption prong of the test, courts look at (1) whether the external event was unforeseeable and (2) whether the risk of the external event happening was within the control of the parties.[19]

B. Understanding the Force Majeure Clause

To avoid relying on the common law, parties often write force majeure clauses that list the types of external events that would excuse performance of the contract.[20] A force majeure clause is a contractual provision that allows a party to escape liability for failure of performance of a contract when an unforeseen event, outside the control of the parties, renders performance impracticable.[21] The force majeure clause is essentially the common law doctrine impracticability, but in written form.[22]

Having a force majeure clause in a contract can show to a court that the contractual parties actively contemplated and agreed to allocate the risk of certain events happening.[23] For example, if today the contractual parties in *Taylor v. Caldwell* had agreed to a force majeure clause that would suspend rent payments for the music hall "due to fire," under current law Caldwell would only have to point to the written agreement to successfully get out of his otherwise agreed-upon contractual obligation to pay. But without a contractual provision,

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18 RESTATEMENT (SECOND) OF CONTS., ch. 11, § 261 (AM. L. INST. 1981) (rule for common law); U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 1977) (rule for the sale of goods).

19 *See* Nathan Somogie, Note, *Failure of A "Basic Assumption": The Emerging Standard for Excuse Under MAE Provisions*, 108 MICH. L. REV. 81, 101–02 (2009).

20 *See* David Gibson & Hamid Yunis, *COVID-19 and Force Majeure: A Historical Perspective and Lessons for the Future*, MCDERMOTT WILL & EMERY (Apr. 24, 2020) https://www.jdsupra.com/legalnews/covid-19-and-force-majeure-a-historical-78497/ [https://perma.cc/A8KT-ZMS5] (explaining that force majeure clauses allow for greater clarity and certainty in contracting by planning out what happens in case certain events occur in the future).

21 Force-Majeure Clause, BLACK'S LAW DICTIONARY (11th ed. 2019).

22 *See What to Know About Force Majeure Clauses in Light of COVID-19 and How You Can Plan Now*, ROYSTON RAYZOR (last visited Oct. 6, 2022) https://www.roystonlaw.com/newsroom-news-80 [https://perma.cc/54UL-PX66] (explaining how the use of force majeure clauses arose as an evolution of the common law doctrines of impracticability and frustration of purpose).

23 *See* Robert N. Barnes & Randall J. Wood, *The Allocation of Risk in Gas Purchase Contracts After* Golsen v. Ong Western, Inc., 13 OKLA. CITY U. L. REV. 503, 535 (1988) ("The allocation of risk between the parties, as governed by the principal intent and purpose of the entire contract, is the court's truest guide to properly resolving the many excuses for nonperformance . . . .").

Caldwell could still rely on the unwritten, common law doctrine of impracticability. Common law contractual defenses like impracticability are "default rules," meaning that parties can fall back on those defenses where the contract is silent on how to allocate a risk.[24] However, if the parties failed to actively contemplate or allocate a known risk, courts would be less willing to grant impracticability under the assumption that the parties could have allocated the risk.[25]

C. Understanding the "Catch-all" Provision

Many force majeure clauses contain not only a list of specific types of events that would excuse contract performance, but also a general catch-all provision that that would excuse performance because of events not otherwise specified in the clause.[26]

While a broadly-worded catch-all provision may appear to significantly expand the scope of the force majeure clause, courts still may refuse to excuse a party's lack of contractual performance.[27] Many jurisdictions have recognized and have applied two limitations to the scope of the catch-all provision: the common law limitations of unforeseeability and control, as well as the interpretive limitations of *ejusdem generis* and the principle of interpreting contracts as a whole.

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24 Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1525 (2016).

25 *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991–92 (5th Cir. 1976) ("[B]ecause the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting. Underlying this presumption is the view that a promisor can protect himself against foreseeable events by means of an express provision in the agreement." (citations omitted)).

26 *See, e.g.*, TEC Olmos, LLC v. ConocoPhillips Co, 555 S.W.3d 176, 179 (Tex. App. 2018) (containing a force majeure clause that excuses performance "[s]hould either Party be prevented or hindered from complying with any obligation created under this Agreement . . . by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war *or* any *other* cause *not enumerated herein but which is* beyond the reasonable control of the Party whose performance is affected" (emphases added and removed)).

27 *See id.* at 185.

