COME HELL OR HIGH WATER: FORCE MAJEURE IN TEXAS

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I. INTRODUCTION

Essayist and former practitioner of mathematical finance, Nicholas Taleb, said "Mild success can be explainable by skills and labor. Wild success is attributable to variance."[1] Great fortunes can be created when the unexpected happens. Great losses may also be incurred applying similar logic—there are unexpected and unforeseeable events that occur, and their effect on commercial transitions can be significant. A force majeure clause allows a party to excuse themselves from performance under the right circumstances. The "breadth of application of the doctrine makes difficult an attempt to formulate a statement of the requisites governing its application. But the difficulty may be largely avoided if the expressions of the courts are used as a

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1. *See* NASSIM NICHOLAS TALIB, FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN LIFE AND IN THE MARKETS 12 (2d ed. 2004).

basis of departure."[2] A force majeure clause integrated into a contract serves to specifically exclude articulated force majeure events, mentioned and integrated by the parties into the contract.[3] Common law protection is provided by another doctrine: the doctrine of impossibility.[4]

Impossibility is also an excuse for performance but exists when the contract between the parties does not feature a force majeure clause.[5] In the absence of such a clause, impossibility applies where an unforeseen event renders performance impossible.[6] Thus, in Texas, either a party premeditates the notion of some force majeure event and negotiates its mention into a force majeure clause, or allows for the courts to make their own determination as to whether an event qualifies under the doctrine of impossibility.

This article aspires to discuss the rules and application of force majeure and impossibility in Texas, reconcile their origins and underpinnings with modern application, and explore their practical effect today. Also, this article takes normative positions on the application of force majeure and impossibility in Texas and suggests that Texas courts overturn precedent in the following ways. One, the interests of justice would be better served by applying reverse ejusdem generis to the interpretation of force majeure clauses. Two, the interests of justice would be better served if the courts used a higher standard, such as the preponderance of the evidence, in deciding whether a material fact was a basic assumption of both parties. Although still discretionary, such a burden would require some proof instead of allowing the absence of proof to suffice.

II. ORIGINS AND UNDERPINNINGS OF FORCE MAJEURE

Force majeure began as two Roman concepts: *pacta sunt servanda* and *clausula rebus sic stantibus*.[7] *Pacta sunt servanda* translates from Latin to mean that contractual "agreements must be kept" and that neglect of party obligations is a violation of the contract.[8] *Rebus sic stantibus* is the legal doctrine allowing for a contract or a treaty to become inapplicable because of a fundamental change of circumstances and translates from Latin to mean

2. J. Denson Smith, *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, 45 YALE L.J. 452, 454 (1936).

3. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)

4. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

5. *Id.* at 72.

6. *Id.*

7. Jocelyn L. Knoll & Shannon L. Bjorklund, *Force Majeure and Climate Change: What is the New Normal?*, 8 J. AM. COLL. CONSTR. LAWS. 2 (2014) (citing Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, 12 UNIF. L. REV. 101, 102 (2007)).

8. *Id.*; *see also* Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

"things thus standing."[9] Thus, *rebus sic stantibus* is essentially an escape to the general rule of *pacta sunt servada*.[10] They are two sides to a coin—the coin being the integrity of contract law. Over time, these concepts manifested themselves in the civil code of France during Napoleon's reign (the Napoleonic Code), which dates back to 1804.[11] Unlike English courts at that time, which enunciated contractual rigidity, French courts were more amenable to revoking contracts for reasons authorized by law.[12] Still today, Article 1148 of the modern French Civil Code states that there would not be a claim for damages where force majeure prevents the fulfilment by the obligor of an obligation.[13] "Considered to be his greatest legacy, Napoleon's Civil Code assured the spread of the ideals of the French Revolution long after the end of his rule."[14] The compilers of the Code provided that "no damages could be recovered when non-performance was the result of force majeure."[15]

> But nowhere in the Code did they undertake to define this term. Just how broad it might be, how much it might cover, what the limits of its applicability were, had to be worked out by the French courts very much as Anglo-American courts have worked out, more or less definitely, the proper scope of the doctrine covering the discharge of liability on the grounds of impossibility.[16]

After Napoleon was exiled *again* to Saint Helena Island, the civil code which bore his name carried on, and its ideals eventually made their way into English and then subsequently American common law.[17]

Under the Modern French Code, as derived from the Napoleonic Code, "three elements need to be present for an event to qualify as force majeure: the harm causing event needs to be external, unforeseeable, and irresistible."[18] External events are outside an obligee's "sphere of . . . control," sometimes referred to as "'acts of God' [or] 'acts of war.'"[19] In the nineteenth century, like now, courts encountered merchants who have lost cargo and

9. Knoll & Bjorklund, *supra* note 7, at 6; *see* Medina & Medina v. Country Pride Foods Ltd., 631 F. Supp. 293 (D.P.R 1986); *Clausula rebus sic stantibus*, WIKIPEDIA (Mar. 20, 2023, 3:28 PM), https://en.wikipedia.org/wiki/Clausula_rebus_sic_stantibus [https://perma.cc/M4X5-ZY35].

