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Contract Basics for Litigators: Illinois

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A Q&A guide to state law on contract principles and breach of contract issues under Illinois 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 Illinois, the elements necessary for a valid contract are:

- An offer.
- An acceptance.
- Consideration.
- Ascertainable Material terms.
- Intent to be bound and mutual assent.

(*DiLorenzo v. Valve & Primer Corp.*, 347 Ill. App. 3d 194, 199-200 (2004); *Lal v. Naffah*, 149 Ill. App. 3d 245, 248 (1986)).)

Offer

The test for an offer is whether it induces a reasonable belief in the recipient that he can, by accepting, bind the offeror (*VC Mgmt., LLC v. Reliastar Life Ins. Co.*, 195 F. Supp. 3d 974, 985 (N.D. Ill. 2016) (applying Illinois law)). Illinois courts typically refer to legal definitions of the term "offer" to determine whether the words or conduct constituted an offer to enter into a contract. For example, courts have defined an offer as a "display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract" and "the manifestation of willingness to enter into a bargain, made in a manner that justifies another party's understanding that its assent to that bargain is invited and will conclude it" (*First 38, LLC v. NM Project Co.*, 2015 IL App (1st) 142680-U, ¶ 51 (unpublished order under Ill. S. Ct. R. 23) (citing Black's Law Dictionary 1113 (8th ed.2004) and Restatement (Second) of Contracts § 24 (1981))).

Acceptance

Under Illinois law, an acceptance occurs if the party assented to the essential terms contained in the offer (*Klein v. Klein*, 2017 IL App (1st) 153393-U, ¶ 23 (unpublished order under Ill. S. Ct. R. 23)). An offeree may manifest acceptance through a variety of channels, including conduct, words, a signature, or performance (*VC Mgmt., LLC*, 195 F. Supp. 3d at 989). The offeree must objectively manifest its acceptance (*Trapani Constr. Co. v. Elliot Grp., Inc.*, 2016 IL App (1st) 143734, ¶ 56).

The acceptance must be absolute, unconditional, and identical with the terms of the offer. Under the "mirror image" rule in Illinois, if the acceptance is not strictly identical to the offer, it is considered a counteroffer that effectively rejects and extinguishes the initial offer. (*Nomanbhoy Family Ltd. P'ship v. McDonald's Corp.*, 579 F. Supp. 2d 1071, 1092 (N.D. Ill. 2008) (applying Illinois law).)

Consideration

Illinois courts define consideration as the bargained-for exchange of promises or performance (*DiLorenzo v. Valve & Primer Corp.*, 347 Ill. App. 3d 194, 200 (2004)). Refraining

from doing something one is otherwise entitled to do is a form of consideration (*DiLorenzo*, 347 Ill. App. 3d at 200). This type of consideration is common in forbearance agreements where a party agrees to refrain from enforcing a legal right (*RBS Citizens, Nat'l Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 186-87 (2011)).

Courts do not assess whether the consideration was adequate. Courts assess only whether consideration exists to support formation of the contract. (*Gallagher v. Lenart*, 226 Ill. 2d 208, 243 (2007); *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 16.)

Ascertainable Material Terms

In order for a contract to be enforceable, its terms and provisions must enable the court to ascertain what the parties have agreed to do (*Builders, Inc. v. Noggle Family Ltd. P'ship*, 352 Ill. App. 3d 1182, 1185 (2004)).The material terms of a contract are those terms that are necessary and have enough detail for a court to enforce them (*Babbitt Municipalities, Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶ 29; *Vill. of Rockton v. Rock Energy Co-op.*, 2011 WL 10418590, at *2 (Ill. App. Ct. Apr. 8, 2011) (unpublished order under Ill. S. Ct. R. 23).

Intent to be Bound and Mutual Assent

Under Illinois law, to form a contract there must be an objective manifestation of a meeting of the minds or mutual assent as to the terms of the contract (*Anand v. Heath*, 2019 WL 2716213, at *3 (N.D. Ill. June 28, 2019) (applying Illinois law); *Burkhart v. Wolf Motors of Naperville, Inc.*, 2016 IL App (2d) 151053, ¶ 14). Courts measure the parties' intent to be bound based on the parties' words and acts (*Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 239 (N.D. Ill. 1976) (applying Illinois law); see also *Tindall Corp. v. Mondelez Int'l, Inc.*, 248 F. Supp. 3d 895, 908-09 (N.D. Ill. 2017) (applying Illinois law)).