1. *Limitations via Common Law*

a. The "Unforeseeability" Limitation

Courts read an "unforeseeability limitation" into force majeure clauses.[28] While the federal circuit courts have two competing views on whether the listed events in a force majeure clause must be unforeseeable, the courts agree that to successfully invoke the catch-all provision, any event not explicitly listed in the force majeure clause must be unforeseeable.[29]

The first view on applying the unforeseeability limitation is to presume that contract parties intend to limit their force majeure clause through the common law limitations.[30] This view tends to import the unforeseeability limitation on the entire force majeure clause, including on the listed terms.[31] One example of this view can be seen in the case *Gulf Oil Corp. v. Federal Energy Regulatory Commission*.[32] The Third Circuit held there that to invoke force majeure, a party must show that the external event was unforeseeable, even if the event was specifically listed in the clause.[33] Gulf Oil had failed to deliver a contractually-required daily quantity of gas due to downtime to repair and maintain the company's pipes.[34] The force majeure clause in the contract defined as a force majeure event the "breakage or accidents to machinery or lines of pipe" and "the necessity for making repairs to or alterations of machinery or lines of pipe."[35] Even though the force majeure clause did not impose an unforeseeability limitation, the court read one in, noting that "it is well settled that a *force majeure* clause . . . defines the area of unforeseeable events that might

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28 *See id.* at 181.

29 *Compare* Gulf Oil Corp., v. Fed. Energy Regul. Comm'n, 706 F.2d 444, 454 (3rd Cir. 1983) (applying the foreseeability limitation to listed and "catch-all" terms in the force majeure clause), *with E. Air Lines, Inc.*, 532 F.2d at 990, 992 (applying the unforeseeability limitation to only "catch-all" terms in the force majeure clause, not the listed terms).

30 *See* Robyn S. Lessans, Comment, *Force Majeure and the Coronavirus: Exposing the "Foreseeable" Clash Between Force Majeure's Common Law and Contractual Significance*, 80 MD. L. REV. 799, 810 (2021) ("[C]ourts that presume parties intend force majeure's common-law significance to be imported, and would require a high bar to overcome that presumption . . . tend to impose an unforeseeability requirement upon the force majeure event." (citations omitted)).

31 *Id.*

32 706 F.2d at 454.

33 *Id.*

34 *Id.* at 449–50.

35 *Id.* at 448 n.8.

excuse nonperformance within the contract period."[36] The court ultimately held that Gulf Oil had to show that the need for repairs was "unforeseeable and infrequent."[37]

The second view on applying the unforeseeability limitation is to prioritize the written text of the contract, but bringing in the common elements of impracticability for gap-filling purposes.[38] In the Fifth Circuit case *Eastern Air Lines v. McDonnell Douglas*, Eastern Air Lines contracted with McDonnell Douglas to purchase and receive ninety-nine jet-powered passenger planes.[39] However, McDonnell Douglas consistently failed to deliver the planes on time.[40] Over the course of the contract, the US federal government had increased its engagement in the Vietnam War.[41] In doing so, the US engaged in a policy called "jawboning," in which the US government informally pressured aircraft manufacturers to deliver military aircraft for the war effort, or else potentially face formal governmental directives against them.[42] The force majeure clause in this case read in relevant part:

> Seller shall not be responsible nor deemed to be in default on account of delays in performance . . . due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to . . . *any act of government, governmental priorities* . . . .[43]

The Fifth Circuit held that because the contract specifically gave the parties an excuse for delays due to government actions like the jawboning policy, McDonnell Douglas did not need to show that its contractual force majeure defense was limited to unforeseeable events.[44] The Fifth Circuit reasoned that contracting parties ought to be able to protect itself from

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36 *Id.* at 452.

37 *Id.* at 454.

38 Lessans, *supra* note 30, at 810, 810 n.99 ("[L]ease terms are controlling regarding *force majeure*, and common law rules merely fill in gaps left by the lease." (alteration in original) (quoting Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 436 (Tex. App. 1993))).

39 532 F.2d 957, 962–63 (5th Cir. 1976).

40 *See id.* at 964 (describing how ninety out of the ninety-nine planes were delivered each at an average of eighty days after the contractually-required date).

41 *Id.* at 980–81.

42 *See id.* at 982–86 (describing how the US military pressured McDonnell Douglas and other US manufacturing firms to meet the demands of the Vietnam War, and how firms understood that military interests superseded their commercial interests).

43 *Id.* at 988 (emphasis added).

44 *Id.* at 992.

foreseeable events by expressed provisions in the contract.[45] Underlying this argument is the view that if a party wrote in a force majeure event in the contract, they necessarily foresaw the event.[46]

But while the opinion in *Eastern Air Lines* represents an example of a court applying the unforeseeability limitation to a listed term, how should a court apply rules of unforeseeability to a catch-all? Such was the problem addressed in the *TEC Olmos, LLC v. ConocoPhillips Co* case. The two parties had entered into an oil drilling contract that allowed for suspension of contractual performance "by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war *or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected*."[47] When Olmos lost financing to perform the contract due to a drop in oil prices, Olmos attempted to invoke the catch-all provision in the force majeure clause, as economic hardship was not a listed force majeure event.[48]

The court rejected Olmos's claims. The court argued that when a party fails to protect itself from a force majeure event through an explicit listed provision and instead relies on the general catch-all provision, the contract is ambiguous as to whether the party intended to assume the risk of the event happening. In these situations, the court relies on common law rules of impracticability as contractual gap-filler, and one of the rules of common law impracticability is that the event must be unforeseeable. Applying these rules to the *TEC Olmos* case, the court held that a future fluctuation in the oil market is clearly a foreseeable event.[49] The court also determined that

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45 *See id.* at 991–92 ("[B]ecause the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting. . . . Therefore, when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable." (citations omitted)).