10. WIKIPEDIA, *supra* note 9.

11. Knoll & Bjorklund, *supra* note 7, at 8.

12. Smith, *supra* note 2, at 452.

13. Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, 12 UNIF. L. REV. 101, 102 (2007) (discussing origins of American force majeure).

14. *Napoleon's Legacy*, PBS, https://www.pbs.org/empires/napoleon/n_politic/legacy/page_1.html [https://perma.cc/YWY7-WMTY].

15. Smith, *supra* note 2, at 452.

16. *Id.* at 452-53.

17. *See* Katsivela, *supra* note 13, at 102.

18. *Id.* at 103.

19. *Id.*

missed deadlines due to force majeure events at sea and on land. In the absence of modern globalization and air freight transportation and with the prevalence of unexpected disaster in an era of imperial wars and maritime dependence, such laws provided some incentive for trade to continue despite the risk of loss. However, "an inherent defect of the goods under the control of the [obligee did] not generally qualify as force majeure since it [was] not deemed to be external to the debtor's sphere of activities or control."[20]

In addition to the event being external, French force majeure required that the event be "absolutely unforeseeable" at the time of contract formation.[21] Thus, if the obligee could have foreseen the event, they should have provided for it in the contract. But who decides whether the parties could or could not have foreseen an event? After all, some believe in the idiom that nothing is impossible, and there are undoubtedly contracting merchants who believed this as well.[22] Whether or not an event was unforeseen is a fact question, decided by the court when evaluating the surrounding circumstances.[23] Therefore, it seems the same event in some cases may be deemed an unforeseeable event and other cases not.[24]

Finally, the third element of French force majeure required that the event be irresistible.[25] This did not mean that the French code was speaking of events consisting of beautiful sirens enticing sailors to their destruction (although that might qualify),[26] but the code was instead referring to an event that renders performance not "merely onerous or burdensome" but impossible.[27] Courts still take this definition of impossibility into account since today, both Texas and French law require the obligee to take measures that a reasonable person would have taken against the event before an event is considered impossible.[28]

In both the traditional application of force majeure and in modern applications, courts engage in a "highly factual determination" and consider cases one at a time.[29] This means that courts will inevitably have a high amount of

20. *Id.* at 104 (discussing goods that are not qualified under force majeure).

21. *Id.* at 105.

22. *See* Meredith Wadman, *'Nothing Is Impossible,' Says Lab Ace Nita Patel*, 370 SCI. MAG. 652 (2020), https://www.science.org/doi/pdf/10.1126/science.370.6517.652 [https://perma.cc/86V3-GG2J].

23. *See* Katsivela, *supra* note 13, at 105.

24. *See id.*

25. *See id.* at 102.

26. *See* HOMER, THE ODYSSEY (Robert Fagles trans., 1996).

27. Katsivela, *supra* note 13, at 106.

28. *Id.*; *see also* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60, 69 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[A] party is expected to use reasonable efforts to surmount obstacles to performance . . . and a performance is impracticable only if it is so in spite of such efforts." (alteration in original)).

29. *See* Katsivela, *supra* note 13, at 107.

discretion in assessing the presence of force majeure. How courts tend to utilize said discretion is in *pari passu* with how parties prepare their contractual agreements. Running from this logic, it is reasonable to see how jurisdictions such as Texas have tended towards deferring to and narrowly construing the language of the contract under scrutiny.

III. FORCE MAJEURE IN TEXAS

In Texas, force majeure's "historical basis has mostly eroded in favor o[f] contract interpretation."[30] "[T]he scope and effect of a force majeure clause depend ultimately on the specific language used in the contract and not on any traditional definition of the term."[31] The application of force majeure requires that a force majeure clause was written into the contract under scrutiny.[32] Without such a clause there is no application of force majeure.[33] Instead, there is a separately named excuse which is referred to as an impossibility defense (sometimes referred to as impracticability), which functions much like the original civil code force majeure doctrine does—requiring objective impossibility, reasonable efforts to surmount the obstacle, and the absence of something known as the basic assumption of both parties.[34] This basic assumption requirement, which will be discussed in depth in a later section, functions like the unforeseeability requirement in the French civil code in that the court steps in and decides for the parties whether or not the force majeure event was something assumed by both parties.

