

## Contract Basics for Litigators: Texas

by Evan A. Moeller and Aaron G. McLeod, Adams and Reese LLP, with Practical Law Commercial Litigation

Status: Law stated as of 19 Oct 2020 | Jurisdiction: Texas, United States

This document is published by Practical Law and can be found at: [us.practicallaw.tr.com/w-025-4730](https://us.practicallaw.tr.com/w-025-4730)

Request a free trial and demonstration at: [us.practicallaw.tr.com/about/freetrial](https://us.practicallaw.tr.com/about/freetrial)

A Q&A guide to state law on contract principles and breach of contract issues under Texas common law. This guide addresses contract formation, types of contracts, general contract construction rules, how to alter and terminate contracts, and how courts interpret and enforce dispute resolution clauses. This guide also addresses the basics of a breach of contract action, including the elements of the claim, the statute of limitations, common defenses, and the types of remedies available to the non-breaching party.

### Contract Formation

#### 1. What are the elements of a valid contract in your jurisdiction?

In Texas, the elements of a valid contract are:

- An offer.
- Acceptance in strict compliance with the terms of the offer.
- Consideration.
- Mutual assent (meeting of the minds) regarding material terms.
- Execution and delivery of the contract with the intent that it be mutual and binding.

(*Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007); *Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 804 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 449 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).)

#### Offer

Under Texas law, an offer is a statement or conduct that shows with reasonable certainty an intent by the offeror to enter into a binding agreement with the offeree (*Tauch v. Angel, Trustee for Gobschack Gift Tr.*, 580 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] 2019,

pet. denied); *Principal Life Ins. Co. v. Revalen Dev., LLC*, 358 S.W.3d 451, 455 (Tex. App.—Dallas 2012, pet. denied)).

To prove a valid offer, a party must show that:

- The offeror intended to make an offer. The offeror's conduct and language must show with reasonable certainty an intent to enter a binding contract with the offeree. An invitation to engage in negotiations does not show an intent to make an offer.
- The terms of the offer were clear and definite. The offeree cannot accept an offer to form a contract unless the terms of the offer are reasonably certain (*Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000) (no contract existed where the agreement to share revenue lacked essential terms regarding the percentage of revenue the plaintiff receives); *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 352 (Tex. App.—Corpus Christi 1997, pet. denied).)
- The offeror communicated the essential terms of the offer to the offeree.

(*Tauch*, 580 S.W.3d at 814; *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied).)

An offer may be revoked at any time before acceptance (*Tauch*, 580 S.W.3d at 815). Revocation is effective either when it is communicated directly to the offeree or when the offeree receives notice of the offeror's intention to revoke (*Kidwill v. Werner*, 2006 WL 3627883, at \*1 (Tex. App.—Waco Dec. 13, 2006, no pet.) (mem. op.); *Valencia v. Garza*, 765 S.W.2d 893, 896 (Tex. App.—San Antonio 1989, no writ)).



### Acceptance

Under Texas law, to prove a valid acceptance of an offer, a party must show:

- The acceptance was made before the offer lapsed or was revoked by the offeror (*Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 25-26 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).
- The offeree accepts the offer:
  - in a manner that strictly complies with the offer’s terms (if the offer requires a specific manner of acceptance); or
  - in a reasonable way from the overall circumstances if the offer does not specify the manner of acceptance.
- The acceptance was communicated to the offeror.
- The acceptance was clear and definite.

(*Tecore, Inc. v. AirWalk Comms.*, 418 S.W.3d 374, 385 (Tex. App.—Dallas 2013, pet. denied); *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278-79 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Engelman Irrigation Dist.*, 960 S.W.2d at 352; *Valencia*, 765 S.W.2d at 896-97.)

If an acceptance is made via mail, it is made when notice of the acceptance is physically transmitted to the offeror, such as dropping it into a mailbox (the mailbox rule) (*Am. Heritage Life Ins. v. Koch*, 721 S.W.2d 611, 613 (Tex. App.—Tyler 1986, writ ref’d n.r.e.) (this rule does not apply if the offer stipulates that the acceptance must be received before the contract is completed)). The mailbox rule may not apply if the offeror requires that certain conditions be met for acceptance (*Cantu v. Cent. Educ. Agency*, 884 S.W.2d 565, 566-67 (Tex. App.—Austin 1994, no writ) (where offeror made no requirements on how offer should be accepted, offer was accepted once acceptance was dropped in the mail)).

The acceptance must be identical to the offer to make a binding contract (*GasMark, Ltd. v. Kimball Energy Corp.*, 868 S.W.2d 925, 928 (Tex. App.—Fort Worth 1994, no writ)). An acceptance that does not mirror the material terms of the offer is both a rejection of the original offer and a counteroffer (*Principal Life Ins. Co.*, 358 S.W.3d at 455 (parties must agree to the same thing, in the same sense, at the same time)).

### Consideration

Under Texas law, a contract must be based on consideration (sometimes called mutuality of obligation). Consideration is the bargained for exchange of promises and consists of either:

- A benefit to the promisor.
- A loss or detriment to the promisee.

(*Ullico Cas. Co. v. Allied Pilots Ass’n*, 262 S.W.3d 773, 790-91 (Tex. 2008) (the detriment must induce the making of the promise and the promise must induce the incurring of a detriment); *TLC Hospitality, LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 760-61 (Tex. App.—Tyler 2018, pet. denied) (obligations must be imposed on both parties at the inception of the contract or else the contract lacks consideration).)

Consideration must be sufficient. A single consideration is sufficient to support multiple bargained-for promises in a single contract (*Birdwell v. Birdwell*, 819 S.W.2d 223, 228 (Tex. App.—Fort Worth 1991, writ denied)). Past consideration or a promise to fulfill a pre-existing duty is not sufficient consideration (*Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 659 (Tex. 2006) (Jefferson, C.J., concurring)). Consideration is presumed sufficient to support a contract when the contract is in writing and signed by the parties to be charged (*McLernon v. Dynegey, Inc.*, 347 S.W.3d 315, 335 (Tex. App.—Houston [14th Dist.] 2011, no pet.)).