The "intent to be bound" analysis often overlaps with the "mutual assent" analysis because courts typically examine the parties' words, conduct, and acts to determine both elements (see *Lal*, 149 Ill. App. 3d at 248 ("An essential element for the formation of a contract is the manifestation of agreement or mutual assent by the parties to the terms thereof")).

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

Illinois's statute of frauds requires the following types of promises or agreements to be in writing:

- A promise to pay for the debt or default of another person (740 ILCS 80/1).
- Any agreement in consideration of marriage (740 ILCS 80/1).
- An agreement for the sale or lease or other disposition of real property. However, the lease of property for less than one year is not within the statute of frauds and may be oral. (740 ILCS 80/2.)
- Any agreement that could not possibly be performed within one year (740 ILCS 80/1). This does not necessarily include contracts that have an indefinite duration if, when the contract was made, the contract's full performance could have occurred within one year from inception of the contract (*Dugas–Filippi v. JP Morgan Chase, N.A.*, 66 F. Supp. 3d 1079, 1089 (N.D. Ill. 2014) (applying Illinois law); *Armagan v. Pesha*, 2014 IL App (1st) 121840, ¶ 41).
- A wholesale brewer's agreement (815 ILCS 720/5(4)).
- The sale of a business opportunity that is required to be registered under the Business Opportunity Sales Law of 1955 (815 ILCS 602/5-40(a)).

For sales contracts governed by the UCC, the writing requirement applies to contracts for the price of $500 or more (810 Ill. Comp. Stat. Ann. 5/2-201(1)).

For more information on the statute of frauds generally, see Practice Note, Signature Requirements for an Enforceable Contract.

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

In Illinois, to satisfy the statute of frauds, the writing must:

- Consist of one or more documents signed by the party against whom enforcement is sought.
- Contain all essential terms without resort to parol evidence.

(*Gilmore v. City of Mattoon*, 2019 IL App (4th) 180777, ¶¶ 23-25.)

In sales contracts, a writing may be sufficient even if it omits or incorrectly states a term but is not enforceable beyond the quantity stated in the writing. Further, in a contract between merchants, a written confirmation of the contract sent by one party is sufficient unless the

other party gives written notice of objection to within ten days after it receives the confirmation. (810 Ill. Comp. Stat. Ann. 5/2-201.)

To satisfy the statute of frauds for a covered real estate transaction, the agreement must:

- Be in writing.
- Identify the parties.
- Contain the signature of the party to be charged;
- State the essential terms including:
  - the purchase price; and
  - the manner of payment.
- Identify the property in detail.

(*GLS Dev., Inc. v. Wal-Mart Stores, Inc.*, 944 F. Supp. 1384, 1393 (N.D. Ill. 1996) (applying Illinois law); *Hartke v. Conn*, 102 Ill. App. 3d 96, 100 (1981).)

Types of Contracts

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

Illinois recognizes the following types of contracts:

- Express.
- Implied-in-fact.
- Quasi-contract.
- Written and oral.
- Unilateral and bilateral.

Express Contract

An express contract is an agreement arrived at by the parties' words, whether oral or written (*Cable Am., Inc. v. Pace Elecs., Inc.*, 396 Ill. App. 3d 15, 20 (2009)). An express contract is derived from an actual agreement, either verbal or written, rather than the party's conduct (*Greenview Ag Ctr., Inc. v. Yetter Mfg. Co.*, 246 Ill. App. 3d 132, 137 (1993)).

Implied-in-Fact Contract

An implied-in-fact contract is based on the parties' conduct. It is considered a tacit promise, inferred in whole or in part by the parties' conduct and not solely from their words. (*Greenview Ag Ctr.*, 246 Ill. App. 3d at 137.)

The only distinction between an express contract and an implied-in-fact contract is how a party manifests assent to the contract.

Quasi-Contract

A quasi-contract, sometimes called an implied-in-law contract, is a legal fiction created without regard to a party's assent (by words or conduct) to any specific contract terms. The theory of quasi-contract includes the remedies of quantum meruit and unjust enrichment. Illinois courts recognize a quasi-contract when that a defendant received a benefit that it would be unjust for it to retain. (See *Marque Medicos Farnsworth, LLC v. Liberty Mut. Ins. Co.*, 2018 IL App (1st) 163351, ¶ 16; *Vill. of Bloomingdale v. CDG Enters., Inc.*, 196 Ill. 2d 484, 500 (2001).)

