Contractual Clauses That Impact Disputes

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I. Introduction

In the process of drafting contracts, parties can shape the process for resolving their future disputes. They can potentially select the forum for dispute resolution, the body that will resolve the disputes, the law that will be applied to their disputes, and the remedies that will be available to them. These clauses are so important that they can abrogate even constitutional rights.

Indeed, in Texas, sophisticated parties have broad latitude in defining the terms of their business relationship. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 58 (Tex. 2008). Courts must construe contracts by the language contained in the document, with a mind to Texas's strong public policy favoring preservation of the freedom to contract. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811-12 (Tex. 2012). "In short, the parties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner they choose." *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.).

This paper attempts to give a broad discussion of the purpose and enforcement of many of the most prevalent contractual clauses that impact the resolution of disputes.

These materials should not be considered as, or as a substitute for, legal advice; and they are not intended to nor do they create an attorney-client relationship. Since the materials included here are general, they may not apply to your individual legal or factual circumstances. You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel. The views expressed in this presentation do not necessarily reflect those of Winstead PC, its lawyers, or its clients.

Finally, this paper has suggested forms, which are general in nature. Every transaction and/or contract is different. Accordingly, a person should not rely on these forms in all circumstances and should alter them as necessary depending on the facts of the transaction and/or contract.

II. Arbitration Clauses

A. Form

[]. Arbitration.

Mandatory clause that is broad:

The Parties shall resolve any of the following in arbitration in [location]: disputes (including, but not limited to, any potential contract, tort, equitable, statutory or other claims) arising from, concerning or related to (i) the interpretation of this Agreement, (ii) the rights and obligations of any Party hereunder, or (iii) the relationship of the Parties.

Mandatory clause that is narrow:

The Parties shall resolve any dispute regarding the interpretation of this Agreement or any breach thereof in binding arbitration.

Sending initial issues to arbitrator for determination:

The Parties agree that any issue arising from or related to the validity, enforceability, and scope of this arbitration clause shall solely be

determined by the arbitrator in an arbitration proceeding. All disputes under this arbitration agreement shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association.

Selection of arbitrators:

If arbitration is required to resolve a dispute among the Parties, the Parties shall agree on three arbitrators. If the Parties cannot agree on the three arbitrators, then they will each select one arbitrator and then the those two arbitrators shall select the third arbitrator.

Or

Either Party will notify AAA and request AAA to select one arbitrator approved by both Parties to act as the arbitrator for resolution of the dispute.

Discovery/Rules of Arbitration:

The arbitrator(s) selected will establish the rules for proceeding with the arbitration of the dispute and such rules will be binding upon all parties to the arbitration proceeding. The arbitrator(s) may use the rules of the AAA for commercial arbitration but is encouraged to adopt such rules as the arbitrator deems appropriate to accomplish the arbitration in the quickest and least expensive manner possible. In any event, the arbitrator(s) (1) shall permit each side no more than [_____] depositions (including the deposition of experts), which depositions may not exceed four hours each, one set of ten interrogatories (inclusive of sub parts) and one set of twenty-five document requests (inclusive of sub parts), (2) shall permit fifty requests for admissions, (3) shall limit the hearing, if any, to [____] days, (4) set the final arbitration hearing date for a date no more than 90 days after the filing of the arbitration, and (5) shall render their/his or her decision within 120 days of the filing of the arbitration. All arbitration proceedings shall be confidential.

Costs of Arbitration:

The arbitrator(s) will have the authority to determine and award costs of arbitration and the costs incurred by any party for their attorneys, advisors and consultants, though the arbitrator shall be bound by the Agreement's attorney's fees clause.

Award of Arbitrator:

Any award made by the arbitrator(s) shall be binding on the Parties and shall be enforceable to the fullest extent of the law. The arbitrator(s) shall issue a written opinion discussing all material legal and factual issues necessary for resolution of the dispute.

Governing Law and Actual Damages in Arbitration:

In reaching any determination or award, the arbitrator(s) will apply the laws of the State of [____] without giving effect to any principles of conflict of laws under the laws of the State of [_____]. The arbitrator's award will be limited to actual damages and will not include punitive or exemplary damages. Nothing contained in this Agreement will be deemed to give the arbitrator any authority, power or right to alter, change, amend, modify, add to or subtract from any of the provisions of this Agreement. All privileges under state and federal

law, including, without limitation, attorney client, work product and party communication privileges, shall be preserved and protected. All experts engaged by a party must be disclosed to the other party within 30 days after the date of notice and demand for arbitration is given.

Right to Appeal:

The Parties agree that the Arbitrator(s)'s decision may be corrected for legal or factual errors via an appeal to a state or federal court in [location], and then, if necessary, to appellate courts. The Parties will create a record of the arbitration hearing so that a court may review the arbitrator(s)'s decision. This arbitration provision is solely controlled by and construed under the Texas Arbitration Act and not the Federal Arbitration Act.

B. Introduction

Over the past few decades, parties have increasingly resorted to the use of arbitration clauses in a number of contractual contexts. That is not surprising as there are federal and state statutes that support and encourage the use of arbitration for dispute resolution. Correspondingly, courts have been very willing to assist parties in enforcing arbitration agreements.

A party seeking to enforce an arbitration agreement should file a motion to compel arbitration. Typically, when the motion is granted, the trial court abates all proceedings and orders that the claimant initiate arbitration proceedings. Once in arbitration, the parties have limited discovery and agree that either a single arbitrator or a panel of arbitrators decide issues of fact and law. Therefore, by agreeing to arbitrate, the parties agree to waive their right to a jury trial. Once the arbitrator renders a decision, the prevailing party files the decision with the trial court for enforcement. Unless they expressly contract to the contrary, the parties generally have very little opportunity for appellate review over the arbitrator's decision.

C. Enforcement Of Arbitration Clauses

Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination. *Porter & Clements, L.L.P. v. Stone,* 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Federal and state law strongly favors arbitration. *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996).

Texas courts liberally enforce arbitration clauses notwithstanding the fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. *See, e.g., Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (enforcing arbitration clause in attorney/client agreement).

In Texas, arbitration agreements are interpreted under general contract principles. *See In re Kellogg Brown & Root*, 166 S.W.3d 732, 738 (Tex. 2005); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the

agreement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). There are no special defenses to an arbitration agreement other than normal contract defenses such as fraud, duress, and unconscionability.

D. Procedure For Compelling Arbitration

A motion to compel arbitration is procedurally akin to a motion for summary judgment and is subject to the same evidentiary standards. *See In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Thus, the party alleging an arbitration agreement must present summary proof that an agreement to arbitrate requires arbitration of the dispute. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 897 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *Jebbia*, 26 S.W.3d at 757. The party resisting may then contest the opponent's proof or present evidence supporting the elements of a defense to enforcement. *Jim Walter Homes, Inc.*, 207 S.W.3d at 897; *Jebbia*, 26 S.W.3d at 757. Only where a material issue of fact is raised, is there a need for an evidentiary hearing. *Jim Walters Homes, Inc.*, 207 S.W.3d at 897.

The elements of a valid arbitration agreement are: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

The term "meeting of the minds" refers to the parties' mutual understanding and assent to the expression of their agreement. *Principal Life Ins. Co. v. Revalen Dev., LLC*, 358 S.W.3d 451, 454 (Tex. App.—Dallas 2012, pet. denied). Contracts require mutual assent to be enforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind. *Id*. By signing a contract, a party is presumed to have read and understood its contents. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134 (Tex. 2004).