46 *Id.*; *see also* Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 102 (2007) (arguing that a rule from the case Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444 (3rd Cir. 1983), which states that parties must show unforeseeability even for listed force majeure events, is "unduly restrictive").

47 TEC Olmos, LLC v. ConocoPhillips Co, 555 S.W.3d 176, 179 (Tex. App. 2018) (emphasis added).

48 *Id.* at 180.

49 *Id.* at 184.

a potential failure to obtain financing was a foreseeable event.[50] Olmos knew it required financing to perform its contractual obligations, yet failed to protect itself by defining a failure to obtain financing as a listed force majeure event.[51] Hence, the court concluded that the unforeseeability limitation prevented Olmos from invoking the catch-all provision in the force majeure clause.[52]

However, Judge Brown in his dissent disagreed with the majority's reasoning that the court should apply an unforeseeability limitation at all. First, Judge Brown argued courts should not add in an unforeseeability limitation when doing so would essentially add a term to or alter the meaning of the contract.[53] Second, Judge Brown argued that courts should not add an unforeseeability limitation into the contract if, when reading the contract as a whole, the contract lacks evidence that the parties intended to have an unforeseeability limitation on the force majeure clause.[54] Applying these rules to the *TEC Olmos* contract at issue, Judge Brown noted that the force majeure clause at issue lacks any evidence of an unforeseeability limitation: the contract excuses performance when a party is "prevented or hindered" by "any" cause "beyond the reasonable control of the Party whose performance is affected."[55] Judge Brown asserted that the catch-all provision is broad, with the only restriction being events that were "beyond the reasonable control" of the parties.[56] Hence, the language of the contract does not contain an unforeseeability limitation.[57] In addition, Judge Brown noted that the purpose of the force majeure clause was to give Olmos an opportunity to delay ConocoPhillips' ability to terminate the contract and collect liquidated damages.[58] The parties appeared to have given the force majeure clause a low threshold to invoke with limited consequences: a party's performance only needs to be "hindered" rather than entirely prevented, and the party's performance is "suspended" until the hindrance ends.[59] Judge Brown concluded that the nature

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50 *Id.* at 185.

51 *Id.*

52 *Id.*

53 *Id.* at 192 (Brown, J., dissenting).

54 *Id.*

55 *Id.* at 198.

56 *Id.*

57 *Id.*

58 *Id.* at 199.

59 *Id.*

of this agreement weighs against the idea that the parties implicitly agreed to greater limitations against Olmos' ability to suspend its performance.[60]

One Indiana state court has also declined to apply the unforeseeability limitation to the catch-all provision of a force majeure clause. In the 2013 case *Specialty Foods of Indiana, Inc. v. City of South Bend*, the city of South Bend had entered into an agreement with the National Football Foundation and College Hall of Fame, Inc. ("NFF") and the Century Center to host the College Football Hall of Fame ("Hall of Fame") in a new building owned by the Century Center.[61] To facilitate this tourist attraction, the Century Center had also entered into an agreement with Specialty Foods to be the exclusive supplier of food and beverages in the Hall of Fame. Before the time ran out on the Specialty Foods agreement, the NFF announced that they would relocate Hall of Fame to Atlanta, Georgia.[62] This move necessarily terminated Specialty Foods' supply agreement prematurely.[63] When Specialty Foods sued South Bend and Century Center to seek declaratory judgment on its rights post-Hall of Fame move, the trial court held that the catchall provision in the force majeure clause in Specialty Foods' agreement excused Century Center's lack of performance.[64] The force majeure clause read:

> In the event Century Center . . . shall be . . . prevented from the performance of any obligation required under this Agreement by . . . *any other reason not within the reasonable control of Century Center* . . . then the performance of such obligation shall be excused for the period of such delay . . . .[65]

On appeal, Specialty Foods argued that because the termination of the agreement to host the Hall of Fame was a foreseeable occurrence, Century Center could not use the catch-all provision of the force majeure clause to excuse its contractual obligations towards Specialty Foods.[66] However, the court ultimately did not attach an unforeseeability limitation to the

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60 *Id.* at 199–200.

61 997 N.E.2d 23, 25 (Ind. Ct. App. 2013)

62 *Id.* at 25–26.

63 *Id.* at 26.

64 *Id.*

65 *Id.* at 27 (emphasis added).

66 *Id.*

catch-all provision, finding no textual support for the concept in the force majeure clause nor anywhere else in the agreement.[67]

As seen in *TEC Olmos*, the principle behind the unforeseeability limitation is that contractual parties should not stay silent on contractual risks they know about, in the hopes that a court would pass that risk to the other party in litigation.[68] However, the *Specialty Foods* case illustrates the lack of a textual basis for such a limitation. Hence, under the view that unforeseeability comes in as a gap-filler, to avoid such a requirement parties would have to explicitly disclaim any potential unforeseeability limitation that a court might attach to their contracts.[69]

b. The "Control" Limitation?