Written and Oral Contracts

A written contract contains the essential terms of the transaction in writing whereas an oral contract represents an agreement that the parties have not reduced to writing. Illinois recognizes both types of contracts as valid, but the statute of frauds requires certain types of contracts to be in writing (see Question 2).

Unilateral and Bilateral Contracts

In a unilateral contact only one party is bound at the outset, while a bilateral contract binds both parties. Illinois law recognizes an option contract as one in which a party grants to the option holder the sole power to accept performance on the terms specified at which time it is converted from a bilateral to a unilateral contract (see *Terraces of Sunset Park, LLC v. Chamberlain*, 399 Ill. App. 3d 1090, 1093-94 (2010)).

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.

Parties' Intent

An Illinois court's primary goal is to ascertain and give effect to the intention of the parties at the time the contract was formed (*Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 77). For example, when analyzing an ambiguous term, the guiding principle is always what

the parties intended the term to mean considering the overall contract. Illinois courts determine the intention of the parties to a written contract based on the words of the contract alone without resorting to any extrinsic evidence. Courts may resort to extrinsic evidence to explain an ambiguity in the contract. (*Hickox v. Bell*, 195 Ill. App. 3d 976, 989-90 (1990).)

Grammar and Meanings

Unless the intent of the parties appears to have been otherwise, Illinois courts construe a modifying word as referring to its nearest antecedent (*Hardware Mut. Cas. Co. v. Curry*, 21 Ill. App. 2d 343, 349 (1959)). When a contract does not define a term, the court will give the term its plain and ordinary meaning (citing *Deutsche Bank Nat'l Tr. Co. v. Roongseang*, 2019 IL App (1st) 180948, ¶ 27).

Implied Terms

In addition to the written provisions of a contract, certain terms and conditions are implied as a matter of law and are just as binding as written or spoken terms. One of the most commonly litigated implied provisions is the covenant of good faith and fair dealing. However, the implied covenant of good faith and fair dealing cannot be used to vary the express terms of a contract. (*RBS Citizens, N.A. v. Sanyou Imp., Inc.*, 2011 WL 4790936, at *2-*3 (N.D. Ill. Oct. 6, 2011) (applying Illinois law).)

Entire Contract

Illinois courts read provisions of a contract harmoniously to give effect to all portions (*Matthews*, 2016 IL 117638, at ¶ 77)).

Ambiguity or Inconsistency

A contractual term is ambiguous if it is subject to more than one reasonable interpretation. However, in determining if a provision is ambiguous, an Illinois court must consider the entire agreement to clarify what the parties meant by the provision in question. (*Thompson v. Gordon*, 241 Ill. 2d 428, 442–43 (2011).) If the court cannot resolve the ambiguity by reference to the entire agreement, the court may admit parol evidence to determine the meaning by reference to the parties' statements and conduct (see Question 6).

As a rule of last resort, the court should construe an ambiguous term against the drafter (*Baker v. Am.'s Mortg. Servicing, Inc.*, 58 F.3d 321, 327 (7th Cir. 1995) (applying Illinois law) ("This canon of construction (*contra proferentem*) is a rule of last resort, a 'tie-breaker' of sorts, that comes into play only when neither the extrinsic evidence nor other methods of construction can resolve the ambiguity"); *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 165-66 (2002)).

Specific Over General

A contract provision specifically addressing a specific subject matter controls over any other contract provision that generally addresses that same subject matter (*Grevas v. U.S. Fid. & Guar. Co.*, 152 Ill. 2d 407, 411 (1992)). When general words follow particular words in a document, unless a contrary interest is evident, the general words are construed to include only the same kinds of things as the particular words (see *Interstate Steel Co. v. Ramm Mfg. Corp.*, 108 Ill. App. 3d 404, 407 (1982)).