To determine whether claims fall within the scope of an arbitration agreement, a court must focus on the factual allegations rather than the legal claims asserted. *Prudential*, 909 S.W.2d at 900. When considering an arbitration agreement, a court must give "due regard" to the federal policy favoring arbitration. *Webb v. Investacorp., Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). A court should construe an arbitration clause broadly, and when a contract contains an arbitration clause, there is a presumption of arbitrability. *AT&T Tech., Inc. v. Commc's Workers of Am.*, 475 U.S. 643, 650 (1986).

Any doubts as to arbitrability are to be resolved in favor of coverage. *In re FirstMerit Bank N.A*, 52 S.W.3d at 754. Likewise, a court should resolve any doubts about the scope of the arbitration agreement in favor of coverage. *Id*. The court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue . . . ." *Commerce Park at DFW Freeport v.*

Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984); *Metropolitan Property v. Bridewell*, 933 S.W.2d 358, 361 (Tex. App.—Waco 1996, no writ).

Arbitration agreements containing phrases such as "relating to" are interpreted broadly. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998); *In re Bank One, N.A.*, 216 S.W.3d 825, 826-27 (Tex. 2007) (resolving doubt as to scope of arbitration agreement covering disputes "arising from or relating in any way to this Agreement" in favor of coverage); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration clause, Court recognized that the use of language "any" dispute "arising out of or related to" as broad language that expressly includes tort and other claims); *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d 879, 887 (Tex. App.—Houston [14th Dist.] 2012, original proceeding); *TMI Inc. v. Brooks*, 225 S.W.3d 783, 791 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (holding that phrase "arising out of and/or related to" in arbitration agreement is "broad form in nature, evidencing the parties' intent to be inclusive rather than exclusive."). The phrase "relates to" is a very broad term. *Schwarz v. Pully*, No. 05-14-00615, 2015 Tex. App. LEXIS 8115 (Tex. App.—Dallas August 3, 2015, no pet.). A claim "relates to" a contract if it has a significant relationship with or touches matters covered by the contract. *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, no pet.).

Broad arbitration clauses embrace "all disputes between the parties having a significant relationship to the contract, regardless of the label attached to the dispute." *Penzoil*, 139 F.3d at 1067. One court has held that an arbitration clause using a phrase such as "any dispute . . . relating to, arising from, or connected in any manner to this Agreement" is broad and "embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *FD Frontier Drilling (Cyprus), Ltd. v. Didmon*, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). "If the facts alleged 'touch matters,' have a 'significant relationship' to, are 'inextricably enmeshed' with, or are 'factually intertwined' with the contract containing the arbitration agreement, the claim is arbitrable." *Id.; Cotton Commercial USA, Inc. v. Clear Creek ISD*, 387 S.W.3d 99, 108 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Pennzoil Co. v. Arnold Oil Co.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding).

Additionally, broad language has been construed to extend not only to claims that literally arise under the contract, but to all disputes arising out of the parties' relationship. *Didmon*, 438 S.W.3d at 695 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998) (claims on a promissory note were arbitrable due to a development agreement's arbitration clause); *Hale-Mills Constr. Ltd. v. Willacy County*, No. 13-15-00174-CV, 2016 Tex. App. LEXIS 340 (Tex. App.—Corpus Christi January 14, 2016, no pet.); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993).

E. Right To Appeal Decision Refusing To Enforce Arbitration

Because the main purpose of arbitration is cost-savings and the avoidance of prolonged delay, in the Texas Arbitration Act, the Texas Legislature provided that a trial court's denial of a motion to arbitrate is immediately appealable: "A party may appeal a judgment or decree entered under this chapter or an order: (1) denying an application to compel arbitration." Tex. Civ. Prac. & Rem. Code § 171.098(a)(1). Similarly, the Texas Legislature enacted Texas Civil Practice and Remedies Code section 51.016 that provides courts of appeals with jurisdiction to decide an appeal from an interlocutory order on a motion to compel arbitration under the Federal Arbitration Act:

> In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

Tex. Civ. Prac. & Rem. C. Ann. § 51.016. This section is effective for any case filed on or after September 1, 2009. *See id*. at cmts.

F. Delegation of Enforcement Issues To Arbitrator

Parties can agree to delegate to the arbitrator the power to resolve gateway issues regarding the validity, enforceability, and scope of an arbitration agreement. *AT&T Technologies, Inc. v. Communications. Workers*, 475 U.S. 643 (1986) (holding parties may agree to arbitrate arbitrability); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1985) (holding question of primary power to decide arbitrability "turns upon what the parties agreed about that matter").

An arbitration provision can state that any dispute shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association. Rule 7(a) of the Commercial Arbitration Rules of the AAA grants an arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the Arbitration Agreement." COMMERCIAL RULES OF THE AMERICAN ARBITRATION ASSOCIATION, Rule 7(a) (http://adr.org/aaa/faces/rules).

Courts have concluded that an arbitration agreement's incorporation of rules empowering an arbitrator to decide arbitrability and scope issues clearly and unmistakably evidences the parties' intent to allow the arbitrator to decide those issues. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012) (We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to

arbitrate arbitrability."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("[W]e conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (concluding that agreement's incorporation of AAA rules clearly and unmistakably showed parties' intent to delegate issue of determining arbitrability to arbitrator); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (holding that by incorporating AAA Rules into arbitration agreement, parties clearly and unmistakably agreed that arbitrator should decide whether arbitration clause was valid); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 549-52 (S.D. Miss. 2005) (holding that by agreeing to be bound by procedural rules of AAA, including rule giving arbitrator power to rule on his or her own jurisdiction, defendant agreed to arbitrate questions of jurisdiction before arbitrator); *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (holding arbitration clause stating that arbitration shall proceed according to rules of AAA provides clear and unmistakable delegation of scope-determining authority to arbitrator).

For example, in *T.W. Odom Mgmt. Servs. v. Williford*, the court of appeals reversed a trial court's decision denying a motion to compel arbitration in an employee injury suit where the employment agreement clearly provided that the AAA rules would apply. No. 09-16-00095, 2016 Tex. App. LEXIS 9353 (Tex. App.—Beaumont August 25, 2016, no pet.). The court stated:

> The 2013 agreement states that "[t]he arbitration will be held under the auspices of the American Arbitration Association ("AAA")[,]" and "shall be in accordance with the AAA's then-current employment arbitration procedures." The agreement also references the AAA National Rules for Resolution of Employee Disputes. Under the AAA's Employment Arbitration Rules, Rule 6, the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." … [The parties] agreed that any arbitration would be conducted in accordance with the AAA's employment arbitration procedures, and the agreement references the AAA's National Rules for Resolution of Employee Disputes. The parties agreed to a broad arbitration clause that

> expressly incorporated rules giving the arbitrator the power to rule on its own jurisdiction and to rule on any objections with respect to the existence, scope, or validity of the agreement.

Id. at *12-13. The court therefore ordered that the trial court should have ruled that the arbitrator could make the decision on the scope and enforceability of the clause. *Id*.

G. Waiver Of Arbitration Rights

The Texas Supreme Court has been reluctant to find that a party waived its right to arbitration by court related conduct. *See, e.g., RSL Funding, LLC v. Pippins*, 2016 Tex. LEXIS 616 (Tex. July 1, 2016); *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502 (Tex. 2015); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573 (Tex. 2014); *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542 (Tex. 2014).