Lack of consideration is an affirmative defense to a contract that must be pleaded and proved by the defendant (*Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *TLC Hospitality, LLC*, 570 S.W.3d at 761).

### Mutual Assent

Under Texas law, the creation of a binding contract requires mutual assent or a “meeting of the minds” regarding the essential terms of the contract (*David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008)). This is an objective determination based on the parties’ actions and statements, not on their subjective state of mind. It requires both parties to understand and agree to the subject matter and essential terms of their agreement. (*City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 720 (Tex. App.—Fort Worth 2008, pet. dism’d).)

The essential terms of a contract must be agreed on before a party can enforce the contract. Terms are essential and material if the parties would reasonably regard them as a vital element of the bargain (*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 481-82 (Tex. 2019).) A contract is unenforceable if the essential terms are uncertain or omitted (*Shipley v. Vasquez*, 534 S.W.3d 482, 487 (Tex. App.—San Antonio 2017, pet. denied); *Meru v. Huerta*, 136 S.W.3d 383, 391 (Tex. App.—Corpus Christi 2004, no pet.) (agreement

to enter into negotiations in the future is unenforceable because there is no way to determine what contract the negotiations may produce)). Essential terms are determined on a case-by-case basis (*Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016)).

Mutual assent may be either:

- Expressly stated in the contract (an express contract).
- Inferred from the circumstances (an implied-in-fact contract).

(*BoRain Capital, LLC v. Hashmi*, 533 S.W.3d 32, 36 (Tex. App.—San Antonio 2017, pet. denied).)

### Delivery and Execution with Intent to Be Bound

Under Texas law, the parties form a binding contract by delivering it to the appropriate party. Delivery occurs when the party parts with possession or custody of an instrument with the intent that it become operative (*Scaife v. Associated Air Ctr. Inc.*, 100 F.3d 406, 410-11 (5th Cir. 1996) (applying Texas law) (no contract was formed where the contract was never delivered or signed by the parties and work under the contract never began); *Mid-Continent Cas. Co. v. Global Enercom Mgmt. Inc.*, 323 S.W.3d 151, 157 (Tex. 2010).)

However, a contract need not be signed and delivered if the contract does not require it and the parties show intent by their conduct to be bound (*Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (no mutual assent to form a contract where university never delivered signed draft of employment contract to plaintiff)).

## 2. What categories of contracts must be in writing to satisfy your jurisdiction's statute of frauds?

Under Texas law, the statute of frauds requires certain types of contracts to be in writing and signed by the person (or an authorized agent) against whom enforcement is sought (Tex. Bus. & Com. Code Ann. § 26.01(a)). The types of contracts required to be in writing include:

- A promise by an executor or administrator to answer out of the person's own estate for any debt or damage due from the person's testator or intestate (Tex. Bus. & Com. Code Ann. § 26.01(b)(1)).
- A promise to pay the debt, default, or miscarriage of another person (an oral suretyship) (Tex. Bus. & Com. Code Ann. § 26.01(b)(2)).

- An agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation (Tex. Bus. & Com. Code Ann. § 26.01(b)(3)).
- A contract for the sale of real estate (Tex. Bus. & Com. Code Ann. § 26.01(b)(4)).
- A real estate lease for a term longer than one year (Tex. Bus. & Com. Code Ann. § 26.01(b)(5)).
- Any agreement that cannot be performed within one year from the date the agreement was made (Tex. Bus. & Com. Code Ann. § 26.01(b)(6)).
- A promise or agreement to pay a commission for the sale or purchase of:
  - an oil or gas mining lease;
  - an oil or gas royalty;
  - minerals; or
  - a mineral interest.(Tex. Bus. & Com. Code Ann. § 26.01(b)(7)(A)-(D).)
- An agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Texas Civil Practice and Remedies Code Ann. § 74.001, but not pharmacists (Tex. Bus. & Com. Code Ann. § 26.01(b)(8)).
- A loan agreement for an amount more than \$50,000 as defined by Texas Business and Commerce Code § 26.02(b) (Tex. Bus. & Com. Code Ann. § 26.02(a)(1)).
- A contract for the sale of goods valued at \$500 or more with certain exceptions (Tex. Bus. & Com. Code Ann. § 2.201(a)).

## 3. In your jurisdiction, what must the writing contain to satisfy the statute of frauds?

Under Texas law, a writing satisfies the statute of frauds if it:

- Contains all the essential elements of the agreement. Terms are essential if the parties:
  - reasonably regard the terms as vitally important to the elements of the bargain; and
  - intended them to be essential.

(*Burrus v. Reyes*, 516 S.W.3d 170, 186-87 (Tex. App.—El Paso 2017, pet. denied) (because the law implies a reasonable time for performance, time for performance is not an essential term); see also *Kanan v. Plantation Homeowner's Ass'n, Inc.*, 407 S.W.3d 320, 330 (Tex. App.—Corpus Christi 2013, no pet.) (to be enforceable, a contract must define

essential elements with sufficient detail so a court can determine the obligations of the parties.)

- Is complete within itself in every material detail.
- Can be ascertained from the writing without having to resort to oral testimony or parol evidence.
- Demonstrates an intent by the parties to be bound by the contract.
- Is signed by the party to be charged.

(*Capano Energy, LLC*, 593 S.W.3d at 729-30 (emails between a landowner and energy company regarding payment for easement did not satisfy the statute of frauds where the emails did not contain all of the essential elements of the contract); *Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 778-79 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (writing that contemplated future contract or promise does not satisfy statute of frauds); *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 877 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (essential elements of a contract may never be supplied by parol evidence, but details which explain or clarify essential terms may be proven by parol evidence).)