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

In Illinois, the parol evidence rule prevents a party from using a prior or contemporaneous oral agreement or other extrinsic evidence to vary the terms of a written agreement unless there is ambiguity in the contract. In other words, an unambiguous written contract intended by the parties to be their final agreement may not be contradicted, modified, or varied by parol evidence. (*Right Field Rooftops, LLC v. Chicago Cubs Baseball Club*, LLC, 870 F.3d 682, 690 (7th Cir. 2017) (applying Illinois law); *Gallagher*, 226 Ill. 2d at 233; *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 757-58 (2004).) Even absent an ambiguity, courts may consider extrinsic evidence of industry custom and usage (*Intersport, Inc. v. Nat'l Collegiate Athletic Ass'n*, 381 Ill.App.3d 312, 319 (1st Dist.2008)).

Illinois courts apply the parol evidence rule in the same way whether or not a contract includes a merger clause (see *Asset Recovery Contracting, LLC v. Walsh Constr. Co. of Ill.*, 2012 IL App (1st) 101226, ¶ 71; *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999)).

Altering and Terminating Contracts

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

Under Illinois law, to modify a contract, the parties' contract modification must satisfy all criteria essential for a valid contract, including:

- Offer.
- Acceptance.
- Consideration

(*VC Mgmt., LLC*, 195 F. Supp. 3d at 985 (applying Illinois law); *Nebel, Inc. v. Mid–City Nat'l Bank of Chicago*, 329 Ill. App.3d 957, 964 (2002).)

Illinois law permits parties to a written contract to alter or modify its terms by subsequent oral agreement, even where the written contract precludes oral modification (*R.J. O'Brien & Assocs., Inc. v. Vierstra*, 2003 WL 1627271, at *5 (N.D. Ill. Mar. 27, 2003) (applying Illinois law); *Tadros v. Kuzmak*, 277 Ill. App. 3d 301, 312 (1995)).

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

Yes. Under Illinois law, a novation is a separate and new agreement between the parties that discharges an existing obligation and substitutes a new one (*Crest Hill Land Dev., LLC v. Conrad*, 2019 IL App (3d) 180213, ¶ 35). To prove that the parties intended to create a novation, a party must show:

- The existence of a previously valid contract.
- The agreement of all the parties to the new contract.
- The extinguishment of the old contract.
- The validity of the new contract.
- Consideration, which parties generally satisfy by extinguishing an old obligation in exchange for a new one.

(*Crest Hill Land Dev.*, 2019 IL App (3d) 180213, ¶ 35.)

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

Contracts typically terminate after satisfaction of the contractual obligations or on a date specified in the contract. If there is no fixed date or other measure of the parties' obligations, the contract is treated as for an indefinite term and any party may terminate it at will (*Jespersen v. Minnesota Min. & Mfg. Co.*, 183 Ill. 2d 290, 293 (1998)). If an otherwise indefinite contract is terminable on the occurrence of a specific event, then it is not considered terminable at will (*A.T.N., Inc. v. McAirlaid's Vliesstoffe GmbH & Co. KG*, 557 F.3d 483, 487 (7th Cir. 2009) (applying Illinois law)).

To terminate a contract before the parties have satisfied the contractual obligations, the terminating party must have a valid legal justification, such as the other party's material breach, or have a contractual provision governing termination before completion. Under Illinois law, a material breach empowers the non-breaching party to terminate the contract (*Peoria Partners, LLC v. Mill Grp., Inc.*, 2015 WL 8989675, at *4 (N.D. Ill. Dec. 16, 2015) (applying Illinois law); *Wolfram P'ship, Ltd. v. LaSalle Nat'l Bank*, 328 Ill. App. 3d 207, 222-23 (2001), as modified on denial of reh'g (Mar. 20, 2002)).

Dispute Resolution Clauses

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

Illinois law interprets and enforces choice of law provisions under either a statutory or common law analysis.

Illinois allows parties to choose Illinois law to govern their contracts even if the transaction has no connection or "bears [no] reasonable relation" to the state, if the aggregate of the transaction is at least $250,000 (735 ILCS 105/5-5). However, the law does not apply to:

- Labor contracts.
- Personal, family, or household service contracts.
- The extent provided to the contrary in the UCC choice-of-law provisions addressed by 810 ILCS 5/1-301.

(735 ILCS 105/5-5.)

Statutes of limitations are procedural and not covered by a generic choice-of-law clause (*Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 351-352 (2002)).