The person asserting waiver has the burden to establish her waiver defense to the motion to compel arbitration. *Williams Indus., Inc. v. Earth Dev. Sys. Corp*., 110 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.). There is a strong presumption against waiving a right to arbitration. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002). A party asserting waiver as a defense has the burden to prove that (1) the other party has "substantially invoked the judicial process," which is conduct inconsistent with a claimed right to compel arbitration, and (2) that the inconsistent conduct has caused it to suffer detriment or prejudice. *Id*. at 174 ("[m]erely taking part in litigation is not enough unless a party 'has substantially invoked the judicial process to its opponent's detriment.'"); *see also Perry Homes v. Cull*, 258 S.W.3d 580, 587—92 (Tex. 2008); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (holding that party who litigated in the trial court for two years did not substantially invoke the judicial process to their opponent's detriment because the party engaged in minimal discovery, and party opposing arbitration failed to demonstrate sufficient prejudice to overcome the strong presumption against waiver).

"Merely taking part in litigation is not enough." *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006). *See also G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502 (Tex. 2015) (holding that movant did not waive arbitration rights by filing counterclaims, filing motions for relief, and participating in pretrial discovery); *Richmont Holdings*, 455 S.W.3d at 576 (holding that movant did not waive arbitration rights by initiating lawsuit, invoking forum-selection clause, moving to transfer venue, propounding request for disclosure, and waiting nineteen months after being sued to move for arbitration); *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 694 (Tex. 2008) (holding that movant did not waive arbitration rights by noticing deposition, serving written discovery, and waiting eight months to move for arbitration); *In re Bruce Terminix, Co*., 988 S.W.2d 702, 703-04 (Tex. 1998) (holding that movant did not waive arbitration rights by propounding requests for production and interrogatories and waiting six months to seek arbitration); *EZ Pawn Corp. v.*

Mancias, 934 S.W.2d 87, 88-89 (Tex. 1996) (holding that movant did not waive arbitration rights by propounding written discovery, noticing deposition, agreeing to reset trial date, and waiting nearly a year to move for arbitration).

Rather, that conduct must demonstrate that the party "has substantially invoked the judicial process to [its] opponent's detriment." *Id*. The Texas Supreme Court declined to find waiver of the right to arbitrate when a movant filed cross-actions. *D. Wilson Constr.*, 196 S.W.3d at 783. Whether a movant sought "disposition on the merits" is a key factor in deciding waiver. *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex. 2014). A "heavy burden of proof" is required to establish waiver of arbitration rights, and the court must resolve all doubt in favor of arbitration. *In re Bruce Terminix Co*., 988 S.W.2d 702, 705 (1998). A party does not substantially invoke the judicial process merely by participating in discovery. *See In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

Further, the party asserting waiver must also establish that it has been harmed by the opposing party's conduct. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002) (quoting *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 898-99 (Tex. 1995) ("[A] party does not waive a right to arbitration merely by delay; instead the party urging waiver must establish that any delay resulted in prejudice."); *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 368 (Tex. App.—Beaumont 2008, orig. proceeding) (holding party opposing arbitration was not prejudiced when party requesting arbitration waited 14 months to request arbitration after answering the lawsuit, filing counterclaims, and engaging in discovery).

H. Conspicuousness Requirement

In Texas, there is a presumption that parties that sign contracts have read and understood the contracts' provisions. *See Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996). There is no requirement that the party relying on the arbitration agreement prove that it is conspicuous. For example, an arbitration clause can be incorporated by reference into another contract. *See In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007). In *Bank One*, the Court enforced an arbitration agreement that was contained in a lengthy depository agreement that had been incorporated by reference into an account signature card. *See id.* Certainly, a clause that is not expressly set out in an agreement is not conspicuous.

It should be noted that there are narrow statutory exceptions: the Texas Property Code requires that arbitration clauses in new home contracts be conspicuous, and the Texas Business and Commerce Code requires that an arbitration clause in certain contracts requiring arbitration in another jurisdiction be conspicuous. *See* Tex. Prop. Code Ann. § 420.003; Tex. Bus. & Com. Code Ann. § 35.53(b).

I. Direct-Benefits Estoppel Theory

The Texas Supreme Court held that the direct-benefits estoppel theory may apply to allow a non-signatory to enforce an arbitration clause or to enforce an arbitration clause against a

non-signatory. "[A] litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001) (emphasis added). Therefore, a party is estopped from suing "based on the contract" and at the same time ignoring an arbitration clause contained in that contract.

In *FirstMerit Bank*, the non-signatory plaintiffs sued the signatory defendant for, among other things, breach of contract, revocation of acceptance, and breach of warranty. *See id*. at 752-53, 755. By bringing the breach-of-contract and breach-of-warranty claims, the plaintiffs sought benefits that stemmed directly from the contract's terms. The Texas Supreme Court concluded that, by seeking to enforce the contract, the non-signatory plaintiffs "subjected themselves to the contract's terms, including the Arbitration Addendum." *Id*. at 756.

The Court has subsequently repeatedly used direct-benefits estoppel in the context of arbitration clauses. *See Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013); *Meyer v. WMCO-GP LLC*, 211 S.W.3d 302 (Tex. 2006) (applying direct benefits estoppel to allow a non-signatory defendant to enforce arbitration clause against a signatory plaintiff); *In re Vesta Insurance Group, Inc*., 192 S.W.3d 759 (Tex. 2006). *But see In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 741 (Tex. 2005) (holding that estoppel did not apply to facts of case).

J. Parties Can Draft Clause To Allow For Appellate Review

One of the main concerns that litigants have about arbitration is that there is very little appellate review. The fear of a "run-away" arbitrator with no real judicial review of an award has resulted in parties taking out arbitration clauses and inserting jury waiver clauses in their contracts.

As background, the United States Supreme Court held that the Federal Arbitration Act's grounds for vacatur and modification "are exclusive" and cannot be "supplemented by contract." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008). Under that decision, parties' attempts to contract for expanded judicial review of an arbitrator's award are unenforceable.

The Texas Supreme Court held the opposite regarding the Texas General Arbitration Act ("TAA"). *See Nafta Traders, Inc., v. Quinn*, 339 S.W.3d 84 (Tex. 2011). In *Nafta Traders*, an employee sued her employer for sex discrimination in violation of state law. The dispute was sent to arbitration, where the employee prevailed. The employer challenged the award in court, arguing that it contained damages that were either not allowed or unsupported by the evidence. The arbitration agreement stated that "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." *Id*. The employer alleged that the arbitrator exceeded his authority in making the award. The trial court confirmed the award, and the court

of appeals held that the employer could not assert its complaints citing the *Hall Street* opinion.

The Texas Supreme Court held that under the TAA, parties can expand judicial review of an arbitrator's award. If the parties limit an arbitrator's authority to render awards, e.g., to exclude meeting awards that contain errors of law or fact, then the parties can provide for further and more detailed judicial review of the award. The Texas Supreme Court stated: "We must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall Street's* reasoning and reach our own judgment." *Id*. The Court then concluded:

> Under the TAA (and the FAA), an arbitration award must be vacated if the arbitrator exceeds his powers. Generally, an arbitrator's powers are determined by agreement of the parties. Can the parties agree that the arbitrator has no more power than a judge, so that his decision is subject to review, the same as a judicial decision? Hall Street answers no, based on an analysis of the FAA's text that ignores the provision that raises the problem, and a policy that may be at odds with the national policy favoring arbitration. With great respect, we are unable to conclude that Hall Street's analysis of the FAA provides a persuasive basis for construing the TAA the same way.… Accordingly, we hold that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.

Id. The Court then held that the FAA would not preempt the TAA's allowance of expanded judicial review for an arbitration award enforceable under both the FAA and the TAA. The Court then remanded the case to the court of appeals for further review of the employer's grounds.