Catch-all provisions typically contain the written requirement that to properly declare force majeure, the event must be beyond the control of the parties (the "control limitation").[70] What the control limitation entails is that the party invoking force majeure (1) could not have caused the event preventing contract performance and (2) must have taken reasonable steps to prevent the event from happening.[71]

Should the control limitation apply to the listed terms of a force majeure clause? Because the control limitation is typically written into the contract, courts have used the *ejusdem generis* interpretive canon to answer this question.[72] But what

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67 *Id.*

68 *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 184 (Tex. App. 2018) ("To dispense with the unforeseeability requirement in the context of a general 'catch-all' provision would . . . render the clause meaningless because *any event* outside the control of the non-performing party could excuse performance, even if it were an event that the parties were aware of and took into consideration in drafting the contract.").

69 *See, e.g.*, In re Flying Cow Ranch HC, LLC, No. 18-12681, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018) ("[While] *force majeure* clauses that include foreseeable events and events that merely frustrate performance . . . are permissible, such events must be provided for in the language of the contract . . . .").

70 *See, e.g.*, *TEC Olmos, LLC*, 555 S.W.3d at 179 ("Should either Party be prevented . . . from complying with any obligation created under this Agreement . . . by reason of fire, flood, storm . . . or any other cause not enumerated herein *but which is beyond the reasonable control of the Party whose performance is affected* . . . ." (emphasis deleted)).

71 Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984).

72 *See* Kelley, *supra* note 46, at 104–05. *Compare* Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 287–88 (Tex. App. 1998) (applying the control limitation to listed events in the force majeure clause when the catch-all followed the listed events), *with* PPG Indus., Inc. v. Shell Oil Co., 919 F.2d 17, 18 (5th Cir. 1990)

if a contract does not contain a control limitation? While courts have yet to decide this question, some courts have suggested in dicta that the control limitation should apply regardless of the interpretive canons.[73]

Two rationales may justify applying the control limitation absent a written requirement. The first reason is that the control limitation simply reiterates that parties are obligated to perform their contractual obligations.[74] If a party can simply cause a force majeure event to prevent its performance, then the contract has not obliged the parties to perform at all, essentially rendering the contract unenforceable.[75] The second reason is the concept bases itself off of the implied covenant of good faith: a failure to mitigate or intentionally causing a force majeure event to occur fundamentally undermines the purpose of the contract.[76]

2. *Limitations via Canons of Construction*

In addition to the common law limitations, courts also place limitations on force majeure clauses via interpretive canons of construction. Courts generally cite the canon *ejusdem generis*, though they have also advocated in favor of the canon of reading contracts as a whole.

a. The *Ejusdem Generis* Limitation

The order of clauses in the force majeure clause can change how a court interprets the catch-all. The catch-all may first come after the list of events, which may read:

(declining to apply the control limitation to listed events in the force majeure clause when the catch-all preceded the listed events). For a discussion on the *ejusdem generis* canon, see *infra* subsection I.C.2(a).

73 *Nissho-Iwai Co.*, 729 F.2d at 1540 ("[T]he California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest."); *see* Kelley, *supra* note 46, at 105.

74 *Nissho-Iwai*, 729 F.2d at 1540.

75 *Id.* (citing Alphonse M. Squillante & Felice M. Congalton, *Force Majeure*, 80 COM. L.J. 4, 4 (1979); U.C.C. § 2-615-17 (AM. L. INST. & UNIF. L. COMM'N 1977)).

76 *See Nissho-Iwai*, 729 F.2d at 1540 (arguing that a failure to exercise reasonable diligence to prevent a force majeure event constitutes a breach of the duty of good faith); *Implied Covenant of Good Faith and Fair Dealing*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/implied_covenant_of_good_faith_and_fair_dealing [https://perma.cc/Y756-K89R] (last visited Apr. 18, 2023) [hereinafter *Implied Covenant*] ("[The] [i]mplied covenant of good faith and fair dealing . . . is a rule used by most courts in the United States that requires every party in a contract to implement the agreement as intended, not using means to undercut the purpose of the transaction.").

> Should either Party be prevented from complying with any obligation created under this Agreement, by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war, *or any other cause beyond the reasonable control of the Party whose performance is affected*, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention.[77]

On the other hand, the catch-all can be placed prior to the list of events. Such a force majeure clause may read:

> Should either Party be prevented from complying with any obligation created under this Agreement *for reasons beyond the reasonable control of either party, including, without limitation*, by reason of fire, flood, storm, act of God, governmental authority, labor disputes, or war, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention.[78]

The order of provisions in the force majeure clause may implicate the interpretive canon *ejusdem generis* ("of the same sort"). When a list of specific terms precedes a general term, the general term will be interpreted to contain only things that are of the same general type as the specific terms.[79] A catch-all provision in a force majeure clause tends to follow a list of specified force majeure events and so courts apply the interpretive canon to the catch-all provision.