If Section 5-5 does not apply, Illinois reverts to common law principles reflected in the Restatement (Second) of Conflict of Laws § 187 (1971) to determine the validity of a choice of law clause (see *Dancor Constr., Inc. v. FXR Constr., Inc.*, 2016 IL App (2d) 150839, ¶¶ 72-73). Under the Restatement, courts generally enforce the parties' choice of law unless the selected state does not have a "substantial relationship" with the parties or the transaction. There should be at least a "reasonable basis" for the choice of law. Courts consider factors like:

- The location of the parties or the subject property.
- Where the parties will perform the contract.

(See *State Farm Mut. Auto. Ins. Co. v. Burke*, 2016 IL App (2d) 150462, ¶¶ 61-62.)

For example, a court found a reasonable basis for the choice of law where:

- A party's principal place of business was in the state.
- The contract was executed in the state.
- The payments due under a lease were sent to the party's home office in the state.

(*Potomac*, 156 Ill. App. 3d at 760.)

In certain instances, courts may apply another state's law if applying the selected law would violate a significant public policy of another state:

- That has a materially greater interest in a specific issue.
- Whose law would have been applied in the absence of a choice of law clause.

(See *Champagnie v. W.E. O'Neil Constr. Co.*, 77 Ill.App.3d 136, 139 (1979).)

For more information on the enforceability of choice of law provisions, see Standard Clause, General Contract Clauses: Choice of Law (IL): Drafting Note: Enforceability of Choice of Law Provisions in Illinois.

Illinois federal courts sitting in diversity must apply the choice of law rules of the forum state (*NewSpin Sports, LLC v. Arrow Elecs., Inc.*, 910 F.3d 293, 300 (7th Cir. 2018)). Therefore, the federal approach generally follows the approach used in Illinois state courts.

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

The interpretation and enforcement of choice of forum provisions depends on whether the breach of contract claim is pending in Illinois state or federal court.

Illinois State Court Analysis

Unless a forum selection clause is unreasonable or unjust, an Illinois state court will enforce the provision (*GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶ 37). To determine if the forum selection clause is unreasonable, a court looks at:

- The law governing the formation and construction of the contract.
- The residency of the parties involved.
- The place of execution or performance of the contract.
- The location of the parties and witnesses involved in the litigation.
- The inconvenience to the parties of any particular location.
- Whether the parties had equal bargaining power.

(*Calanca v. D & S Mfg. Co.*, 157 Ill. App. 3d 85, 88 (1987).)

When parties freely agree to be bound by a forum selection clause that contemplates inconvenience, a party cannot later try to invalidate the clause based on this factor (*Calanca*, 157 Ill. App. 3d at 88). Mere inconvenience is not a reasonable basis for voiding an express forum selection clause (*Brandt v. MillerCoors, LLC*, 2013 IL App (1st) 120431, ¶ 17).

The fact that a party uses a standard contract containing a forum selection clause is not sufficient in itself to demonstrate unequal bargaining power between the parties (*Brandt*, 2013 IL App (1st) 120431, ¶ 20).

Courts do not enforce forum selection clauses procured by fraud or overreaching but the fraud alleged must be specific to the forum selection clause itself and not to the procurement of the contract generally (see *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 93 (2007)).

For more information on how Illinois state courts interpret and enforce forum selection clauses, see Standard Clause, General Contract Clauses: Choice of Forum (IL): Drafting Note: Illinois Courts.

Illinois Federal Court Analysis

Whether under traditional diversity or federal question jurisdiction, federal courts in Illinois analyze choice of forum provisions under federal common law, not Illinois state law (28 U.S.C. § 1404(a)).

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 Forum Selection Clauses). Courts in the Seventh Circuit have generally found forum selection clauses presumptively valid and enforceable unless the party challenging enforcement can show that the provision is unfair or unreasonable (*Jackson v. Payday Fin., LLC*, 764 F.3d 765, 776 (7th Cir. 2014); *Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 939 (S.D. Ill. 2016)). In assessing fairness and reasonableness a court considers whether:

- The clause was motivated by bad faith, such as a means of discouraging individual from pursuing legitimate claims.

- A party obtained accession to the forum selection clause by fraud or overreaching.
- The party seeking to enforce the clause gave the other notice of the forum provision.

(*Feather*, 216 F. Supp. 3d at 941.)

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

Under Illinois law, courts play only a gatekeeping role limited to determining whether:

- There is a valid agreement to arbitrate.
- The dispute falls within the scope of that agreement.