There are several practice tips that arise from this decision. First, parties are the masters of their own arbitration agreements and the judicial review that may result. The parties should take time to carefully consider the type of language to use. Second, parties can select the law that will control an arbitration agreement. So, parties that want to enlarge judicial review of an award should expressly state that the arbitration clause will be construed under the TAA. If that is done, there will be little argument that the arbitration clause should not be construed under the TAA and solely under the FAA. Third, arbitration proceedings are often informal, where the parties have no record of the hearing and where the rules of evidence and procedure are relaxed. If a party desires to seek judicial review of an arbitration award, it will need to be able to show a court a record that establishes a reversible error. So, parties should make a record of all proceedings and should

invoke rules of evidence and procedure as appropriate to preserve error. Otherwise, as in state court, an arbitrator will be presumed to have made the correct ruling.

K. Conclusion On Arbitration Clauses

Texas courts liberally enforce arbitration clauses. There is a strong presumption in favor of enforcing arbitration clauses, and a party fighting arbitration has the burden to raise contractual defenses. An arbitration clause can be enforced against or against a non-signatory. Absent narrow statutory exceptions, there is no conspicuousness requirement, and parties can even enter into enforceable arbitration agreements by incorporation. Courts seem to treat arbitration clauses like any other contractual clause.

III. Forum-Selection Clauses

A. Form

The Parties hereby irrevocably and unconditionally agree that all suits, actions, proceedings, or disputes, whether litigation or arbitration, that arise out of or relate to this agreement or the Parties' relationship, whether the claims arise from contract or tort, and whether the claims are legal or equitable in nature, will be litigated exclusively in [forum]. Both Parties irrevocably and unconditionally waive any objection to the laying of jurisdiction or venue in [forum] for any suit, action, proceeding, or dispute, whether litigation or arbitration. Both Parties have had the opportunity to consult an attorney, and they have voluntarily agreed to this forum-selection clause. The aforementioned choice of forum is intended by the Parties to be mandatory and not permissive in nature, thereby precluding the possibility of litigation between the Parties in any jurisdiction other than that specified in this paragraph. Each Party hereby waives any right it may have to assert the doctrine of forum non conveniens or similar doctrine or to object to venue with respect to any proceeding brought in accordance with this paragraph. Both Parties acknowledge that [forum] is a convenient forum.

B. Introduction

As business deals become more and more complex and frequently involve parties that are citizens of different forums, the issue of contracting for dispute resolution in a particular forum has become very common. Parties often spend much time and effort resolving this issue in the negotiation process with a contractual clause – a forum-selection clause – in their agreement. A forum-selection clause is a clause in a contract that provides that any dispute between the parties shall be filed in a particular jurisdiction. Otherwise stated, a "mandatory forum-selection clause" is a contractual provision that requires certain claims to be decided in a forum or forums other than the forum in which the claims have been filed. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Forum selection clauses are presumptively valid. *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (per curiam).

Of course, disputes arise when a party to the contract simply disregards the forum-selection clause and files suit

in a forum that violates the parties' agreement. For example, the parties may choose to have their disputes resolved in states such as New York, Illinois, California, and Florida, or may choose a foreign country such as England, Germany, or Brazil. If a dispute arises, and a party files suit in Texas, the defendant may want to hold the plaintiff to their agreement and have the dispute resolved in the forum previously agreed upon. The defendant would then file a motion to dismiss the suit. A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit. *See In re AIU Ins. Co*., 148 S.W.3d 109, 111-21 (Tex. 2004). Allowing a lawsuit to proceed in a forum other than that for which the parties contracted promotes forum shopping with its attendant judicial inefficiency, waste of judicial resources, delays of adjudication of the merits, and skewing of settlement dynamics. *In re Lisa Laser USA, Inc*., 310 S.W.3d 880, 883 (Tex. 2010) (per curiam). Once dismissed, the plaintiff would then have to file suit in the jurisdiction contained in the parties' agreement.

C. Right To Mandamus Relief If Court Refuses To Enforce Forum-Selection Clause

The Texas Supreme Court has repeatedly held that mandamus relief is available to enforce a forum-selection clause in a contract if a trial court errs in not enforcing same. *See, e.g., In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding); *In re Laibe Corp*., 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs.*, 286 S.W.3d 921, 922 (Tex. 2009) (orig. proceeding) (per curiam); *In re Int'l Profit Assocs.*, 274 S.W.3d 672, 674 (Tex. 2009) (orig. proceeding) (per curiam); *In re AutoNation, Inc.*, 228 S.W.3d 663, 665 (Tex. 2007) (orig. proceeding); *In re AIU Ins. Co.*, 148 S.W.3d 109, 115-19 (Tex. 2004) (orig. proceeding).

D. Historic Enforcement Of Forum-Selection Clauses In Texas

Texas courts, like others across the country, had historically invalidated forum-selection clauses for violating public policy. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972). However, since the United States Supreme Court's landmark decision in *M/S Bremen*, and its later decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595-96 (1991), Texas courts have begun enforcing forum-selection clauses. *See In re AIU Ins. Co*., 148 S.W.3d at 111-12.

Historically, Texas courts and federal courts used different analyses to determine the enforceability of mandatory forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-14 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Under the test of *M/S Bremen* and *Shute*, forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen*, 407 U.S. at 10, 92 S. Ct. at 1913; *see*

Shute, 499 U.S. at 588, 111 S. Ct. at 1525. The clause's opponent has a "heavy burden" to make a "strong showing" that the forum-selection clause should be set aside. *M/S Bremen*, 407 U.S. at 15, 92 S. Ct. at 1916. This burden includes "clearly" showing that enforcement would be "unreasonable and unjust"; that the clause was "invalid for such reasons as fraud or overreaching"; that "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision"; or that "the contractual forum will be so gravely difficult and inconvenient" that the opponent "will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 15, 18, 92 S. Ct. at 1916, 1917.

In contrast, most Texas courts of appeals had recognized a two-part test to determine whether a forum-selection clause was valid and enforceable: the clause was enforceable if (1) the parties contractually consented to submit to the exclusive jurisdiction of another jurisdiction and (2) the other jurisdiction generally recognized the validity of such provisions. *See Satterwhite Aviation Serv. v. Int'l Profit Assocs.*, No. 01-07-00053-CV, 2008 Tex. App. LEXIS 674 (Tex. App.—Houston [1st Dist.] January 31, 2008, no pet.) (court cited historical standard as correct standard even after Texas Supreme Court opinions); *My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864-65 (Tex. App.—Dallas 2003, no pet.); *Holeman v. Nat'l Bus. Inst., Inc.*, 94 S.W.3d 91, 97 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App.—Eastland 2001, pet. denied); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296-97 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, pet. denied); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ); *Greenwood v. Tillamook Country Smoker, Inc.*, 857 S.W.2d 654, 656 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (Hecht, J. dissenting from denial of petition for writ of mandamus). Even if these two threshold criteria were met, however, a forum-selection clause would not bind a Texas court if the interests of witnesses and public policy strongly favored that the suit be maintained in a forum other than the one to which the parties had agreed. *See My Cafe-CCC, Ltd.*, 107 S.W.3d at 865; *Holeman*, 94 S.W.3d at 97; *Southwest Intelecom, Inc.*, 997 S.W.2d at 324; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 71; *Greenwood*, 857 S.W.2d at 656.

One court has held that the principal differences between the *M/S Bremen* and *Shute* test and the Texas courts-of-appeals test were:

> (1) the M/S Bremen and Shute test views the forum-selection clause as prima facie valid and enforceable, while the Texas test requires the clause's proponent to establish, as a threshold matter, that the forum that the parties selected recognizes the validity of the general type of forum-selection clause and (2) the M/S Bremen and Shute test allows the opponent to defeat the

> forum-selection clause if, among other things, its enforcement would be unreasonable or unjust, while the Texas test does not expressly recognize this enforcement exception.