Partial performance is an exception to the statute of frauds and may take a contract out of the statute (*Burrus*, 516 S.W.3d at 182-85; *Thomas v. Miller*, 500 S.W.3d 601, 609 (Tex. App.—Texarkana 2016, no pet.)).

## Types of Contracts

### 4. Describe the types of contracts your jurisdiction recognizes. Please include how your jurisdiction defines each type.

Texas law recognizes the following types of contracts:

- Express.
- Implied-in-fact.
- Quasi-Contract, or implied-in-law.
- Unilateral and Bilateral.

### Express Contract

A contract is express when its terms have been explicitly set out by the parties. The parties' mutual agreement to be bound by the contract is expressly stated in the contract, rather than by the parties' conduct (*E-Learning LLC v. AT&T*

*Corp.*, 517 S.W.3d 849, 858 (Tex. App.—San Antonio 2017, no pet.); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

### Implied-in-Fact Contract

An implied-in-fact contract is based on inferences from the facts and circumstances of the case. The court implies mutual assent from the parties' acts and conduct (*McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 392 (Tex. 2019) (implied-in-fact contract not established between hospital and nurses for annual salary where there was no evidence hospital intended to be bound by the agreement); *Wal-Mart Stores, Inc.*, 93 S.W.3d at 557-58 (meeting of the minds is an essential element of an implied contract and is evidenced from conduct and course of dealing)).

### Quasi-Contract

A quasi-contract, also called an implied-in-law contract, is a legal fiction imposed regardless of any actual agreement between the parties (*Walker v. Cotter Props., Inc.*, 181 S.W.3d 895, 900 (Tex. App.—Dallas, 2006, no pet.) (recovery of damages is appropriate to prevent a party from obtaining a benefit from another by fraud, duress, unjust enrichment, or undue advantage)). A quasi-contract imposes an obligation between two parties in the interest of justice even though it is clear that no promise was ever intended or made. A party generally cannot recover under the theory of a quasi-contract when a valid, express contract exists that covers the subject matter of the parties' dispute (*Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (recovery under an equitable theory is inconsistent with the existence of a valid contract).)

A plaintiff asserting breach of a quasi-contract typically seeks restitution under quantum meruit or unjust enrichment (*Burlington N. R.R. Co. v. Sw. Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana, 1996) *aff'd* 966 S.W.2d 467 (Tex. 1998) (law implies a contractual obligation on the defendant to restore benefits to the plaintiff where the defendant has been unjustly enriched in a matter not governed by a contract); *Houston Med. Testing Servs., Inc. v. Mintzer*, 417 S.W.3d 691, 698 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (law imposes an obligation in the interest of justice even though no promise was made or intended and there was no meeting of the minds)).

### Unilateral and Bilateral Contracts

A bilateral contract exists when:

- There are mutual promises between two parties, making each both a promisor and a promisee (*Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302 (Tex. 2009)).
- Each promise is sufficient consideration for the other (*Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 224 (Tex. App.—Fort Worth 2009, pet. denied) (there must be mutuality of obligation which may consist of benefits or detriments to the contracting parties)).

A unilateral contract exists when a promisor promises a benefit if a promisee performs (*City of Pearsall v. Tobias*, 533 S.W.3d 516, 522 (Tex. App.—San Antonio, 2017, pet. denied)). Consideration for a unilateral contract exists not by an exchange of promises but by a promise exchanged for performance. Once a promisee performs, a unilateral contract becomes enforceable. (*City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011); *Vanegas*, 302 S.W.3d at 302 (unilateral contract existed where company's promise to pay at-will employees five percent of sale proceeds if employees remained employed until sale of company was finalized was a promise made in exchange for performance).)

### Construction of Contracts

**5. What are the general rules of contract construction in your jurisdiction? For example, rules construing inconsistencies, intention of the parties, definitions, etc.**

#### Intention of the Parties

Under Texas law, courts attempt to ascertain the parties' intentions based solely on the words used in the contract, viewing the entire writing as a whole (*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)).

#### Grammar and Meanings

Under Texas law, courts interpret the language that the parties use in a contract by its ordinary meaning unless it clearly appears that doing so defeats their intentions. Words, terms, or phrases that have specialized meanings in a certain industry or field are treated as terms of art and given the specialized meaning they are understood to

have. (*Barrow-Shaver Res. Co.*, 590 S.W.3d at 479; *Plains Expl & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015) (courts interpret contracts from a "utilitarian" standpoint, interpreting language in the context of the business activity sought to be served by the agreement); *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121-22 (Tex. 1996).)

#### Implied Terms

Texas courts highly disfavor implied contract terms. Texas courts find a contract contains implied provisions only when the court believes that such provisions are legally necessary to further the intentions of the parties. (*HECI Expl Co. v. Neel*, 982 S.W.2d 881, 888-89 (Tex. 1998) (courts cannot make contracts for the parties); *Sharon Ibrahim, Inc. v. Houston-Galveston Area Local Dev. Corp.*, 582 S.W.3d 753, 771 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (in order to imply a term into an agreement, it must appear that it was so necessary to the contract that the parties inadvertently left it out and it is essential to the contract as a whole).)

#### Entire Contract

Under Texas law, a court examines the entire contract and attempts to harmonize all of its provisions, even if some parts appear to be contradictory or inconsistent (*Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002)). Each clause of a contract is considered in the context of the instrument as a whole (*Plains Expl & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015)).

#### Ambiguity or Inconsistency

A contractual term is ambiguous if either:

- Its meaning is uncertain or doubtful.
- It is subject to two or more reasonable interpretations after applying the applicable rules of contract construction.