If the contract contains a force majeure provision, the parties should review it carefully and be guided by it.[35] The gaps not covered by impossibility, so to speak, are filled by the presence and contents of the force majeure provision. An act of God or an act of war usually will not relieve a party of its obligations, "unless the parties expressly provide otherwise" by including an applicable force majeure provision.[36] If the clause specifically mentions the event which hindered performance, even if it is foreseeable, the risk is con-

30. Jason Bernhardt, *Your Contract and Coronavirus: Now What?*, WINSTEAD: NEWS ALERTS (Mar. 27, 2020), https://www.winstead.com/Knowledge-Events/News-Alerts/346404/Your-Contract-and-Coronavirus-Now-What [https://perma.cc/Z2G8-NBLL].

31. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 197 n.68 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting Roland Oil Co. v. R.R. Comm'n of Tex., No. 03-12-00247-CV, 2015 WL 870232, at *5 (Tex. App.—Austin Feb. 27, 2015, pet. denied) (mem. op.)).

32. *See id.* at 198 n.68.

33. *See id.*

34. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

35. Bernhardt, *supra* note 30.

36. GT & MC, Inc. v. Tex. City Refin., Inc., 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

sidered to be consciously mitigated by the parties and performance is excused.[37] Force majeure provisions will include a list of events negotiated over and integrated into the contract.[38] This process requires a risk and reward evaluation by the parties as they go back and forth over which events are to be listed and the price demanded.[39] Courts will then apply contract interpretation principles to the specific enumerations when determining whether a related event is encompassed.[40]

Because the presence of a writing controls, in regards to events that are catastrophic to performance, parties also must be sure to include some sort of catch-all provision for the types of events which are not more specifically enumerated.[41] This catch-all is where the truly unforeseen events are *caught*, and it is primarily the catch-all where the courts apply their discretion to determine what was the intent of the parties when they drafted the catch-all. Thus, when the alleged force majeure event is not specifically listed and falls within the general terms of the catch-all provision, the court will require that the defendant prove that the event was unforeseeable.[42] Regardless of the language in the contract, the court will only accept a force majeure or impossibility defense argument if there is a causal link between the event and the nonperformance.[43]

A. Issues with Application of Force Majeure in Texas

Under Texas law, whether a party has a valid force majeure argument is a fact-specific analysis of contract interpretation principles.[44] Courts will begin their analysis by looking at the language of the contract, with their primary purpose being to ascertain the intent of the parties.[45] "If the written instrument is worded so that it can be given a certain definite meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."[46] Then, if the contract contains a force majeure provision, Texas courts will look to the specific language in a contract to determine the scope and effect of a force majeure provision.[47]

37. *TEC Olmos*, 555 S.W.3d at 183 ("[W]hen parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable.").
38. *See id.* at 185.
39. *See id.* at 182.
40. *See id.*
41. *See id.* at 183-84.
42. *Id.* at 184.
43. *See* 30 RICHARD A. LORD, WILLISTON ON CONTRACTS § 77:31, at 360-61 (4th ed. 2021).
44. *See* Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).
45. *See id.*
46. *Id.*
47. *Id.*

1. Interpretation by Ejusdem Generis

A Texas court's primary concern "in interpreting a contract is ascertaining the true intent of the parties."[48] Texas courts will examine the writing as a whole, assigning effect to contractual provisions based on the nature of other provisions enumerated in more specific words.[49] This legal analysis, where contract interpretation is done cumulatively by looking within the four corners of the contract for provisions of "the same kind," is known by its Latin translation as *ejusdem generis*.[50]

Although seemingly originating in application towards the interpretation of statutes, this practice is used in Texas to interpret ambiguous language in force majeure contractual provisions.[51] This canon provides that when "general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned."[52] For example, in *R & B Falcon Corp. v. American Exploration Co.*,[53] a federal court applying state law distinguished between events listed in the contract's force majeure provision which were "essentially governmental instability and supply-chain-related events external to actual performance of the contract" and the "mechanical problem of unknown origins" which was the alleged reason for non-performance.[54] Applying *ejusdem generis* interpretation principles to the interpretation of the contract, the court held that one of the reasons why the plaintiff's claim for force majeure failed was that the events alleged to have caused nonperformance "bear little resemblance to the listed excuses for performance."[55] In conducting such an application, the court was not looking for the subjective intent of the parties; instead, it is "the objective intent, the intent expressed or apparent in the writing, that is sought."[56] It is important to remember that the *ejusdem generis* analysis is inapplicable under Texas law where the language at issue is deemed to be unambiguous.[57]

48. Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc., 157 S.W.3d 462, 465 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

49. *See id.*

50. Stanford v. Butler, 181 S.W.2d 269, 272 (Tex. 1944).

51. *See* R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001) (applying *ejusdem generis* principles to force majeure clauses).

52. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 185 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012)).

53. *R & B Falcon Corp.*, 154 F. Supp. 2d at 974-75.

54. *Id.* at 974.

55. *Id*. at 975.

56. Corley v. Entergy Corp., 246 F. Supp. 2d 565, 574 (E.D. Tex. 2003) (quoting Bennett v. Tarrant Cty. Water Control & Improvement Dist. No. One, 894 S.W.2d 441, 446 (Tex. App—Fort Worth 1995, writ denied).

57. P. Bordages-Account B, L.P. v. Air Prods., L.P., 369 F. Supp. 2d 860, 870 (E.D. Tex. 2004).

But when the events enumerated in the force majeure clause are considered ambiguous, *ejusdem generis* applies.[58]

It is the judge who is making the decision of what is objectively apparent from the writing.[59] Thus, the plaintiff in *R & B Falcon Corp*. hit a dead end to his argument when the court made its decision. Because the court does not take the parties' subjective intent into consideration, without specificity, the court may interpret the contract in a way that is possibly not the way it was meant. This places pressure on the parties to make sure that they use specificity when drafting. However, by its very nature, the types of events listed in the force majeure clauses are not specific—otherwise, the drafters may be compelled to list every possible scenario in an impractically long and tedious process of consideration which inevitably would result in a needlessly long contract. Instead, parties usually place a catch-all in their force majeure clauses.[60] "Although there is authority for the view that if the event should have been foreseen as possible then the plea will not be allowed, the better view would seem to be that no more is required than that it should not have been foreseen as probable."[61]

2. Force Majeure Catch-All Clauses

To encompass force majeure events not specifically enumerated in the clause, parties are usually advised to accompany any listing of force majeure events with a catch-all provision. But drafting the catch-all presents its own challenges. Issues arise involving the canon of interpretation *ejusdem generis*, which limits the meaning of the catch-all to the same type of events as those listed specifically.[62] Thus, broad language meant to encompass "any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected," will not in fact encompass "any other cause."[63] In *TEC Olmos, LLC v. ConocoPhillips Co.*,[64] the defendant entered into an agreement with the plaintiff to drill in search of oil and gas.[65] The contract executed contained the following force majeure clause, including both specific event enumerations and a catch-all provision:

> Should either Party be prevented or hindered from complying with any obligation created under this Agreement, other than the obligation to

58. *Id.* at 870-71.

59. *See id.*

60. *See* TEC Olmos, L.L.C. v. ConocoPhillips Co. 555 S.W.3d 176, 183-84 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

61. Smith, *supra* note 2, at 455-56.

62. *See* R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969 (S.D. Tex. 2001) (applying *ejusdem generis* principles to force majeure clauses).

63. *TEC Olmos*, 555 S.W.3d at 182.

64. 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

65. *Id.* at 179.

> pay money, 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, then the performance of any such obligation is suspended [66]

Subsequently, the global oil market entered a downturn effectively eliminating the defendant's financing and caused it to invoke the foregoing force majeure clause.[67] The defendant argued that economic change was enumerated in the force majeure clause's catch-all provision.[68] The court held that a market downturn was not a force majeure event.[69] In its reasoning, the court opined that "[w]hen more specific items in a list are followed by a catch-all 'other,' the doctrine of ejusdem generis teaches that the latter must be limited to things like the former."[70] In other words, "'only events or things of the same general nature or class as those specifically enumerated' excused a party's non-performance."[71] The court continued to explain that "[t]he specified events involve natural or man-made disasters (fires, floods, storms, act of God), governmental actions (governmental authority and war), and labor disputes" were of a type of risk that "would be difficult [to mitigate] absent a force majeure clause."[72] Market downturns, however, were of a different type of risk, and could be mitigated by conditioning performance on securing financing.[73]

Although agreeable, the result in *TEC* is problematic for two reasons. First, the defendant may have believed that it had negotiated an effective catch-all provision and thus was caught off guard when a court ruled that it had not. Such a holding would come after the contract had been executed; thus, even if a defendant could show that the integration of the provision was intended to cover "any event," the court would use its own discretion to decide what the clause meant—potentially holding in the alternative to the will of the parties.

Secondly, the methodology of Texas courts tips in favor of more sophisticated parties who can afford legal counsel privy to *ejusdem generis*' effect on the interpretation of an otherwise clear catch-all provision. Small businesses and individuals may be caught in a situation where they are not aware they are allowed an excuse until it is too late. It is the position of this article

66. *Id.*
67. *Id.* at 180.
68. *Id.* at 182.
69. *Id.*
70. *Id.* at 185.
71. *Id.* at 186 (quoting Seitz v. Mark-O-Lite Sign Contractors, Inc., 510 A.2d 319, 321 (N.J. Super. Ct. Law Div. 1986)).
72. *Id.*
73. *Id.*

that the interests of justice would be better served by applying reverse *ejusdem generis* to the interpretation of force majeure clauses.