Phoenix Network Techs. (Europe) Ltd., 177 S.W.3d at 611-14.

E. Current Test For Enforcement Of Forum-Selection Clause

"A forum-selection clause is a creature of contract." *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A forum-selection clause does not govern claims that fall outside of its scope. *See, e.g., Major Help Ctr. v. Ivy, Crews & Elliott, P.C.*, 2000 WL 298282, Tex. App.—Austin 2000, no pet.) (DTPA claim was held to be independent of agreement, and forum-selection clause did not apply); *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 813 (Tex. App.—Texarkana 1995, writ denied) (FSC did not apply to claims based on fraudulent inducement where rights and liabilities under the contract were not at issue); *Pozero v. Alfa Travel, Inc*., 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ) (forum-selection clause in cruise ticket contract did not apply to claims not based on the contract). *See also, Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324-25 (Tex. App.—Austin 1999, pet. denied) (applying contractual interpretation principles to analysis of forum-selection clause).

Whether a trial court must dismiss a case may depend on whether the forum-selection clause is mandatory or permissive. *See Ramsay v. Texas Trading Co., Inc*., 254 S.W.3d 620 (Tex. App.—Texarkana 2008, pet. denied) (court determined that trial court correctly dismissed suit based on a mandatory clause; however, a dissenting justice would have found the clause to be permissive and reversed). Courts have recognized that clauses in which parties merely "consent" or "submit" to the jurisdiction of a particular forum will not justify dismissing a suit that is filed in a different forum. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1063 (8th Cir. 2003); *Keaty v. Freeport Indonesia, Inc*., 503 F.2d 955, 956-57 (5th Cir. 1974). *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, original proceeding) (part of forum-selection clause dealing with any and all claims was merely permissive and did not require a dismissal of plaintiff's fraud claim); *Apollo Property Partners, LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 n. 4 (Tex. App.—Houston [14th Dist.] August 5, 2008, no pet. hist.); *Sw. Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 323-26 (Tex. App.—Austin 1999, pet. denied) (clause whereby parties "stipulate to jurisdiction [in] Minnesota, as if this Agreement were executed in Minnesota" was not a mandatory forum-selection clause); *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 330 (Fla. Dist. Ct. App. 2007) (distinguishing mandatory forum-selection clauses from permissive clauses that "constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude

jurisdiction or venue in any other forum"). Simply consenting to one jurisdiction does not mean that the party agreed that there was only one appropriate forum. Whereas, a mandatory clause provides that there is only one appropriate forum for dispute resolution, and a trial court should dismiss a suit filed a forum that conflicts with the agreed-upon forum. *See In re AIU Insurance Co.,* 148 S.W.3d 109, 111 (Tex. 2004) (the clause stated: "all litigation, arbitration or other form of dispute resolution shall take place . . . ").

A court should first review whether a plaintiff's claims are within the scope of the forum-selection clause before determining whether that provision is enforceable. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687-88 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (analyzing scope before enforceability); *Braspetro Oil Servs. Co. - Brazil v. Modec (USA), Inc.*, 240 Fed. Appx. 612, 616 (5th Cir. 2007) ("Before we can consider enforcing a forum-selection clause, we must first determine 'whether the clause applies to the type of claims asserted in the lawsuit.'").

Review of Texas case law illustrates that forum-selection clauses are broadly enforced when "any and all" claims that "relate to" or "arise from" the contract are referenced. *RSR Corporation v. Siegmund*, 309 S.W.3d 686 (Tex. App.—Dallas 2010, no pet.). *See, e.g., In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration clause, Court recognized that the use of language "any" dispute "arising out of or related to" as broad language that expressly includes tort and other claims).

The Texas Supreme Court clarified that the test for enforcement in Texas was the same as the federal test. In *In re AIU Insurance*, AIU, a New York corporation, provided pollution-liability coverage for, among other entities, a Delaware corporation ("Dreyfus") with its principal place of business in Texas. 148 S.W.3d 109, 110-11 (Tex. 2004). Dreyfus sued AIU in Texas for breach of contract, statutory, and tort claims regarding whether certain environmental claims against it were covered by the policy. *See id*. at 111. AIU moved to dismiss the suit because the policy contained a forum-selection clause providing for suit in New York. *See id.* The trial court denied AIU's dismissal motion, the court of appeals denied a writ of mandamus, and the Texas Supreme Court granted writ. *See id*. at 110-11.

The Court noted that this was the first case where it addressed the validity of a forum-selection clause. *See id*. at 111. Historically, forum-selection clauses were not favored because they were viewed as "ousting" a court of jurisdiction. *See id.* However, the Court noted that the United States Supreme Court had held that such clauses should be given full effect "absent fraud, undue influence, or overweening bargaining power." *Id*. (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). The United States Supreme Court held that such a clause should control absent a strong showing that it should be set aside," and that "the correct approach [is] to enforce the forum clause specifically unless [the party opposing it] could clearly show that enforcement would be unreasonable and unjust, or

that the clause was invalid for such reasons as fraud or overreaching." *Id*. A clause may come under one of these exceptions "if enforcement would contravene a strong public policy of the forum" where the suit was filed, or "when the contractually selected forum would be seriously inconvenient for trial." *Id*.

The Texas Supreme Court held that the forum-selection clause was enforceable and rejected Dreyfus's arguments that certain of the factors established in *M/S Bremen* and *Shute* made the clause unenforceable. *See id*. at 111-16. The Court placed the burden on Dreyfus, the party opposing enforcement of the forum-selection clause, to carry its "heavy burden" of showing that the forum-selection clause should not be enforced under the *M/S Bremen* and *Shute* test. *Id*. at 113-14. The Court found that Dryfus did not meet its burden: "In the present case, the State of New York is not a 'remote alien forum.' There is no indication that AIU or Dreyfus chose New York as a means of discouraging claims. Nor is there any evidence of fraud or overreaching." *Id*. at 114. The Court held that it was certainly foreseeable to Dreyfus that it would have to litigate in New York, and that Dreyfus had shown that litigating in New York would essentially deprive it of its day in court. *Id*. at 113. After a lengthy discussion about whether AIU had an adequate remedy at law, the Court granted its petition for writ of mandamus.

Currently, "Texas state courts employ the federal standard for analyzing forum selection clauses; thus, our analysis under federal law is substantively similar to state law, and we apply Texas procedural rules." *In re Omega Protein, Inc.*, NO. 01-08-00656-CV, 2009 Tex. App. LEXIS 419 (Tex. App.—Houston [1st Dist.] January 20, 2009, orig. proceeding) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)). One court has come to at least two conclusions. "First, the Texas Supreme Court has expressly adopted the *M/S Bremen* and *Shute* test, including who has the burden to show that the forum-selection clause should not be enforced and of what that burden consists." *See Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d at 611-14. "Second, the Texas Supreme Court has implicitly adopted the presumption from *M/S Bremen* and *Shute* that forum-selection clauses are prima facie valid." *Id*. The Texas Supreme Court's implicit adoption of the federal presumption supplants the threshold requirement that the clause's proponent establish that the forum that the parties selected recognizes the validity of forum-selection provisions. *See id*.