The *TEC Olmos* case presents a classic application of *ejusdem generis*.[80] The court here held that the specific-to-general ordering of the force majeure clause limited the catch-all provision to events similar to the listed events.[81] Because economic conditions in the oil market are dissimilar from the force majeure clause's listed terms, such natural or man-made disasters, governmental actions, or labor disputes, the court

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77 *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App. 2018) (containing a force majeure clause with nearly identical language).

78 *See id.*; *see also* JN Contemporary Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118, 121 (2d Cir. 2022) (containing a force majeure clause with the "including, without limitation" language).

79 Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964) ("*E.g.*, *S* contracts to sell *B* his farm together with the 'cattle, hogs, and other animals.' This would probably not include *S*'s favorite house-dog, but might include a few sheep that *S* was raising for the market.").

80 For the factual background on *TEC Olmos, LLC*, see *supra* subsection I.C.1(a).

81 *TEC Olmos, LLC*, 555 S.W.3d at 185–86.

concluded that Olmos could not rely on the catch-all to invoke force majeure by economic conditions.[82]

However, Judge Brown argued in his dissent that *ejusdem generis* did not apply at all, because the contract at issue was unambiguous.[83] Canons of construction do not apply when the contract is unambiguous.[84] Hence, Judge Brown argues that the catch-all provision should not be limited to events similar to the listed terms.[85]

Justice Antonin Scalia and Bryan Garner provide two rationales for using this interpretive strategy. First, when the listed terms are categorically similar, one can assume that that the intent of the author was for the catch-all to cover things of that category.[86] Second, *ejusdem generis* prevents listed terms from becoming superfluous: if a catch-all were really all-expansive, then there would be no point for the writer to precede the catch-all phrase with a list of items.[87]

One caveat on applying *ejusdem generis* is that courts only apply interpretive canons after a finding that the contract provision at issue is ambiguous.[88] How, then, could a court find ambiguity in a catch-all provision? After all, isn't the phrase "any other cause" unambiguous as applied to any potential force majeure event? Perhaps not. *Ejusdem generis* can be applied when there is ambiguity as to the scope of the provision, which is found in words like "any."[89] As Justice Breyer notes in his dissent in *Ali v. Federal Bureau of Prisons*, catch-all words

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82 *Id.* at 186.

83 *Id.* at 198 n.71 (Brown, J., dissenting).

84 *Id.*

85 *Id.* at 200.

86 Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012) (arguing that when the listed terms in a clause "all belong to an obvious and readily identifiable genus," a reader assumes that the writer has that genus in mind throughout the clause).

87 *Id.* at 200 ("If the testator really wished the devisee to receive *all* his property, he could simply have said 'all my property'; why set forth a detailed enumeration and then render it all irrelevant by the concluding phrase *all other property*?").

88 *E.g.*, Hussong v. Schwan's Sales Enters., Inc., 896 S.W.2d 320, 325 (Tex. App. 1995) ("The doctrine of *ejusdem generis* applies only when the contract is ambiguous. It does not apply when the parties' intent is apparent." (citations omitted)).

89 *See* Linda D. Jellum, Mastering Statutory Interpretation 136 (2d ed. 2013) (arguing that words of which their meaning is "certainly vague, overly broad, and unclear" without *ejusdem generis* should get the benefit of that interpretive canon to ascertain its meaning).

like "any" are always limited by their context.[90] In fact, under this view the principle of *ejusdem generis* necessarily creates the ambiguity.[91] Otherwise, the interpretative canon would be rendered useless because the plain meaning of the catch-all word would always supersede the limitation.[92]

Ejusdem generis normally applies when the general term follows a list of specific terms. However, courts disagree on whether *ejusdem generis* should be applied when the general term (*e.g.*, the catch-all) precedes the list of specific terms, such as the case *JN Contemporary Art v. Phillips Auctioneers*, where the force majeure clause read in part: "In the event that the auction is postponed for *circumstances beyond our or your reasonable control, including, without limitation*, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination . . . ."[93] Justice Scalia and Garner point out that legal authorities have required that the general term follow the list of specific terms for *ejusdem generis* to apply; indeed, the "vast majority" of *ejusdem generis* cases deal with provisions of that order.[94]

However, some courts have applied *ejusdem generis* against contracts where the catch-all preceded the list of specific terms. Such was the case in *Team Marketing USA Corp. v. Power Pact, LLC*.[95] The plaintiff marketing company had agreed with the defendant to staff the promotional events of the defendant's client, but the defendant's client cancelled the promotion.[96] The force majeure clause read: "[[D]efendant] shall not be liable to [plaintiff] if Promotion is not able to take place or [plaintiff] is rendered unable to timely perform any of its obligations hereunder *for any reason, including, without limitation*, strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints of

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90 552 U.S. 214, 243 (2008) (Breyer, J., dissenting) ("The word 'any' is of no help because all speakers (including writers and legislators) who use general words such as 'all,' 'any,' 'never,' and 'none' normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work.").