For example, in *Roland Oil Co. v. Railroad Commission of Texas*, the force majeure provision at issue incorporated a catch-all clause that encompassed "any other cause or causes beyond reasonable control of the party."[74] Interpreting the clause, the court explained that "'other' means 'additional' or 'remaining' of a group or type not already mentioned" and that "similar things that are beyond a person's ability to control consists of the traditional force majeure events specifically described in the clause."[75] Roland argued that "each of the specific list of events in this clause stand alone and is not modified or described by the phra se 'by any other cause or causes beyond the reasonable control of the party.'"[76] The court explained that "Roland's interpretation would require ignoring the existence of "other" in this provision."[77] But does it?

The court is claiming that the word "other" in the force majeure provision must be a single-word modifier. A single-word modifier is one word that modifies the meaning of another word, phrase, or clause.[78] In the disputed clause, the word "other' is being used as an adjective. Adjectives modify nouns.[79] "Other," then, is modifying "cause or causes beyond reasonable control of the party." Although the court's analysis in this respect is correct, what if the modifier is actually the phrase "other cause or causes" and the modification is to "beyond reasonable control of the party"? This latter possibility of interpretation would be more in line with the interpretation argued by Roland. Regardless, the question remains whether this really was the intent of the parties, or is strict interpretation an imposition of the court's intent on the parties.

Similarly, other courts applying Texas law have also ruled in strange and mysterious ways that could not be predicted. In the bankruptcy case, *In re CEC Entertainment, Inc.*, the force majeure provision at issue stated: "This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or

74. Roland Oil Co. v. R.R. Comm'n of Tex., No. 03-12-00247-CV, 2015 WL 870232, at *5 (Tex. App.—Austin Feb. 27, 2015, pet. denied) (mem. op).

75. *Id.*

76. *Id.* at *6.

77. *Id.*

78. *Single-Word Modifier*, WIKIPEDIA (Aug. 15, 2013, 8:14 PM), https://en.wikipedia.org/wiki/Single-word_modifier#:~:text=A%20single%2Dword%20modifier%20is,word%20modifier%20may%20refer%20to%3A&text=Adjective%2C%20a%20word%20which%20modifies,or%20other%20word%20or%20phrase [https://perma.cc/ET3P-XZCP].

79. *See* Iliff v. Iliff, 339 S.W.3d 74, 80 (Tex. 2011).

inability to raise capital or borrow for any purpose."[80] The court held that the force majeure clause "does not apply to an 'inability to pay any sum of money' or a failure to perform caused by a lack of money."[81] Thus, since "[r]ent is a 'sum of money due' . . . the force majeure clause does not apply to an inability to pay rent."[82] The court here should be searching for the true intent of the parties when interpreting the contract. But the words in the last sentence—"due to the lack of money"— are ambiguous. The drafters could have intended the force majeure clause not to apply if default is "due to the lack of money" as a result of the events enumerated. Or, the drafters could have intended the force majeure clause not to apply due to a "lack of money," *in itself*, as a result of undercapitalization or some other internal factor. This latter intention is distinguishable from an "act of God" or "unusual government restriction" (specific events enumerated in the force majeure provision). So, depending on how the court chooses to read the language, which could be read either way, the force majeure clause is or is not effective.

3. Reverse Ejusdem Generis

Unlike *ejusdem generis*, the canon of reverse *ejusdem generis* states that "when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase."[83] Although less known, such a canon's application in the context of Texas court interpretation of force majeure clauses allows for a more equitable result. The court is still using its own discretion to decide what the parties intended by using the language in the contract; however, the emphasis is placed on the language in the catch-all clause, allowing less sophisticated contract parties to have more confidence in all-encompassing language, fine-tuned by the specific events listed outside the catch-all. In this way, "when the catch-all [provision] is precise, the inference that the [drafters] intended the enumerated terms to be subject to the catch-all's limits will be rather strong."[84] "When the catch-all [provision] is more general, however, such an implication will rest on more tenuous grounds because the [drafter] may have used the general catch-all [provision] simply as a way of describing the list of terms rather than as a way of limiting it."[85]

As an example, we can revisit the contractual language employed in *TEC*. In that case, the defendant was to be excused when "prevented or hindered from complying with any obligation" by an "obligation to pay money,

80. *In re* CEC Entm't, Inc., 625 B.R. 344, 354 (Bankr. S.D. Tex. 2020).
81. *Id.*
82. *Id.* at 354.
83. *See* Jay Wexler, *Fun with Reverse Ejusdem Generis*, 105 MINN. L. REV 1, 2 (2020).
84. *Id*. at 3.
85. *Id.*