(*Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011); *Marx v. FDP, LP*, 474 S.W.3d 368, 375 (Tex. App.—San Antonio 2015, pet. denied).)

A contractual ambiguity is:

- A patent ambiguity where the ambiguity arises from imprecise language appearing on the face of a written contract.
- A latent ambiguity where the ambiguity does not appear on the face of a contract but becomes apparent



only when using knowledge gained from a collateral matter. An example of a latent ambiguity is a contract for delivery to a green house on Pecan Street when there are two green houses on Pecan Street. (*URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 765 (Tex. 2018)).

Ambiguity does not arise merely because the parties may disagree about the meaning of a contract term (*URI, Inc.*, 543 S.W.3d at 763). Courts enforce the contract as written when the contract is unambiguous (*First Bank v. Brumitt*, 519 S.W.3d 95, 105 (Tex. 2017); *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008)).

If a contract is ambiguous, courts may consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the agreement (*URI, Inc.*, 543 S.W.3d at 764-65 (noting that no issue regarding parties' intentions is raised unless the contract is ambiguous); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

### Specific Over General

Under Texas law, a contract provision specifically addressing a particular subject matter controls over a more general contract provision (*Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P.*, 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied)).

### 6. How does your jurisdiction define and apply the parol evidence rule?

Under Texas law, the parol-evidence rule:

- Precludes evidence of prior or contemporaneous agreements that are inconsistent with the contract, where the contract provides that it is a complete and accurate integration of the parties' entire agreement (*Boy Scouts of Am. v. Response Terminal Sys., Inc.*, 790 S.W.2d 738, 744-45 (Tex. App.—Dallas 1990, pet. denied)).
- Applies only to written contracts (*O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 246 (Tex. App.—San Antonio 1998, pet. denied)).
- Does not preclude evidence of prior contemporaneous agreements that are collateral to, not inconsistent with, and do not vary or contradict the express or implied terms of the original contract (*West v. Quintanilla*, 573 S.W.3d 237, 243 (Tex. 2019); *Boy Scouts of Am.*, 790 S.W.2d at 745 (a collateral agreement is one that the parties might naturally have made but not ordinarily have included in the contract)).
- Does not bar evidence of later agreements that are used to explain or give effect to the contract and are

not inconsistent with, vary, or contradict the terms of the original contract (*Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995, no writ)).

When applying the parol evidence rule, a court must first determine if the contract is a valid integrated contract. Courts presume that a contract is integrated if it is in writing, executed, and includes the final expression of terms. The parol evidence rule is particularly applicable when the contract recites that it contains the entire agreement of the parties, or contains similar merger provisions (*Adams v. McFadden*, 296 S.W.3d 743, 752 (Tex. App.—El Paso 2009, pet. denied) (parol evidence rule presumes all prior negotiations and agreements have been merged into the written contract).)

If a contract is deemed unambiguous, parol evidence will not be received for the purpose of creating an ambiguity or to give a contract a meaning different from its plain language (*Charles R. Tips Family Tr. v. PB Comm. LLC*, 459 S.W.3d 147, 153 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

If a contract is found to be ambiguous, parol evidence may be admitted to resolve the ambiguity (*Charles R. Tips Family Tr.*, 459 S.W.3d at 153). Courts may consider parol evidence of the facts and circumstances surrounding a contract's execution as an aid in understanding the language of the contract, but only to the extent the extrinsic evidence does not add to, alter, or contradict the contract's text (*URI, Inc. v. Kleberg Cty.*, 543 S.W.3d at 765).

## Altering and Terminating Contracts

### 7. Describe how a party modifies a contract in your jurisdiction.

Under Texas law, the parties to the contract may modify it by either:

- A writing executed by the contracting parties.
- An oral agreement if:
  - the written contract does not preclude oral modifications; and
  - it is not a contract required by the statute of frauds or other Texas statute to be in writing.
- A course of performance that shows a meeting of the minds to modify the contract.

(*Pointe W. Ctr., LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 151 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (Texas courts

consider a written bargain or agreement to be of no higher legal degree than an oral one, as either may vary or discharge the other); *Am. Garment Props., Inc. v. CB Richard Ellis-El Paso, L.L.C.*, 155 S.W.3d 431, 435 (Tex. App.—El Paso 2004, no pet.).)

A modification must include all the essential of a contract, including new consideration supporting the modification (*Pointe W. Ctr.*, 476 S.W.3d at 152.)

### 8. Does your jurisdiction recognize novations? If so, how does your jurisdiction define them and how are they executed?

Texas law recognizes novations. The elements of a novation are:

- A valid existing contract.
- A mutual agreement of all parties to make a new contract.
- The extinguishment of the old contract.
- A valid new contract.

(*In re B.N.L.-B*, 523 S.W.3d 254, 263-64 (Tex. App.—Dallas 2017, pet. denied); *Vandeventer v. All Am. Life & Cas. Co.*, 101 S.W.3d 703, 712 (Tex. App.—Fort Worth 2003, no pet.) (novation also includes the substitution of a party to the same agreement).)

A court looks to the intentions of the parties to determine if a novation has occurred. A party cannot create a novation unilaterally (*Vandeventer*, 101 S.W.3d at 712).

Novation is an affirmative defense to a claim for breach of contract (*Fulcrum Ctrl. v. AutoTester, Inc.*, 102 S.W.3d 274, 277 (Tex. App.—Dallas, 2003, no pet.); *Honeycutt v. Billingsley*, 992 S.W.2d 570, 576 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)).