91 *See id.* at 244 ("Context, of course, includes the words immediately surrounding the phrase in question. And canons such as *ejusdem generis* . . . offer help in evaluating the significance of those surrounding words.").

92 *See* JELLUM, *supra* note 89, at 136 ("*Ejusdem generis*, like all the linguistic canons of construction, is not an iron-clad rule, but rather a guide to meaning . . . . If *ejusdem generis* is only applied when ambiguity is found, the canon should never be appropriate.").

93 29 F.4th 118, 121 (2d Cir. 2022) (emphasis added).

94 SCALIA & GARNER, *supra* note 86, at 204.

95 839 N.Y.S.2d 242 (App. Div. 2007).

96 *Id.* at 244.

public authority."[97] Despite the general-to-specific sequencing of this force majeure clause, the court applied *ejusdem generis* anyways, concluding that the cancellation of the promotion was not similar to any of the listed events.[98]

The *Team Marketing* case illustrates the difficulty courts have in figuring out the intent of the contracting parties. One could argue that no matter if the catch-all precedes or succeeds the list of specific terms, a broadly-interpreted catch-all term would render the list superfluous, and thus *ejusdem generis* should apply no matter the ordering of terms.[99] On the other hand, Justice Scalia and Garner argue that placing the list of specific terms after the catch-all is a way to "doubly" ensure that the broad catch-all includes the specifics.[100] Indeed, the phrase "*including without limitation*" in the general-to-specific formulation strongly suggests that that catch-all is not meant to be restricted by the list of terms.[101] No such equivalent phrasing exists for the specific-to-general formulation.[102] In addition, Justice Scalia and Garner argue that *ejusdem generis*, as a matter of common verbal usage, works specifically because of the order of terms: the general phrase is limited by what comes before.[103] Hence, Justice Scalia and Garner argue that the correct approach is to apply *ejusdem generis* only when the catch-all follows a list of specific terms.[104]

b. The Limitation via Interpreting the Contract as a Whole

One fundamental principle of contract interpretation is that provisions must be read not in isolation but in the context of the whole contract.[105] Another way to state this principle is that contracts should not be read in a way in which the terms contradict each other.[106]

This principle of reading contracts as a whole tends to apply when contract parties attempt to invoke economic conditions

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97 *Id.* at 246 (emphasis added).

98 *Id.*

99 Scalia & Garner, *supra* note 86, at 210.

100 *Id.* at 204.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 Patterson, *supra* note 79, at 854.

106 *See* Scalia & Garner, *supra* note 86, at 168, 180 (discussing the principle that courts should interpret text "in a way that renders them compatible rather than contradictory").

as force majeure to excuse performance in a fixed-price contract. In the case *Valero Transmission Co. v. Mitchell Energy Corp.*, Valero had agreed to purchase natural gas from Mitchell Energy at a fixed price.[107] When the market price for natural gas dropped well below that fixed price, Valero sought to invoke the catch-all provision of the contract's force majeure clause, citing economic conditions.[108] In ruling against Valero and holding that economic conditions are not unforeseeable, the court noted that when a contract fixes the price for an economic transaction, the parties implicitly allocate the risk of market price fluctuations.[109] The *Valero* case demonstrates that allowing for a party to invoke economic conditions as force majeure (without an explicit condition) would run inconsistent with the purpose of a fixed-price transaction. In essence, when faced with the choice of interpreting the contract to favor the price agreement or the force majeure clause, the court favored the price agreement.

II
ANALYSIS

Courts should not apply the common-law limitations of unforeseeability or control on the catch-all provisions of force majeure clauses. Nevertheless, courts should still prevent catch-all provisions from becoming all-encompassing by properly applying the implied covenant of good faith and interpretive canons like *ejusdem generis* and interpreting contracts as a whole.

A. The Common Law Limitations are Inconsistent with the Plain Language of the Typical Force Majeure Clause

A reader of a typical force majeure term[110] will find no direct suggestion of an unforeseeability limitation, as the word "foreseeable" does not appear. In contrast, that a control limitation typically appears as a written requirement seemingly presents an inconsistency in how contracting parties view the

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107 743 S.W.2d 658, 660 (Tex. App. 1987).

108 *See id.* at 661.

109 *Id.* at 663 ("Indeed, the uncertainty of future market prices is often the motivation for entering into a long-term contract. The primary purpose of a price agreement is to fix the price and consequently to avoid the risk of price fluctuation." (citation omitted)).

110 *E.g.*, TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App. 2018).

two common law requirements. Contract parties manually define the applicability and scope of force majeure clauses, and thus they do not rely on the common law. Hence, the method of interpreting a typical force majeure clause should be to view only the written text as controlling.