The Texas Supreme Court has narrowly applied defenses to the enforcement of a forum-selection clause. In *In re Lyon Financial Services Inc*., a Texas imaging company ("MNI") entered into a lease with Lyon for the use of imaging equipment. 257 S.W.3d 228 (Tex. 2008) (per curiam). The lease agreement contained a forum-selection clause that provided that the state and federal courts of Pennsylvania had jurisdiction over all matters arising out of the lease, but that Lyon had the right to file suit in any jurisdiction where MNI, a surety, or the collateral resided or were located. Furthermore, there were three related schedules all incorporating by reference the equipment lease and a subsequent restructuring agreement incorporating the previous lease. The

agreements also specified that Pennsylvania law would be used for interpretation. After a dispute arose concerning whether Lyon had improperly charged MNI for equipment, MNI sued Lyon in Texas state district court for usury and unjust enrichment. Lyon filed a motion to dismiss and asserted that the forum-selection clause mandated that MNI file suit in Pennsylvania. The trial court denied the motion, and the court of appeals denied Lyon's petition for writ of mandamus.

The Texas Supreme Court first stated that forum-selection clauses are presumptively enforceable. It then addressed MNI's arguments as to why the clause should not be enforced. First, MNI argued that the clause was a product of fraudulent misrepresentations. The Court held that fraudulent inducement to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. MNI had an affidavit from its representative that stated he was misled that the forum-selection clause only applied to a schedule that he was not suing upon. The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. Further, MNI's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud.

Second, MNI argued that the clause should not be enforced because there was a disparity in bargaining power in that MNI's representative did not have legal advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. The Court determined that these facts did not show unfairness or overreaching. The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. The Court also found that the clause was not unfair simply because the clause allowed Lyon to file suit in Texas or Pennsylvania and required MNI to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged.

Third, MNI argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. MNI produced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause.

Fourth, MNI argued that it would be unjust to enforce the clause because

Pennsylvania does not allow a corporation to sue for usury. The Court held that MNI's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. Further, MNI made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. Therefore, the Court conditionally granted the petition and ordered the trial court to grant the motion to dismiss.

There are several interesting points raised by *In re Lyon Financial Services Inc*. First, the Texas Supreme Court will make it very difficult for a plaintiff to argue that he was defrauded into entering into a forum-selection (or arbitration) clause where the agreement contains language that it is the final agreement and that there are no other representations outside of the agreement. This language is typical in most agreements and seemingly trumps a plaintiff's affidavit evidence to the contrary. Second, the Court seems to be very unwilling to find that a forum-selection clause is not enforceable simply because the plaintiff did not read it, it is contained in an "adhesion" contract, and/or it would be expensive for the plaintiff to litigate in the forum of choice.

In *In re International Profit Associates, Inc.*, the plaintiff entered into two-page consultation agreements with the defendants whereby the defendants would provide business consulting services. 274 S.W.3d 672 (Tex. 2009). There was a forum-selection clause above the signature line of the agreements that stated: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying." *Id*. The defendants then recommended that the plaintiff hire an individual named David Salinas to help increase sales. Allegedly, Salinas then embezzled large sums of money from the plaintiff. The plaintiff sued the defendants in Texas state court based on negligence, fraud, negligent misrepresentations, and a breach of good faith and fair dealing. The defendants filed a motion to dismiss the suit based on the forum-selection clauses contained in the agreements.

The plaintiff argued that the clauses were unenforceable because (1) they were ambiguous; (2) they were procured through overreaching and fraud; (3) the interests of the defendants' witnesses and the public favored litigating the case in Texas; and (4) enforcement of the clauses would effectively deprive the plaintiff of its day in court. The Texas Supreme Court disagreed with each of these, and, in a per curiam opinion, conditionally granted the petition and ordered the trial court to grant the defendants' motion to dismiss.

The Court started its analysis with the following statement: "Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden." *Id*. In discussing the ambiguity argument, the Court stated that just because the clauses did not mention "litigation" did not mean that they were ambiguous:

> A contract is ambiguous when it is susceptible to more than one reasonable interpretation. The forum-selection clauses in this case are not susceptible to more than one reasonable interpretation. Each clause specifies that exclusive jurisdiction and venue shall vest in [Illinois]. The only reasonable interpretation is that the clauses fix jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois.

Id. The plaintiff also argued that the clauses were ambiguous as to whether they applied to contract and tort claims, and therefore its tort claims should not be dismissed. The Court refused to answer that question because it found that all of the plaintiff's factual claims arose from the contract. The Court drew heavily from arbitration and federal precedent regarding whether a claim sounded in tort or contract. Specifically, the Court cited to its prior opinion in *In re Weekley Homes, L.P.*, where the court found that certain tort claims sounded solely in contract and were controlled by an arbitration clause. 180 S.W.3d 127, 131-32 (Tex. 2005). The Court stated that:

> whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law.

2009 Tex. LEXIS 5. The Court stated that "determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made." *Id.*

In analyzing the pleadings of the case, the Court stated that the plaintiff's claims all arose out of the consulting agreements because the defendants recommended Salinas in the course of their consulting work and because the agreements did not limit the scope of the defendants' consulting work. The Court determined that the plaintiff's claims were within the scope of the forum-selection clauses.

The Court then turned to the plaintiff's argument that the forum-selection clauses were not enforceable because they were procured by fraud and overreaching. The plaintiff supported that allegation by arguing that its representative did not know about the clauses and that the defendants did not point those clauses out to her at a time when all of the communications were going on in Texas. The Court disagreed. Because the clauses were in two page contracts, were in the same font style and size as the other terms of the contract, and were located near the signature lines, the defendants had no duty to affirmatively point them out to the plaintiff.

Finally, the Court dismissed the plaintiff's arguments regarding the interests of the witnesses and public, convenience of litigation, and deprivation of the plaintiff's day in court. The Court stated that the plaintiff could have foreseen litigation in Illinois, which is not a remote alien forum. Further, the fact that there may be two suits – one in Texas against other defendants not parties to the agreements and one in Illinois against the defendants – did not deprive the plaintiff of its day in court. The Court concluded: "[the plaintiff] presented no evidence to overcome the presumption that the forum-selection clauses are valid." *Id*.

The Texas Supreme Court has also been reluctant to find that a party waived its right to a forum-selection clause by court related conduct. *See, e.g., In re Nationwide Ins. Co. of Am.*, No. 15-0328, 2016 Tex. LEXIS 579 (Tex. June 24, 2016).

The end conclusion from a review of these cases is that the party opposing the enforcement of a forum-selection clause truly has a heavy burden in defeating enforcement of such a clause.

F. Conspicuousness Requirement

The Texas Supreme Court determined that, like arbitration clauses, there is no conspicuousness requirement for the enforcement of a forum-selection clause. In *In re International Profit Associates Inc*., Riddell Plumbing Inc. hired International Profit Associates ("IPA") to provide business consulting services. 286 S.W.3d 921 (Tex. 2009). The parties' contract contained a forum-selection clause selecting Illinois as the forum for any contract dispute. The forum-selection clause was on the first page of a four-page contract. However, Riddell sued IPA in Dallas County, Texas. IPA filed a motion to dismiss the case based on the forum-selection clause. At the hearing, Riddell's president testified that IPA never presented the first page containing the forum-selection clause to him. The trial court denied the motion to dismiss, and explained that IPA did not prove the page containing the forum-selection clause was ever presented to Riddell. The court of appeals denied IPA's petition for writ of mandamus. IPA filed a petition with the Texas Supreme Court.

The issue in the case is whether a party seeking to enforce a forum-selection clause has to prove the other party was shown the clause when the contract was formed. The Texas Supreme Court held that the party challenging the forum-selection clause must prove its invalidity, and that party "bears a heavy burden of proof." *Id*. at 923 The burden is not on the party seeking to enforce the clause. The Court stated the following standard:

> A trial court abuses its discretion in refusing to enforce the forum-selection clause, unless the party opposing enforcement of the clause can clearly show that: (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was

> brought, or (4) the selected forum would be seriously inconvenient for trial.

Id. Under this standard, the Court determined that the trial court abused its discretion in refusing to enforce the clause.