### 9. Describe how a party terminates a contract in your jurisdiction.

Under Texas law, contracts typically terminate after all contractual obligations are satisfied or on a date or under conditions specified in the contract. Absent fraud, courts generally enforce contracts that provide for termination or that provide for cancellation without penalty. If the contract does not have a termination provision, the law imposes a reasonable time standard. (*Cnty. Health Sys. Prof. Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017) (employment contract as written can only be cancelled for cause during years one through three and without cause under specified conditions for year four

and five); *Tiger Truck, LLC v. Bruce's Pulp & Paper, LLC*, 282 S.W.3d 176, 183-84 (Tex. App.—Beaumont, 2009, no pet.); *Driver Pipeline Co. v. Mustang Pipeline Co., Inc.*, 69 S.W.3d 779, 787-88 (Tex. App.—Texarkana 2002), *rev'd on other grounds*, 134 S.W.3d 195 (Tex. 2004).)

A party may also terminate a contract when:

- The other party commits a material breach or repudiates the contract.
- The party has complied with contractual provisions governing termination.

(*Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017); *Guerro v. Santa Rosa Indep. Sch. Dist.*, 241 S.W.3d 594, 603-04 (Tex. App.—Corpus Christi 2007, pet. denied); *Driver Pipeline Co.*, 69 S.W.3d at 787-88.)

## Dispute Resolution Clauses

### 10. How does your jurisdiction interpret and enforce choice of law provisions?

Under Texas law, choice of law provisions are enforced where:

- There is a reasonable relationship between the parties and the chosen state.
- The law of the chosen state is not contrary to a fundamental policy of Texas.

(*Gator Apple, LLC v. Apple Tex. Rests., Inc.*, 442 S.W.3d 521, 532-33 (Tex. App.—Dallas 2014, pet. denied) (parties generally cannot choose the law of a forum that has no relationship to the agreement); *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282, 289 (Tex. App.—Corpus Christi 1990, writ denied).)

A Texas court may not disregard a choice-of-law clause, however, merely because the law of the chosen forum leads to a different result than Texas law (*DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-81 (Tex. 1990) (applying Texas law in breach of non-compete agreement claim despite choice of law clause applying Florida law, where Texas had a materially greater interest in determining enforceability of agreement and law of Florida was contrary to fundamental policies of Texas government non-compete law)).

Texas courts apply these principles using the framework of the Restatement (Second) of Conflict of Laws § 187 (1971) (*DeSantis*, 793 S.W.2d at 677-78.)

For more information on how Texas courts interpret and enforce choice of law provisions, see [Standard Clause, General Contract Clauses: Choice of Law \(TX\)](#). For an overview of choice of law and choice of forum issues, see [Practice Note, Choice of Law and Choice of Forum: Key Issues](#).

### 11. How does your jurisdiction interpret and enforce choice of forum provisions?

Under Texas law, choice of forum provisions may be either permissive or mandatory. The interpretation and enforcement of choice of forum provisions depends on whether the breach of contract claim is pending in Texas state or federal court.

#### Texas State Court Analysis

Under Texas law, choice of forum or forum selection provisions generally are enforced if:

- The parties have contractually consented to submit to the exclusive jurisdiction of another state.
- The other state recognizes the validity of such provisions.

(*Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296-97 (Tex. App.—Houston [14th Dist.] 2000, no pet.).)

The enforcement of forum selection clauses is mandatory unless a party shows that either:

- Enforcement is unreasonable and unjust.
- The clause is invalid for reasons such as fraud or overreaching.
- The enforcement of the clause goes against a strong public policy.
- The chosen forum is seriously inconvenient for trial.

(*In re Nationwide Insurance Company of America*, 494 S.W.3d 708, 712 (Tex. 2016) (noting that a forum selection clause, like other contractual rights, may be waived); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004); *In re AIU Ins. Co.* 148 S.W.3d 109, 115 (Tex. 2004).)

Forum-selection clauses are enforced regarding claims that sound in tort, where those claims arise out of or relate to a contract containing a valid forum selection clause. Forum selection clauses discourage artful pleading of tort claims in an effort to get around an otherwise binding choice of forum clause in a contract (*Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 437-39 (Tex. 2017).)

For more information on how Texas courts interpret and enforce forum selection clauses, see [Standard Clause, General Contract Clauses: Choice of Forum \(TX\)](#).

#### Texas Federal Court Analysis

Federal courts in Texas apply federal law to determine the enforceability of forum selection clauses in both diversity and federal question cases (*Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008); *Haynsworth v. The Corp.*, 121 F.3d 956, 961-62 (5th Cir. 1997)).

The US Supreme Court has held that courts should enforce the parties' contractually valid choice of forum except in the most unusual cases (*Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 66 (2013); see [Legal Update, Supreme Court Explains How to Enforce Selection Clauses](#)). The Fifth Circuit has generally found forum selection clauses prima facie valid and enforceable unless the party challenging enforcement shows that the provision is unreasonable (*Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995); *Mendoza v. Microsoft, Inc.*, 1 F. Supp. 3d 533, 543 (W.D. Tex. 2014)). A forum selection clause is unreasonable if:

- The inclusion of the clause was the result of fraud or overreaching.
- The party opposing the clause essentially loses its day in court because of the grave inconvenience or unfairness of the selected forum.
- The chosen law is so fundamentally unfair that it deprives the plaintiff of a remedy.
- The enforcement of the clause goes against a strong public policy.

(*Haynsworth*, 121 F.3d at 963.)

### 12. How does your jurisdiction interpret and enforce alternative dispute resolution provisions, such as mediation and arbitration clauses?

Under Texas law, courts enforce arbitration agreements as a matter of policy. A party seeking to enforce an arbitration clause must show:

- There is a valid arbitration agreement, as determined by contract law principles.
- The claims at issue fall within the agreement's scope.

(*In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006); Tex. Civ. Prac. & Rem. Code Ann. § 171.001-171.098 (Texas Arbitration Act recognizes the validity of written arbitration agreements regarding controversies that exist at the time of the agreement or that arise after the agreement).)