Courts certainly have the authority to allow common law force majeure concepts as parol evidence if the parties intended for the common law limitations to control.[111] However, courts should not bring in the common law limitations as "gap-filler." A gap-filling problem arises when the contract is silent on a matter necessary for contract enforcement. For example, U.C.C Section 2-615 allows parties to rely on impracticability if the contract did not allocate force majeure risks at all.[112] However, in the case of a force majeure catch-all, the parties have allocated the risk of "any cause beyond the control of the parties" that renders performance impracticable. There is, in fact, no gap in the force majeure catch-all because its plain meaning is perfectly enforceable without any mention of unforeseeability.

B. The Control Limitation Can Be Still Be Supplanted Through the Implied Duty of Good Faith

In the rare situation where a force majeure clause lacks a written control limitation, courts could still impose such a requirement through the implied duty of good faith, rather than by importing the control limitation from common law impracticability. While what the good faith obligation entails is not always clear,[113] the control limitation certainly protects against violations of the obligation. First, causing a force majeure event to excuse contract obligations is certainly an overt action of bad faith, because such a move directly deprives the other party of their bargain. Second, a party failing to take reasonable steps to prevent a force majeure event from happening negligently deprives the other party of their bargain. For example, in the case *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, the oil producer Occidental agreed to deliver crude oil to

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111 *Parol Evidence Rule*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/parol_evidence_rule [https://perma.cc/XAJ7-27GP] (last visited Apr. 18, 2023) (describing the parol evidence rule as a tool that allows courts to read-in agreements not written in the contract under certain circumstances).

112 U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM'N 1977) ("Except so far as a seller may have assumed a greater obligation . . . .").

113 *Implied Covenant*, *supra* note 76 ("This rule is infamously hard to pin down as courts repeatedly alter its application and meaning because good faith and fair dealing depend heavily on the context of the agreement.").

Nissho-Iwai, but tried to invoke its contractual force majeure to excuse failed deliveries.[114] One claim Occidental brought up was that breakdowns in its pipelines prevented performance, as the force majeure clause covered "breakdown or injury" to "producing" and "delivering facilities."[115] The court concluded that to successfully invoke this force majeure claim, Occidental would have to show that the equipment breakdowns were beyond its control.[116] While the contract in this case does contain a control limitation,[117] applying a good faith obligation instead to this case still makes sense. The maintenance of equipment necessary to obtain and deliver crude oil lies solely within Occidental's abilities. Occidental is certainly free to negotiate a contract that would prevent a contract breach due to failed equipment. However, allowing Occidental to negligently maintain its equipment, thereby causing equipment failures that ultimately prevent contract performance, would essentially allow Occidental to loophole around its explicit contractual obligations.

That being said, the duty of good faith cannot revitalize the unforeseeability limitation. The unforeseeability limitation implicates the drafting of the contract: courts impose this requirement on the catch-all when the parties fail to specifically list the type of force majeure event at issue.[118] While the duty of good faith applies to contract performance, it does not apply to contract drafting.[119]

C. Canons of Construction, When Properly Applied, Can Still Effectively Limit the Scope of Catch-All Provisions, Preventing Them from Becoming All-Encompassing

Interpreting the contract as a whole can rule out interpretations that a force majeure clause was intended to excuse performance for reasons that were not originally written into the contract. This canon of construction can supplant the

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114 729 F.2d 1530, 1533–34 (5th Cir. 1984).

115 *Id.* at 1533–35. Occidental also brought in the claim that its performance was prevented due to the Libyan government placing embargoes on them. *Id.* at 1534.

116 *Id.* at 1542.

117 *Id.* at 1539.

118 *Implied Covenant*, *supra* note 76.

119 See Kelley, *supra* note 46, at 104 (arguing that parties should protect themselves from the unforeseeability limitation by drafting explicit provisions into the contract).

unforeseeability limitation when parties use economic conditions to invoke force majeure for fixed-price contracts.[120]

In addition, force majeure catch-all provisions are ambiguous as to whether an unlisted force majeure event fits into the catch-all (absent evidence elsewhere in the contract). Due to the *ejusdem generis* canon, the plain text of the force majeure clause may either suggest that the list of specific events limit the scope of the following catch-all, or that the catch-all is in fact broad as the definitions of words like "any cause" would suggest.[121]

D. Applying the New Framework

1. *TEC Olmos, LLC v. ConocoPhillips Co.*

The new framework outlined in this Note will still prevent a party from invoking economic conditions as force majeure via the catch-all provision. As mentioned previously, Olmos agreed to drill land leased by ConocoPhillips to search for oil and gas.[122] Olmos was required to start drilling by a particular deadline or face $500,000 in liquidated damages.[123] A force majeure clause allowed Olmos to suspend the drilling deadline if it were "prevented or hindered . . . by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected."[124] Olmos had depended on financing to start the drilling project, but financing dried up after the global price of oil dropped.[125] Instead of drilling at a loss, Olmos attempted to invoke the oil price drop as force majeure through the catch-all provision.[126]

However, Olmos should lose on this claim. First, the contract had already allocated the risk of the drilling project becoming unprofitable through the liquidated damages clause. This is not a fixed price agreement but a "farmout" agreement, where the owner of an oil and gas lease (here, ConocoPhillips)

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120 *See supra* subsection I.C.2(b).