(710 ILCS 5/2; *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶22; see also See *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 24 (three-pronged test depending on whether issue is clearly within the scope of the arbitration clause, clearly outside the scope of the clause, or it is unclear whether the issue falls within the scope of the clause).)

Illinois state courts and federal courts sitting in diversity generally interpret and enforce alternative dispute resolution provisions by relying on basic principles of contract construction (*Ervin v. Nokia, Inc.*, 349 Ill. App. 3d 508, 511-12 (2004) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)) (courts should apply ordinary state-law contract principles in determining whether parties agreed to arbitrate a matter)). For more information on contract construction principles, see Question 5.

As a matter of federal law, which applies in state and federal court, 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 or an allegation of waiver, delay, or a similar defense to arbitrability (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

For more information on the interpretation and enforcement of alternative dispute resolution clauses, see Practice Note, Compelling and Staying Arbitration in Illinois and Standard Clause, General Contract Clauses: Alternative Dispute Resolution (Multi-Tiered) (IL).

Breach of Contract

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

Under Illinois law, a breach of contract claim must allege four elements:

- The existence of a valid and enforceable contract, which requires that there be between the parties:
  - an offer;
  - acceptance;
  - consideration; and
  - mutual assent.

  (*Nat'l Prod. Workers Union Ins. Tr. v. Cigna Corp.*, 665 F.3d 897, 901 (7th Cir. 2011) (applying Illinois law); (*DiLorenzo*, 347 Ill. App. 3d at 199-200; see Question 1.)
- The plaintiff substantially performed the contract.
- The defendant's breach of the contract.
- Damages resulting from the breach.

(*W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 759 (2004).)

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

A defendant's failure to comply with a duty imposed by the contract constitutes a breach (*Nielsen v. United Servs. Auto. Ass'n*, 244 Ill. App. 3d 658, 662 (1993)). Any breach of contract is actionable, and the severity of the breach just affects the plaintiff's damages (see *Pacini v. Regopoulos*, 281 Ill. App. 3d 274, 279 (1996)). Only a material breach by the defendant justifies the plaintiff's nonperformance (see *InsureOne Indep. Ins. Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 43).

Every contract has an implied covenant of good faith and fair dealing (*Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993). Breach of the duty of good faith and fair dealing arises only when one party is vested with contractual discretion and exercises that discretion arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties (*Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1059–60 (1999)).

The covenant of good faith and fair dealing arises most often in contracts that give certain rights to one party but not the other. For example, a franchise contract may give the franchisor absolute discretion to change the policies and procedures to which franchisees must adhere. In that case, a franchisor can only exercise that discretion reasonably and with proper motive and cannot do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. (*Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp. 867, 884–85 (N.D. Ill. 1989) (applying Illinois law).) The duty of good faith and fair dealing, however, cannot be used to overrule or modify the express terms of a contract (*Bank One, Springfield*, 309 Ill. App. 3d. at 1060).

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.

In Illinois, the statute of limitations for a breach of written contract claim is ten years (735 ILCS 5/13-206; *Clark v. Robert W. Baird Co., Inc.*, 142 F. Supp. 2d 1065, 1075 (N.D. Ill. 2001) (applying Illinois law)). The statute of limitations for a breach of oral contract claim is five years (735 ILCS 5/13-205; *Clark*, 142 F. Supp. 2d at 1075). For construction contracts, the statute of limitations is four years from the time plaintiff knew or should reasonably have known of the act or omission giving rise to the claim. There is also a ten-year period of repose for construction contract claims (735 ILCS 5/13-214; see *Graham v. Lakeview Pantry*, 2019 IL App (1st) 182003, ¶ 12 (referring to the ten-year period in Section 13-214(b) as a statute of repose).)

Apart from construction contracts, Illinois does not generally apply the discovery rule to statutes of limitations in breach of contract actions (*Sinclair v. Bloom*, 1996 WL 264725, at *4 (N.D. Ill. May 15, 1996) (applying Illinois law); but see *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 78-79 (1995); *Prignano v. Prignano*, 405 Ill. App. 3d 801, 814 (2010)). Unless circumstances exist that justify the application of the discovery rule, the statute of limitations period on breach of contract actions accrues at the time of the breach (*Milnes v. Hunt*, 311 Ill. App. 3d 977, 980 (2000)).