The threshold questions of whether the parties have agreed to arbitrate or whether a dispute is covered by an arbitration agreement are issues to be resolved by courts, unless the parties have clearly and unmistakably agreed to submit questions of arbitrability to an arbitrator (*Weitzel v. Coon*, 2019 WL 3418515, \*2 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet.) (mem. op.) (question of arbitrability must be submitted to arbitrator where parties had incorporated rules of American Arbitration Association into contract and those rules give an arbitrator power to decide these issues); *Longoria v. CKR Prop. Mgmt., LLC*, 577 S.W.3d 263, 267 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (arbitration agreements are generally valid absent fraud, duress, unconscionability, revocation, or similar grounds)).

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, an allegation of waiver or delay, or a similar defense to arbitrability (*Longoria*, 577 S.W.3d at 268-69; *Miller v. Brewer*, 118 S.W.3d 896, 898 (Tex. App.—Amarillo 2003, no pet.)).

For more information on Alternative Dispute Resolution in Texas, see [Standard Clause, General Contract Clauses: Alternative Dispute Resolution \(Multi-Tiered\)\(TX\); Toolkit, Drafting Contractual Dispute Provisions \(TX\): Alternative Dispute Resolution Resources](#).

## Breach of Contract

### 13. What are the elements of a breach of contract claim in your jurisdiction?

Under Texas law, the elements of a breach of contract claim are:

- The existence of a valid and enforceable contract between the parties.
- The plaintiff performed, tendered performance of, or was excused from performing the contract.
- The defendant's failure to perform the contract.
- The plaintiff's damages resulting from the breach.

(*Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019); *S & S Emergency Training Solutions, Inc. v. Elliot*, 564 S.W.3d 843, 847 (Tex. 2018); *E-Learning, LLC v. AT&T Corp.*, 517 S.W.3d 849, 858 (Tex. App.—San Antonio 2017, no pet.).)

### 14. Describe what circumstances are considered an actionable breach of contract in your jurisdiction.

Under Texas law, a breach of contract occurs when a party fails or refuses to do something that a contract obligates it to do. A breach does not have to be material to be actionable, but a breach must be material to discharge the non-breaching party from further performance obligations. A non-material breach does not excuse the other party from any obligation to perform, however the non-breaching party in that circumstance may sue for damages (*Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199-200 (Tex. 2004) (breach of contract requires finding of a breach, not finding a material breach); *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692-93 (Tex. 1994).)

In determining whether a breach is material, a court considers whether:

- The breach deprives the injured party of the benefit it reasonably expected to receive under the contract.
- A breach of contract action can adequately compensate the plaintiff for the benefit it lost as a result of the breach.
- The defendant is likely to suffer forfeiture.
- The defendant is likely to cure its breach under all the circumstances.
- The defendant's behavior comports with standards of good faith and fair dealing.

(*Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436-37; *Mustang Pipeline Co.*, 134 S.W.3d at 199; Restatement (Second) of Contracts § 241 (1981).)

Some breaches are considered material as a matter of law, such as a failure to timely perform under a contract providing that time is of the essence (*Mustang Pipeline Co.*, 134 S.W.3d at 199-200).

### 15. What is the statute of limitations for a breach of contract action in your jurisdiction? Please also discuss when the limitations period begins to run, whether it may be tolled, and how to plead the defense.

Under Texas law, the statute of limitations for a breach of contract claim is four years (Tex. Civ. Prac. & Rem. Code Ann. §§ 16.004(1), (3), and 16.051; Tex. Bus. & Com. Code Ann. § 2.725 (providing for four-year statute of limitations for an action for breach of contract for sale under Texas's UCC); *Carl M. Archer Tr. v. Tregellas*, 566 S.W.3d 281, 288 (Tex. 2018)). Parties may agree to a different limitations period as part of the underlying contract but cannot agree to a period of less than two years (*Spicewood Summit Office Condo. Ass'n v. Am. First Lloyd's Ins.*, 287 S.W.3d 461, 464-65 (Tex. App.—Austin 2009, pet. denied)).

A breach-of-contract claim accrues at the time of the actionable breach (*Carl M. Archer Tr.*, 566 S.W.3d at 288).

For actions claiming breach of a continuing contract, the limitations period begins to run when either:

- The parties complete the work.
- The contract terminates under its terms.
- The defendant anticipatorily repudiates the contract and the plaintiff adopts the repudiation.

(*Capstone Healthcare Equip. Servs. v. Quality Home Health Care, Inc.*, 295 S.W.3d 696, 700 (Tex. App.—Dallas 2009, pet. denied) (injured party has four years from each breach to bring suit).)

The statute of limitations is an affirmative defense that the defendant must specifically plead and prove (Tex. R. Civ. P. 94). A party asserting an affirmative defense in a bench trial must request findings in support of that defense to avoid waiver on appeal (*Trelltex, Inc. v. Intecx, L.L.C.*, 494 S.W.3d 781, 785 (Tex. App.—Houston [14th Dist.] 2016, no pet.).)

### Discovery Rule

Under Texas law, the discovery rule tolls the statute of limitations until the plaintiff knew or should have known the facts giving rise to the cause of action. The discovery rule applies where the nature of the plaintiff's injury is inherently undiscoverable and the injury is objectively verifiable (*Carl M. Archer Tr.*, 566 S.W.3d at 290 (objective of the discovery rule is to avoid an unjust result); *B. Mahler Interests, L.P. v. DMAC Constr., Inc.*, 503 S.W.3d 43, 59 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (discovery rule did not apply where plaintiff's injuries were easily discoverable); *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 315 (Tex. 2006) (noting the discovery rule is limited to exceptional cases to avoid frustrating the purpose of the statute of limitations).)

### Equitable Estoppel

Under Texas law, equitable estoppel tolls a statute of limitations where:

- A person with actual or constructive knowledge of material facts makes a false representation or concealment of those facts to a party without knowledge or the means of obtaining knowledge of the facts.
- The person intends that party to act on it.
- That party relies on the false representation or concealment of facts to their detriment.