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."[86] The court held that performance was not excused by an economic downturn because when interpreting the contract via the doctrine of *ejusdem generis* , the "any other cause not enumerated" provision was colored by the unforeseeable nature of the enumerated items.[87] Applying reverse *ejusdem generis*, the court would simply read the clause to be covering unforeseeable events, *such as but not limited to* "natural or man-made disasters (fires, floods, storms, act of God), governmental actions (governmental authority and war), and labor disputes." Conversely, if the catch-all provision had instead said "or any other *natural or man-made disasters, governmental actions, or labor disputes"* the court would read the clause as *limited to* the more precisely mentioned categories of events. Although such an interpretation would not have saved the defendant from performance because market downturns are not unforeseeable, at least the force majeure clause was read in a broader way, more in line with force majeure's origins in protecting parties from the uncontrollable.[88]

See for example the application of the Ninth Circuit's reasoning in *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*.[89] In this case, Rio Properties, a hotel and casino operation, filed suit against singer Rod Stewart and his company for refusing to perform due to his diagnosis and treatment for thyroid cancer.[90] The force majeure provision in their agreement broadly stated: "if any party's performance became impossible by 'any [ ] cause beyond such party's reasonable control . . . then there shall be no claim for damages by either party to this Agreement, and the performance shall be rescheduled to a mutually agreeable time.'"[91]

The court found that Rod Stewart's performance could be considered impossible due to his illness, even though the contract did not explicitly identify that as a force majeure event.[92] The court reasoned that it could "admit Stewart's proffered extrinsic evidence regarding the nature and purpose of the integrated contract, its negotiation and execution, and the parties' intent in including the artist illness and force majeure provisions ."[93] Thus, concluding the applicability of the force majeure clause.[94]

86. TEC Olmos, L.L.C. v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (emphasis omitted).
87. *Id.* at 186.
88. *See* Katsivela, *supra* note 13, at 101-02.
89. 94 F. App'x 519 (9th Cir. 2004).
90. *Id.* at 520.
91. *Id.* at 521.
92. *Id.*
93. *Id.*
94. *Id.*

IV. IMPOSSIBILITY, THE TEXAS WAY

There is no force majeure doctrine outside of the contract.[95] That realm is dictated by another doctrine, one known as the doctrine of impossibility.[96] Impossibility is also an excuse for non-performance but exists when the contract between the parties does not feature a force majeure clause. The impossibility defense has also been referred to as impracticability.[97] However, these names are simply synonyms for the same law. Whatever the court chooses to call it, the Texas impossibility defense is based on Section 261 of the Restatement (Second) of Contracts, which provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. [98]

"Texas has recognized three contexts in which the [impossibility] excuse may be available: (1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) a change in the law that prevents a person from performing."[99] Being very careful not to "simply rewrite the parties' contract," Texas courts limit the application of the impossibility defense to situations where "both parties held a basic (though unstated) assumption about the contract that proves untrue."[100] This basic assumption requirement is this article's second qualm with the application of Texas law to excuse parties from the unexpected.

A. Issues with Application of Impossibility in Texas

Certain inferences can be made by courts as to the basic assumptions of both parties. Based on these inferences the court will decide whether an excuse from performance is merited or not. For example, "in a contract for personal services, the death or incapacity of the person involved makes the contract impracticable.....Similarly, a contract to lease or insure a building is rendered impracticable if the building is destroyed. A change in the law that

95. *See id.*
96. *See id.*
97. Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60, 64 n.6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)); *see also* Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *8 (W.D. Tex. Apr. 28, 2021) ("Under Texas law, impossibility and impracticability refer to the same affirmative defense.").
98. *Tractebel Energy Mktg*., 118 S.W.3d at 64.
99. Philips v. McNease, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
100. *Tractebel Energy Mktg*., 118 S.W.3d at 66.

makes performance illegal also renders it impracticable."[101] In these examples, a court may well have reasons based on the bargain of the parties to declare the parties' basic assumption; after all, a personal services contract is one requiring the performance of a certain individual (e.g., Beyonce's performance at a wedding, which no one else can perform). But declaring basic assumptions further away from the parties' bargain is fraught with danger. Over a certain threshold, the court is reaching to determine basic assumptions. Red flags arise when courts dictate the subjective assumptions of contractual parties. Professor Val Ricks, the supervising professor to this article, has opined that when the court does this "rather than exercise its moral, economic, and legal faculties, the court asks us to indulge in a fantasy about party mind-reading so that it can say it is not imposing its own will on the situation. This is never helpful and actually hides the real rationale."[102] Well said!