When a breach of contract claim accrues may depend on the type of transaction involved. For example, where the contract requires performance on demand the statute of limitations begins to run from the date of demand (*Schreiber v. Hackett,* 173 Ill. App. 3d 129, 131 (1988)).

The statute of limitations defense typically is asserted either:

- As an affirmative defense in an answer to the complaint (735 ILCS 5/2-613(d); see *Rajcan v. Donald Garvey & Assocs., Ltd.*, 347 Ill. App. 3d 403, 410 (2004)).
- In a motion to dismiss, in lieu of serving an answer to the complaint (735 ILCS 5/2-619(a)(5)).

The statute of limitations for a breach of contract action may be tolled under certain circumstances, such as:

- Continuous contracts.
- Equitable estoppel.
- By operation of a statute.

Continuous Contracts

Contracts requiring continuous performance are capable of being partially breached, and each partial breach is subject to its own accrual date and own limitation period (see *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶ 35). This typically occurs where an obligation is payable by installments (see *Luminall Paints, Inc. v. La Salle Nat'l Bank*, 220 Ill. App. 3d 796, 802 (1991)).

Equitable Estoppel

Equitable estoppel tolls the statute of limitations where the plaintiff's failure to bring a timely action was caused by the defendant's deception or concealment of material facts (*Jasper Oil Producers, Inc. v. Dupo Oilfield Dev., Inc.*, 2015 IL App (5th) 150084-U, ¶ 14 (unpublished order under Ill. S. Ct. R. 23); *Swann & Weiskopf, Ltd. v. Meed Assocs., Inc.*, 304 Ill. App. 3d 970, 977 (1999)).

Statutes

Counsel also should check relevant statutes for any applicable tolling provisions. For example:

- If a plaintiff is either under the age of 18 years or under a legal disability when the cause of action accrues, the plaintiff may bring the action within two years after the person attains the age of 18 years, or the disability is removed (735 ILCS 5/13-211(a)).
- If a defendant fraudulently conceals the cause of such action from the knowledge of the plaintiff, plaintiff may commence the action within five years after plaintiff discovers that it has cause of action (735 Ill. Comp. Stat. Ann. 5/13-215).

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

Illinois law recognizes both intended and incidental third-party beneficiaries, but only intended beneficiaries have rights and may sue (*Hacker v. Shelter Insurance Co.*, 388 Ill.App.3d 386, 394 (2009). A party must be expressly named in the contract to be considered an intended third-party beneficiary (*Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037, 1039 (1995)).

Remedies for Breach of Contract

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

Under Illinois law, the prevailing plaintiff in a breach of contract action may recover either:

- Compensatory damages, which may include:
  - general (or direct) damages; and
  - special (or consequential) damages.
- Liquidated damages, if required under the contract.

A party may also be entitled to recover its attorneys' fees if there is a fee-shifting provision in the contract (*Bank of Am. v. WS Mgmt., Inc.*, 2015 IL App (1st) 132551, ¶ 119).

The plaintiff generally cannot recover punitive damages in ordinary breach of contract actions (*Morrow v. L.A. Goldschmidt Associates, Inc.*, 112 Ill.2d 87, 95 (1986)).

Compensatory Damages

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

There are two types of compensatory contract damages:

- **General damages.** General damages flow directly from the defendant's breach and are the natural, logical, and probable consequence of that breach (*In re: Emerald Casino, Inc.*, 867 F.3d 743, 757 (7th Cir. 2017) (applying Illinois law); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 318 (1987)).
- **Consequential damages.** Damages that are the consequence of special or unusual circumstances are recoverable when they are within the contemplation of the parties (*In re: Emerald Casino, Inc.*, 867 F.3d at 757; *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 31).

Consequential damages most often occur where the plaintiff incurs liability to a third party because of the defendant's breach, such as where the defendant's breach resulted in the plaintiff being unable to comply with a collateral agreement it had with the third party. It is not necessary to have foreseen the exact breach in issue. Plaintiffs must show only that the alleged consequential damages were a foreseeable and probable result of any breach (*Merix Pharm. Corp. v. Clinical Supplies Mgmt., Inc.*, 59 F. Supp. 3d 865, 882 (N.D. Ill. 2014) (applying Illinois law)).