The Court first acknowledged that evidence that a party concealed a forum-selection clause combined with evidence proving that concealment was part of an intent to defraud a party may be sufficient to invalidate the clause. However, a party who signs a document is presumed to know its contents including documents specifically incorporated by reference. "[S]imply being unaware of a forum-selection clause does not make it invalid." *Id*. at 924. Further, "parties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation." *Id*.

Each of the three pages Riddell's officer admitted that he reviewed was labeled as "one of four" and the page he signed noted just above his signature that the agreement was four pages. He had notice of a missing first page and was under an obligation to review it: "he could have asked for the missing page." *Id*. at 923. The Court concluded that Riddell's inattention is not evidence of fraud or overreaching:

> Scott Riddell's inattention to page one of the contract is not evidence of fraud or overreaching because there is no evidence that IPA made any misrepresentations about or fraudulently concealed the existence of page one or any other portion of the contract. To the contrary, the existence of page one is referenced on every page of the agreement that Scott Riddell read and endorsed. If we were to determine otherwise, it would require a party seeking to enforce a forum-selection clause to prove that the opposing party was separately shown each provision of every contract sought to be enforced and was subjectively aware of each clause. Parties who sign contracts bear the responsibility of reading the documents they sign.

Id. at 924. The Court, in a per curiam opinion, then conditionally granted IPA's petition and directed the trial court to grant the motion to dismiss.

Similarly to arbitration agreements, there is no conspicuousness requirement for forum-selection clauses. Rather, the hiding of such a provision must rise to the level of fraud before it is a defense.

G. Direct-Benefits Estoppel

Texas courts have applied direct-benefits estoppel to determine whether non-signatories may rely upon a forum-selection clause. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Specifically, several courts of appeals hold that equitable estoppel may permit a non-signatory to enforce a forum-selection clause where either of the following two circumstances were present: (1) "under 'direct benefits-estoppel,' a non-signatory may enforce an arbitration agreement when the signatory plaintiff sues it seeking to derive a direct benefit from the contract containing the arbitration provision" and (2) "[e]stoppel theory also applies when a signatory plaintiff sues both signatory and non-signatory defendants based upon substantially interdependent and concerted misconduct by all defendants." *Phoenix*, 177 S.W.3d at 622. *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, orig. proceeding); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc*., 234 S.W.3d at 693-94. Note that Texas Supreme Court has since disapproved of the "concerted misconduct" theory to allow a non-signatory to enforce an arbitration clause. *See In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007).

H. Conclusion On Forum-Selection Clauses

The Court liberally cites to arbitration precedent in enforcing forum-selection clauses. Like the arbitration clause, there is a heavy presumption in favor of forum-selection clauses. Further, like the arbitration clause, there is no requirement that a forum-selection clause be conspicuous and it can be enforced by or against a non-signatory. The Texas Supreme Court has announced some defenses to enforcement that do not exist for arbitration clauses, i.e., enforcement would contravene a strong public policy of the forum where the suit was brought or the selected forum would be seriously inconvenient for trial. Yet, the Court has placed a very high standard to establish these defenses.

IV. Contractual Jury Waivers

A. Form

THE PARTIES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY KNOWINGLY, INTENTIONALLY, IRREVOCABLY, UNCONDITIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT OR ANY CONDUCT, ACT OR OMISSION OF EITHER PARTY OR ANY OF THEIR DIRECTORS, OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, AGENTS OR ATTORNEYS, OR ANY OTHER PERSONS AFFILIATED WITH THE PARTIES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE.

B. Introduction

A contractual jury waiver is a contractual provision that expressly states that the parties to the contract waive their right to a jury should a dispute arise between them. If a dispute arises, one party could sue the other in court, but neither party would have the

option to request a jury to determine the outcome. The judge sits as the finder of fact. Of course, this would seem to conflict with a party's constitutional right to a jury trial. *See* Tex. Const. Art. I, § 15 ("The right of trial by jury shall remain inviolate."); Tex. Const. Art. V, § 10 (granting right to jury trial in district courts). Yet, Texas courts, and almost all other jurisdictions, have held that contractual jury waivers are permissible and enforceable under certain circumstances.

A natural question is why would a party choose to use a contractual jury waiver as compared to an arbitration clause. Generally, arbitration clauses are a good idea for consumer contracts such as a depositor agreement. The initial filing fees for arbitration are normally prohibitive for consumers, and the clause will ward off some claims. However, arbitration clauses may not be such a good idea for other contracts. There are multiple reasons for this, but a few are as follows. Arbitrations are not as inexpensive as advertised. The parties have to pay the arbitrator(s), and this can be very expensive depending on the expertise required. The parties still do discovery, and it is normally about as expensive as regular litigation.

Moreover, arbitrators have an incentive to keep the arbitration going, and therefore, do not generally grant pre-hearing dispositive motions. Judges do not have that incentive, and at least in Texas grant partial or complete summary judgments on a regular basis. So, if a party is in an arbitration, an evidentiary hearing will most likely be required, which will be expensive and uncertain in outcome. In a court of law, that may not be the case. Also, and importantly, in an arbitration there is basically no appellate review. An arbitrator's decision is almost impossible to overturn no matter the facts or the law. In a court of law, there is an appellate remedy to correct the insufficiency of evidence and the incorrect application of law.

As a result, parties are turning to the alternative of the contractual jury waiver. These clauses are recognized in federal courts and most state courts. This eliminates the uncertainty of a runaway jury finding, but preserves other rights that exist in a court of law. When coupled with a forum-selection clause and venue provisions, a party may be able to eliminate the risk of being in an unfavorable jurisdiction or area of a jurisdiction as well.

C. The Texas Supreme Court Affirms Use Of Jury Waivers

In *In re Prudential*, the Texas Supreme Court held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The case involved a dispute over a restaurant lease where the lessees sued the lessor claiming a bad smell disrupted their business. The plaintiffs demanded a jury and paid the fee. *Id*. at 128. The defendants filed a motion to quash the jury demand relying on a jury waiver clause in the lease. The trial court denied the motion, and the defendants sought mandamus relief.

The Texas Supreme Court first stated that nothing in the constitutional provisions or Texas Rules of Civil Procedure provided that any right to a jury trial could not be waived by a party. The Court then addressed the defendants' main contention: that jury waivers were void as against public policy because they would grant parties

the private power to fundamentally alter the civil justice system. The Court found otherwise:

> [P]arties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. ICP argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. We are not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.

Id. Thus, the Court analogized contractual jury waivers to arbitration agreements and forum-selection clauses.

The plaintiffs argued that permitting contractual jury waivers could cause a party to take unfair advantage of another party. *Id*. at 132. The Court held that such an agreement would be unenforceable:

> [A] waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. We echo the United States Supreme Court's admonition that 'waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' Under those conditions, however, a party's right to trial by jury is afforded the same protections as other constitutional rights.

Id. Therefore, the Court found that a contractual jury waiver had to be entered into knowingly and voluntarily.

However, the Court then found that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause:

> By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take

> advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Id.

The plaintiffs argued that the waiver was not entered into knowingly and voluntarily. The Court disagreed and cited factors such as: both sides had counsel, there were a number of changes to the lease, and the waiver was clear and unambiguous. The Court expressly commented that it was not ruling on whether a contractual jury waiver had to be conspicuous. Therefore, even though the Court found that a contractual jury waiver was less intrusive than an arbitration agreement, it found that it had to be voluntarily and knowingly entered into.