(*Wyde v. Francesconi*, 566 S.W.3d 890, 897 (Tex. App.—Dallas 2018, no pet.); *Kamat v. Prakash*, 420 S.W.3d 890, 900 (Tex. App.—Houston [14th Dist.] 2014, no pet.).)

### Tolling Statutes

Texas also has statutes that operate to toll the statute of limitations under certain circumstances. A statute may be tolled where a party is, for example:

- Under a legal disability, such as where the party is:
  - under 18 years of age, regardless of whether the person is married; or
  - of unsound mind.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.001; *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 176 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (a party may ratify a contract once the minor reaches 18 years of age).)

- Prevented from bringing suit by the automatic-stay provisions of federal bankruptcy law (11 U.S.C. § 362(a); *Peterson v. Tex. Commerce Bank-Austin, Nat'l Ass'n*, 844 S.W.2d 291, 294 (Tex. App.—Austin 1992, no writ)).
- Asserting a counterclaim or cross-claim and:
  - the counterclaimant or cross-claimant can show that the counterclaim or cross-claims arise out of the same transaction or occurrence that is the basis of the original action; and
  - the counterclaimant or cross-claimant files the counter or cross-claim no later than thirty days after that party's answer is due.

(Tex. Civ. Prac. & Rem. Code Ann. § 16.069; *Ellard v. Ellard*, 441 S.W.3d 780, 781-82 (Tex. App.—San Antonio 2014, no pet.).)

### 16. Under what circumstances does your jurisdiction recognize a third party's standing to sue for breach of contract?

Under Texas law, a third party has standing to sue for breach of contract if the third party can show that:

- It is a donee or creditor beneficiary of the contract.
- Is not benefited only incidentally by the contract's performance.

(*S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (mere description of a product's intended use cannot confer third-party-beneficiary status on intended users of product); *Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.*, 393 S.W.3d 379, 388 (Tex. App.—Dallas 2012, no pet.) (landlord was not a third-party-beneficiary to insurance contract between insurer and tenant where insurance policy did not clearly and fully set out an intention to confer a direct benefit on the landlord)).

A third party is a beneficiary of a contract if:

- The contracting parties intended to secure a benefit for the third-party.
- The contracting parties made the contract directly for the third-party's benefit.

(*First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017).)

The intention of the contracting parties is controlling. The contract must show an intent to provide a direct benefit to the third party and that intention must be clearly and fully spelled-out. (*Ostrovitz*, 393 S.W.3d at 388 (it is not enough that the third-party benefits from the parties' performance or that the parties knew the third-party benefits).)

There is a presumption against third-party beneficiary agreements in Texas (*First Bank*, 519 S.W.3d at 103). Courts resolve all doubts against conferring third-party beneficiary status (*Ostrovitz*, 393 S.W.3d at 388).

## Remedies for Breach of Contract

### 17. What legal remedies are available to the non-breaching party in your jurisdiction?

Under Texas law, the prevailing plaintiff in a breach of contract action typically may recover compensatory damages, which include:

- General (also called direct) damages.
- Special (also called consequential) damages.

(*Dallas/Fort Worth Int'l Airport Bd. v. Vizant Tech., LLC*, 576 S.W.3d 362, 373 (Tex. 2019); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).)

Attorney fees are recoverable on a claim for a breach of an oral or written contract once a party has prevailed on a valid contract claim (Tex. Civ. Prac. & Rem. Code Ann. § 38.001; *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009); *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 201 (Tex. 2004)).

Punitive damages or exemplary damages are not recoverable in a breach of contract action (*Signal Peak Enters. of Texas, Inc. v. Bettina Invs., Inc.*, 138 S.W.3d 915, 928 (Tex. App.—Dallas 2004, pet. stricken)). A plaintiff may recover punitive damages if the defendant breaches a legal duty separate from the contract in addition to the breach of the contract (*Twin City Fire Ins. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995); *Cent. Sav. and Loan Ass'n v. Stemmons Nw. Bank, N.A.*, 848 S.W.2d 232, 238 (Tex. App.—Dallas 1992, no writ)).

## Compensatory Damages

The purpose of compensatory damages is to restore the plaintiff to the same position they would have been in had the defendant not breached the contract. Compensatory damages include:

- **General damages.** General (or direct) damages flow naturally and necessarily from the breach and compensate for the loss that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of the breach of contract (*Arthur Andersen & Co.*, 945 S.W.2d at 816; *Powell Elec. Sys, Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 118 (Tex. App.—Houston [1st Dist.] 2011, no pet.)).
- **Special damages.** Special or consequential damages result naturally, but not necessarily from the breach of contract. Plaintiffs may recover consequential damages only where the damages are foreseeable and directly traceable to the wrongful act and result from it. The parties must have contemplated at the time they made the contract that the damages would be a probable result of the breach (*Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998); *Powell Elec. Sys., Inc.*, 356 S.W.3d at 118 (recovery of costs for installation of temporary transformer during repairs for damages caused by breach were consequential damages where parties cannot have conclusively presumed to have foreseen that the breach necessitates use of a temporary transformer).)

The plaintiff in a breach of contract action may seek several types of compensatory damages, including:

- **Expectancy (or benefit of bargain) damages.** Expectancy or benefit of the bargain damages give the plaintiff the

benefit of the plaintiff's bargain by placing it in as good a position as it can be if the contract had been performed (*Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888-89 (Tex. App.—Dallas 2004, pet. denied)).

- **Reliance damages.** Reliance damages restore any expenditures made in reliance on the contract (*Siam v. Mountain Vista Builders*, 544 S.W.3d 504, 515-16 (Tex. App.—El Paso 2018, no pet.)). These are useful when a plaintiff's expectation interest damages, like lost profits, are too speculative or uncertain (*Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. App.—Texarkana 1988, no writ)).