When pleading consequential damages, the type of consequential damages sought must be specified (*Williams v. Country Mut. Ins. Co.*, 2015 IL App (1st) 142534-U, ¶ 23 (unpublished order under Ill. S. Ct. R. 23); *Clark v. Standard Life & Accident Ins. Co.*, 68 Ill. App. 3d 977, 986 (1979); but see *Heller Int'l Corp. v. Sharp*, 839 F. Supp. 1297, 1303 (N.D. Ill. 1993) (federal pleading standards do not require such specific allegations)).

A court also may award an injured party its expenditures in partly performing its own obligations under the contract as an alternative measure of damages where the usual method would be too speculative (*Merry Gentleman, LLC v. George & Leona Prods., Inc.*, 799 F.3d 827, 829 (7th Cir. 2015) (applying Illinois law); *Herbert W. Jaeger & Assocs. v. Slovak Am. Charitable Ass'n*, 156 Ill. App. 3d 106, 112-13 (1987)).

Liquidated Damages

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

- The parties agreed in advance to the amount of damages that the non-breaching party may recover.
- The amount of liquidated damages was reasonable at the time of contracting and bears some relation to the damages that might be sustained.
- Actual damages would be uncertain in amount and difficult to prove.

(*Berggren v. Hill*, 401 Ill. App. 3d 475, 479-80 (2010); *Jameson Realty Grp. v. Kostiner*, 351 Ill. App. 3d 416, 423 (2004).)

A liquidated damages clause is not enforceable if:

- The clause is unconscionable.
- The clause violates public policy in some way, such as where the clause is a penalty or forfeiture.

- The amount set out in the clause is grossly disproportionate to the amount of damages incurred.

(*Zerjal v. Daech & Bauer Constr., Inc.*, 405 Ill. App. 3d 907, 913 (2010); *Jameson Realty Grp.*, 351 Ill. App. 3d at 423.)

Courts strike down liquidated damages as penalty clauses most frequently where they specify the same damages regardless of the severity of the breach (*GK Dev., Inc. v. Iowa Malls Fin. Corp.*, 2013 IL App (1st) 112802, ¶ 73).

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

Under Illinois law, if money damages are unavailable or inadequate to compensate the plaintiff for its loss, a court may award equitable relief for breach of contract. The most common equitable remedies include:

- Injunctive relief.
- Rescission.
- Reformation.
- Specific performance.

In addition, a party to a contract may seek a declaratory judgment asking the court to rule on the rights and other legal relations of the parties (735 ILCS 5/2-701). Declaratory judgment and breach of contract actions are inconsistent claims involving different legal concepts and seeking different forms of redress. Declaratory judgments are designed to prevent extensive litigation by settling the rights of the parties after a controversy arises but before they have a claim for relief *(BMO Harris Bank, N.A. v. Jackson Towers Condo. Ass'n*, 2018 IL App (1st) 170781, ¶ 24).

Defenses to Breach of Contract

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

Defenses to Contract Formation

The following defenses challenge the formation of the contract itself:

- Ambiguity
- Capacity of the parties.
- Duress.
- Coercion or undue influence.
- Fraudulent inducement.
- Illegality of the object of the contract.
- Mutual mistake.
- Unilateral mistake.
- Unconscionability.

Defenses to Breach of the Contract

The following common affirmative defenses relate to the merits of the breach of contract claim:

- Accord and satisfaction.
- Anticipatory breach.
- Arbitration and award.
- Economic duress.
- Failure of consideration.
- Failure to mitigate, if there is no liquidated damages clause.
- Frustration of purpose.
- Impossibility.
- Laches.
- Ratification.
- Statute of frauds.
- Statute of limitations.
- Waiver.

Defenses to Damages

The following defenses challenge the damages the plaintiff seeks:

- Duplicative damages or improper double recovery.
- Damages were replaced or indemnified in whole or in part by collateral sources.
- Damages are superseded by contractual liquidated damages clause.
- Damages not available for breach of contract (for example, punitive damages).
- Failure to mitigate damages, if there is no liquidated damages clause.

- The plaintiff cannot prove damages because they are:
  - speculative or not reasonably certain;
  - not directly traceable to the breach;
  - too remote;
  - the result of intervening causes; or
  - damages that the parties did e not contemplate when they made the contract.

For more information on each of these and other defenses, including procedural defenses, see Breach of Contract Defenses Checklist (IL).