121 *See supra* notes 89–92 and accompanying text.

122 TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App. 2018).

123 *Id.*

124 *Id.* (emphasis added).

125 *Id.* at 180.

126 *Id.*

allows a third party (here, Olmos) to work on the property.[127] Importantly, the bargain for the third party is the ability to make a profit off of the oil on the lease.[128] Hence, when the price of oil dropped, the potential revenue and profits from the lease also dropped. Olmos faced a choice: either continue the project out of pocket and potentially face economic losses or face economic losses directly through the liquidated damages clause. The risk Olmos faced by entering into the contract is the same kind of risk allocated through a fixed price contract. In a fixed price contract, a party risks buying a product at a greater price than the ever-fluctuating market value, whereas here, Olmos risked a drilling operation which would have ultimately been more unprofitable than paying the liquidated damages clause. Hence, the contract is unambiguous, and Olmos cannot invoke force majeure.

2. *Specialty Foods of Indiana, Inc. v. City of South Bend*

This case presents an opportunity to apply the *ejusdem generis* limitation to a force majeure catch-all. As mentioned previously, the Century Center (the building that housed the College Football Hall of Fame) and the city of South Bend contracted with Specialty Foods to supply food and beverage for the Hall of Fame.[129] During the course of the contract, the NFF decided to end their commitment to Century Center and South Bend, and thus moved the Hall of Fame to Atlanta.[130] This move prematurely terminated Specialty Foods' contract. The city and the Century Center thus invoked the catch-all provision of their force majeure clause. The force majeure clause in Specialty Foods' contract read:

> In the event Century Center . . . shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes[,] lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war *or any other reason not within the reasonable control of Century Center* . . . as the

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127 Catherine Bazile, *The Nuts and Bolts of Farmout Agreements*, OIL & GAS REP. (Aug. 21, 2014), https://www.theoilandgasreport.com/2014/08/21/the-nuts-and-bolts-of-farmout-agreements/ [https://perma.cc/384X-Z2YL].

128 *See id.*

129 Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E.2d 23, 25 (Ind. Ct. App. 2013).

130 *Id.* at 25–26.

> case may be, then the performance of such obligation shall be excused for the period of such delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.[131]

Under the new framework, the catch-all provision is ambiguous as to whether it refers to the existence of the Hall of Fame in the city, as the scope of "any other reason" could be all-encompassing or limited to similar causes as the listed ones. Hence, *ejusdem generis* would apply, and the interpretive canon would not allow the city to excuse its obligation to Specialty Foods, because the presence of the Hall of Fame is dissimilar to failures of infrastructure, natural disasters, laws, or acts of human violence.

How could the city have disclaimed *ejusdem generis*? One option would be to place the catch-all at the beginning of the list. This provision would read in part: "In the event Century Center . . . shall be . . . prevented from the performance of any obligation required under this Agreement by *any other reason not within the reasonable control of Century Center, including, without limitation,* strikes, lockouts . . . ."[132] Not only would *ejusdem generis* not apply, but the phrase "without limitation" would also show that the city meant for the catch-all to be all-encompassing. Another possible method could keep the order of the provisions but amend the catch-all to say "any other reason *not enumerated herein and* not within the reasonable control of Century Center."[133] The phrase "not enumerated herein" could modify the term "any" to include absolutely any other cause not mentioned in the contract (but of course, still limited to causes that would not contradict the contract, so as to exclude economic conditions as a cause).

One interesting caveat in the *Specialty Foods* case is that the Hall of Fame staying in South Bend was contingent on the city's ability to negotiate a new contract with the Hall of Fame.[134] This ought to implicate the control limitation listed in the contract, but the court ultimately excused the city and Century

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131 *Id.* at 27 (alteration in original) (emphasis added).

132 *See id.* (emphasis added); *see also* Team Mktg. USA Corp. v. Power Pact, LLC, 839 N.Y.S.2d 242, 246 (App. Div. 2007) (containing the "including, without limitation" text in the force majeure catch-all).

133 This phrasing was included in the catch-all provision in *TEC Olmos*. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App. 2018).

134 *See* Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E.2d 23, 25–26 (Ind. Ct. App. 2013) (detailing the contractual arrangement between South Bend, the Century Center, and the owners of the Hall of Fame).

Center of its obligations towards Specialty Foods.[135] Nevertheless, were it found that the city or Century Center somehow intentionally drove away the Hall of Fame, then Specialty Foods could argue that the opposing parties violated their duty of good faith.

CONCLUSION

Courts should no longer read the common law elements of impracticability into the catch-all provisions of force majeure clauses. This view would end the presumed requirements of unforeseeability and control that currently limit the application of force majeure catch-all provisions. Instead, courts should rely on the more generally-applicable doctrines of contract interpretation, such as the interpretive canons of *ejusdem generis* and reading contracts as a whole, and the implied duty of good faith.

135 *Id.* at 29.