1. Attenuated String of Inferences

In addition, by inferring basic assumptions of the parties, courts may make a string of inferences that becomes increasingly attenuated as it's analysis grows. In *Tractebel v. E.I. Du Pont De Nemours and Co.*, the Texas Court of Appeals made a string of inferences in its decision whether or not a particular material fact was a basic assumption of both parties.[103] The fact pattern of the case involved the entrance of the parties into the contract, where one party was to provide government credits to the other in exchange for consideration.[104] There was no force majeure provision in the agreement between the parties.[105] Excusal of non-performance turned on whether the parties shared the *basic assumption* that the credits to be provided were to be particularly those earned by the defendant, as opposed to credits purchased by the defendant on the market and sold to the plaintiff.[106] The court first assumed that because a third party brokered the deal, and it was in his own interest to keep the parties anonymous, neither party knew who they were contracting with.[107] Then the court assumed that since this was the case, both parties could not have shared the basic assumption that it was the defendant's credits specifically that were being transacted.[108] And underlying these two assumptions, is the assumption that the plaintiff, in contracting for the credits,

101. *Id.*
102. Interview with Val D Ricks, Professor of L, S. Tex. Coll. of L. Hous., in Hous., Tex. (2022).
103. *Tractebel Energy Mktg.*, 118 S.W.3d at 66–67.
104. *Id.* at 64.
105. *See id.* at 67.
106. *Id.*
107. *Id.*
108. *Id.*

was not in fact contracting for the *other party's* credits but *any credits*. The court is making three separate assumptions to arrive at a conclusion.

Seeming to realize the attenuated logic at play, the court proffers an alternative scenario: that "even assuming [the plaintiff] knew [the defendant] was selling its own credits, this does not mean [the plaintiff] understood that to be a basic assumption of the contract."[109] Referring to several illustrations in the restatement itself, the court pointed out that "one party's assumption about the source of supply—and the other party's knowledge of that assumption—is not enough to excuse performance if alternative sources of supply are still available to fulfill the contract."[110] In reaching this end point in their logic, the court is saying to the parties that neither party both knew of the source of the credits and assumed that the credits from that source were the ones contracted for. Even in this alternative scenario, at least two assumptions are being made based on "no evidence" to the contrary.[111]

Similarly, in *Al Asher & Sons, Inc. v. Foreman Electric Service Co.*, the court concluded that an impracticability defense fails as a matter of law.[112] In *Al Asher*, Foreman, the defendant, failed to fulfill its obligations under rental agreements it entered into with the plaintiff.[113] Foreman argued that it was impossible to perform under the rental agreements because it had "entered into the Rental Agreements with the intention to use the capital gained from the PREPA [(Puerto Rico Electric Power Authority)] and FEMA [(Federal Emergency Management Agency)] contracts to cover the rental payments" and it "could not have predicted this kind of corrupt and fraudulent conduct from these parties engaged in disaster relief work."[114] The court reasoned that the "PREPA contract was not in existence at the time the rental agreements were made" and "the emails exchanged" between the parties did not establish that both parties "held a basic assumption regarding the non-occurrence of problems with the PREPA contract when the rental agreements were made."[115] Thus, the court concluded that "there is no evidence . . . as to the existence of a basic assumption regarding the PREPA contract held by both parties to the rental agreements."[116]

Like in *Tractabel*, the court is making assumptions based on a lack of evidence to reach their final inference in regards to the basic assumptions of

109. *Id.*
110. *Id.* at 68.
111. *Id.*
112. Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *8 (W.D. Tex. Apr. 28, 2021).
113. *Id.* at *7.
114. *Id.* at *8.
115. *Id.*
116. *Id.*

the parties. The court is inferring that since the contract related to reimbursement was not in existence yet, neither Foreman nor the plaintiff had assumed that fraud would not occur.[117] However, Foreman had "entered into the rental agreements to use the leased equipment to engage in storm restoration in Puerto Rico in the aftermath of Hurricane Maria and, specifically, to use the units to fulfill contracts" with FEMA and PREPA.[118] Regardless of whether or not the court may have reached the correct conclusion, its rationale is not persuasive. The court is saying that its holding is justified by a lack of evidence, but whether or not the parties shared the basic assumption is not adequately explored. Instead, it seems like the court really ruled based on its discretion because "the fact that performance is economically burdensome is insufficient to establish [impossibility]."[119] There is no exploration or use of the court's moral, economic, and legal facilities to further pursue Foreman's meritorious argument.