(*O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 247 (Tex. App.—San Antonio 1998, pet. denied).)

A plaintiff can recover nominal damages even if the plaintiff cannot prove actual damages (*MBM Fin. Corp. v. Woodlands Operating Co. L.P.*, 292 S.W.3d 660, 664-65 (Tex. 2009)).

Parties to a contract are free to agree to limit or modify remedies if a breach occurs (*Frost Nat'l Bank v. Heafner*, 12 S.W.3d 104, 111 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (recovery of benefit of the bargain damages not allowed where contract excluded recovery of consequential damages)).

### Restitution Damages

A plaintiff can be awarded restitution, which restores to the plaintiff any property or money taken from the plaintiff by the defendant, where it is unjust for the defendant to keep any benefits the defendant has received (*City of Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313, 317 (Tex. App.—Austin 1992, no writ)). If the restitution damages necessarily result from the breach of contract, these damages are general or direct damages rather than compensatory damages (*Marrs & Smith P'ship v. Sombrero Oil & Gas Co.*, 511 S.W.3d 53, 59 (Tex. App.—El Paso 2014, no pet.)).

### Liquidated Damages

Contracts may contain a liquidated damages clause, which determines in advance the measure of damages if a breach occurs. Courts generally enforce liquidated damages clauses if:

- The harm caused by the breach is incapable of estimation or is difficult to estimate at the time of the agreement.
- The amount of liquidated damages provided for is a reasonable forecast of just compensation at the time of contracting.

(*FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 69 (Tex. 2014).)

Courts view evidence concerning the difficulty of estimation and the reasonableness of the forecast as of the time the parties executed the contract (*FPL Energy, LLC*, 426 S.W.3d at 69-70). A liquidated damages clause is considered a penalty and unenforceable if either of these elements is lacking (*Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.)).

For more information on liquidated damages in Texas, see [Standard Clause, General Contract Clauses: Liquidated Damages \(TX\)](#).

### 18. What equitable or other non-legal remedies are typically available to the non-breaching party in your jurisdiction?

Under Texas law, if money damages are unavailable or inadequate to compensate the plaintiff for its loss, a court may award equitable relief for the breach of contract (*Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002)). The most common equitable remedies include:

- Injunctive relief, in limited circumstances (*Butnaru*, 84 S.W.3d at 204, 211).
- Rescission (*Humphrey v. Camelot Retirement Cmty.*, 893 S.W.2d 55, 59 (Tex. App.—Corpus Christi 1994, no writ)).
- Reformation (*Howard v. INA Cty. Mut. Ins.*, 933 S.W.2d 212, 219 (Tex. App.—Dallas 1996, writ denied)).
- Specific performance (*Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 887 (Tex. 2019)).

A party to a contract may also seek a declaratory judgment asking the court to rule on the construction or validity of the contract or on the rights, status, or legal relations of the parties (Tex. Civ. Prac. & Rem. Code Ann. §§ 37.003 and 37.004(a)).

### Defenses to Breach of Contract

#### 19. Identify common affirmative defenses to a breach of contract action that your jurisdiction recognizes.

Under Texas law, defenses to a breach of contract action typically focus on formation of contract or the alleged breach, as well as defenses to damages and procedural defenses.

### Defenses to Contract Formation

Under Texas law, a defendant may assert the following affirmative defenses to the formation of a contract:

- Duress.
- Economic duress.
- Fraudulent inducement.
- Statute of frauds (Tex. Bus. & Com. Code Ann. § 26.01 and see Question 2 and Question 3).
- Illegal purpose.
- Indefiniteness.
- Payment.  
(Tex. R. Civ. P. 94.)
- Lack of capacity, due to infancy (Tex. Civ. Prac. & Rem. Code Ann. § 129.001) (18 is the age of majority in Texas) or mental deficiency or illness.
- Mistake, mutual or unilateral.
- Undue influence.
- Unclean hands (where the plaintiff seeks equitable relief).
- Unconscionability.

For more information on each of these and other defenses, including procedural defenses, see [Breach of Contract Defenses Checklist \(TX\)](#) and [State Q&A, Breach of Contract Defenses \(TX\)](#).

### Defenses to Breach

Under Texas law, a defendant may assert the following affirmative defenses to the plaintiff's claims that it breached the contract:

- Accord and satisfaction.
- Equitable estoppel.
- Failure of consideration (Question 1).
- Payment.
- Waiver.  
(Tex. R. Civ. P. 94.)

- Ambiguity (Question 5).
- Anticipatory breach.
- Implied covenant of good faith and fair dealing (when a special relationship exists between the parties).
- Failure of conditions precedent (Tex. R. Civ. P. 54).
- Impossibility (or impracticality) of performance.
- Modification (Question 7).
- Novation (Question 8).
- Ratification.
- Unclean hands (where the plaintiff seeks equitable relief).

For more information on each of these and other defenses, including procedural defenses, see [Breach of Contract Defenses Checklist \(TX\)](#) and [State Q&A, Breach of Contract Defenses \(TX\)](#).

### Defenses to Damages

- Failure to mitigate damages, if the contract does not eliminate the duty to mitigate.
- Duplicative damages or improper double recovery.
- Damages that are unavailable, such as punitive damages.
- Damages are superseded by a liquidated damages clause.
- The plaintiff cannot prove damages because they are, for example:
  - speculative or contingent;
  - not directly traceable to the breach;
  - too remote;
  - the result of other intervening causes; or
  - damages that were not contemplated by the parties when they made the contract.

For more information on each of these and other defenses, including procedural defenses, see [Breach of Contract Defenses Checklist \(TX\)](#) and [State Q&A, Breach of Contract Defenses \(TX\)](#).

#### About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call 1-800-733-2889 or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).