The assumption of a conclusion or fact based primarily on a lack of evidence to the contrary is known in the English literary world as an "argument from ignorance" or "negative proof fallacy."[120] The term was likely coined by philosopher John Locke.[121] Although convincing, arguments from ignorance are hasty and arrived at incorrectly since rules of logic place the burden of proof on the person making the claim; yet here, the court's claim is being proven by the lack of proof provided by the parties.[122] Alternatively, it is this article's position that the interests of justice would be better served if the court uses a higher standard, such as the preponderance of the evidence, in deciding whether a material fact was a basic assumption of both parties. Although still discretionary, such a burden would require some proof instead of allowing the absence of proof to suffice.

In addition, with a supervening event, the court may be able to consider outside evidence since the event happened outside the contract. In *Al Asher*, the court sustained the plaintiff's objection that certain declarations by Foreman be inadmissible due to their status as parol evidence.[123] Paragraph 7 of Foreman's declaration provided that "[b]y executing the Rental Agreements,

117. *See id.*

118. *Id.* at *2.

119. *Id.* at *8 (citing Philips v. McNease, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.)).

120. *Argument from Ignorance*, WIKIPEDIA (May 28, 2021, 2:14 PM), https://simple.wikipedia.org/wiki/Argument_from_ignorance#:~:text=An%20argument%20from%20ignorance%20(Latin,not%20yet%20been%20proved%20true [https://perma.cc/R47V-VLNV].

121. *Argument from Ignorance*, WIKIPEDIA (Jan. 10, 2023, 4:30 AM), https://en.wikipedia.org/wiki/Argument_from_ignorance [https://perma.cc/AWM9-UFJ6].

122. WIKIPEDIA, *supra* note 120.

123. Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., MO:19-CV-173-DC, 2021 WL 2772808, at *5 (W.D. Tex. Apr. 28, 2021).

[Foreman] did not intend to be held liable for unreasonable repairs to the Equipment, inflated shipment fees, and other fees incurred when abiding to Asher's demands."[124] Similarly, Paragraph 8 provided that "[b]y executing the Rental Agreements, [Foreman] did not acknowledge the enforceability or validity of the agreements to the extent same are unenforceable."[125] By excluding these declarations, the court deprived itself of the opportunity to ascertain the parties' true intentions and assumptions without coming to its own conclusions in the absence of evidence to the contrary. Does this application of the parol evidence rule jive with the rationale for the rule? This article argues that it does not.

In the context of ruling on impossibility, the court should not allow the parol evidence rule to keep out applicable evidence. The parol evidence rule is a rule of substantive law, not a rule of evidence.[126] "When parties reduce an agreement to writing, the law of parol evidence presumes, in the absence of fraud, accident, or mistake, that any prior or contemporaneous oral or written agreements merged into the final written agreement . . . ."[127] "[A]ny provisions not set out in the writing [are presumed to have been] abandoned before execution of the agreement or, alternatively," they are presumed to have never been made.[128] Generally, this means the court will look to the contract language, applying the "'customary, ordinary and accepted meaning' of the language."[129] If there is an ambiguity in the contract language, the court will consider extrinsic evidence, which is evidence that relates to the contract but is not in the document itself.[130] The rationale is that one purpose of creating a written agreement is to memorialize the applicable terms and to exclude all other understandings to the contrary.[131] But when analyzing a supervening event, in the context of impossibility, the inquiry is birthed by the fact that the supervening event was not anticipated by the parties at all. The parol evidence rule determines the content of the contract. The doctrine of impossibility gives legal effect to events that happened after the contract formed. Evidence offered to show impossibility is not offered to show the content of the contract and is therefore not limited by the parol evidence rule, generally speaking. The content of the contract is not at issue. But that is just generally so. If the argument is that X or Y is or is not a basic assumption because we

124. *Id.* at *4.
125. *Id.*
126. Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958).
127. DeClaire v. G & B McIntosh Family Ltd. P'ship, 260 S.W.3d 34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.).
128. Id.
129. Atl. Contracting & Material Co. v. Ulico Cas. Co., 844 A.2d 460, 469 (Md. 2004) (quoting Lloyd E. Mitchell, Inc. v. Md. Cas. Co., 595 A.2d 469, 475 (Md. 1991).
130. See Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1208 (Md. 1990).
131. See Hobbs Trailers v. J. T. Arnett Grain Co., 560 S.W.2d 85, 87 (Tex. 1977).

agreed it was or was not in the contract, the parol evidence rule would limit that in *Al Asher*. If the court had considered Foreman's declarations, it may have come to a different conclusion as to the basic assumption of the parties in regards to the applicability of impossibility doctrine.

V. CONCLUSION

For the aforementioned reasons, it is apparent that the doctrine of force majeure and impossibility and their application in Texas is poised for revision by the courts. By looking to the methods used by other states with more developed jurisprudence, Texas courts can reconcile the origins and underpinnings of the doctrine with modern application and create a more practical effect as a remedy for the unforeseen consequences of today.