In *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). In that circumstance, a court should apply the arbitration rules and analysis. *Id.*

The Texas Supreme Court once again addressed contractual jury waivers in *In re GE Capital*, where the court granted mandamus relief to enforce a contractual jury waiver. 203 S.W.3d 314, 316-17 (Tex. 2006). The Court first addressed the plaintiff's argument that the defendant had waived the contractual jury waiver and found that the defendant did not waive its right to enforce the contractual jury waiver by immediately filing a motion to quash the demand.

The Court then addressed whether the contractual jury waiver was enforceable. The plaintiff contended that the trial court correctly refused to enforce the contractual jury waiver because the defendant did not present evidence that the waiver was entered into knowingly and voluntarily as required to enforce such a waiver. The waiver provision was written in capital letters and bold print. The court disagreed with the plaintiff's argument:

> Such a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. [The plaintiff] did not challenge the jury waiver provision in the trial court and only summarily contends here that the provision is invalid. . . Finding no evidence that the provision was invalid or that [the defendant] knowingly waived its contractual right to a non-jury trial, we conclude

> that the trial court abused its discretion in failing to enforce the provision.

Id. (internal citations omitted). Accordingly, the Court found that a voluntary and knowing waiver was still a requirement, but placed the burden on the plaintiff to prove that it was not a voluntary or knowing waiver where the provision was conspicuous.

D. Some Texas Intermediate Appellate Courts View Jury Waivers Differently From Arbitration Clauses

Several courts of appeals that have addressed contractual jury waivers. Some courts treat jury waivers the same as arbitration and forum-selection clauses. One court has held that contractual jury waiver provisions are enforced like any other contractual clause, including an arbitration clause. *See In re Wild Oats Mkts.*, No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App. — Beaumont Apr. 2, 2009, orig. proceeding). That court stated: "In its response, Kuykendahl suggests arbitration cases are treated more favorably than other contractual jury waiver cases. We disagree." *Id.* at n. 1. Ultimately, the court denied the petition for writ of mandamus because the plaintiff was not a signatory to the agreement, and though potentially available, direct-benefits estoppel did not apply due to the facts of the case. *See id.*

Other courts have not been as friendly to the enforcement of contractual jury waivers. For example, in *Mikey's Houses, LLC v. Bank of America, N.A.*, the Fort Worth Court of Appeals found that a trial court erred in enforcing a contractual jury waiver because the defendant did not prove that it was entered into voluntarily and knowingly. 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.).

The court found that contractual jury waivers were very different from arbitration agreements. It found that "public policy favors arbitration; the same cannot be said of the waiver of constitutional rights;" "although statutes generally require courts to compel contractual arbitration, no comparable statutory mandate directs courts to enforce contractual jury trial waivers"; "application of the standards for enforcing arbitration clauses would conflict with the Brady 'knowing and voluntary' standard that the Texas Supreme Court adopted in *In re Prudential*"; and "a distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution." *Id.* at 151-52.

The court found that contractual jury waivers are only enforceable if the waiver is made knowingly, voluntarily, and intelligently "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 149. The court first found that the burden was on the party attempting to enforce the clause and that there was a rebuttable presumption against enforcing the waiver. The court then set out seven factors that a court may look to in determining whether a party has rebutted the presumption against waiver:

> (1) the parties' experience in negotiating the

> particular type of contract signed, (2) whether the parties were represented by counsel, (3) whether the waiving party's counsel had an opportunity to examine the agreement, (4) the parties' negotiations concerning the entire agreement, (5) the parties' negotiations concerning the waiver provision, if any, (6) the conspicuousness of the provision, and (7) the relative bargaining power of the parties.

Id. at 153. In applying those factors, the court cited the present facts of knowing waiver as follows:

> The waiver here was not included in the Texas Real Estate Commission standard one-to-four family residential contract. Nor was it presented to Martin and Powell concurrently with the sales contract. Instead, after the sales contract had been executed, Bank of America presented a two-page addendum to the contract to Martin and Powell for their signatures. No evidence exists in the record that the sales contract or the addendum were negotiated.
>
> Paragraph thirteen, in the middle of the second page of the addendum, provides as follows: "Waiver of Trial by Jury. 13 Seller and Buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract." This paragraph is not set forth any differently than the other paragraphs in the addendum; that is, the entire paragraph is not printed in larger font, not printed in a different color, not bracketed or starred, does not have blanks beside it for the Seller and Buyer to place their initials, nor does it possess any unique features to distinguish it or make it stand out from the other twenty paragraphs in the addendum, as seen in Appendix A. Martin testified that Mikey's Houses was not represented by counsel. She did not recall reading the jury waiver paragraph and testified that it was not discussed or explained. She said that she did not understand that by signing the addendum she was waiving her constitutional right to trial by a jury. She said that she did not understand the consequences of the provision.

Id. at 154. Based on this evidence and the factors set forth above, the court determined that on the record before it, there was no evidence showing that the plaintiffs had knowingly and voluntarily waived their right to a jury trial. *Id*. at 155. The court reversed the trial court's ruling granting the defendant's motion to enforce the jury trial waiver.

In *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, the Houston Fourteenth Court of Appeals similarly referred to enforce a contractual jury waiver. 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). This case involved a dispute over a loan agreement where a non-signatory defendant attempted to enforce a contractual jury waiver against a signatory plaintiff. The defendant alleged that the plaintiff relied on the loan agreement as the basis of its claims and was therefore equitably estopped from denying the application of the jury waiver clause. The defendant cited to precedent that would support such an argument in the arbitration context. The trial court denied the request to apply the jury waiver by the non-signatory defendant.

On mandamus review, the court of appeals first directly contrasted arbitration and jury waiver clauses:

> Unlike arbitration agreements, which are strongly favored under Texas law, the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended. Before a jury waiver will be enforced, such waiver must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences.

Id. The court then analyzed the provision that expressly stated that the lender and borrower agreed to it. The court stated that because the clause expressly only applied to the signatories, the non-signatory defendant could not enforce the provision. The court then held that it would not apply equitable estoppel in the context of contractual jury waivers:

> We decline to recognize direct-benefits estoppel as a vehicle by which a jury waiver clause may be applied to claims against a party that did not sign the contract containing the clause. We are unaware of any court, in Texas or elsewhere, that has applied direct-benefits estoppel to a jury waiver provision.

Id. The court then stated that arbitration clauses are different from and implicate different policy issues than jury waivers:

> We recognize that Texas courts have occasionally referenced arbitration principles in deciding jury-waiver issues. However, these occasional references do not signal a departure from the longstanding principle that jury

> waivers are disfavored in Texas. Nor can *Prudential* or *Wells Fargo* be read as placing jury-waiver provisions on the same footing as arbitration clauses. These mechanisms cannot be treated interchangeably merely because they both lead to decisions by factfinders other than jurors. Jury waiver provisions and arbitration clauses implicate significantly different policies and principles. In upholding parties' freedom to contract, the Texas Supreme Court noted that arbitration agreements--which are strongly favored--allow parties to contractually opt out of the civil justice system altogether. The use of arbitration as an example of contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements.

Id. The court concluded that it would "not use equitable estoppel as a vehicle to circumvent the required "knowing and voluntary" waiver standard." *Id*.

In a later decision, also styled, *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, the Houston Court once again denied a petition for writ of mandamus on a trial court's denial of a motion to enforce a contractual jury waiver. No. 14-08-00819-CV, 2008 Tex. App. LEXIS 9299 (Tex. App.—Houston [14th Dist.] December 11, 2008, orig. proceeding). This was a subsequent proceeding from the case that was just discussed. In the first opinion, the court declined to consider the movant's agency argument. The movant then filed a motion for reconsideration with the trial court based on agency and argued that because the defendant was an agent of a signatory, it should be allowed to enforce the contractual jury waiver. The trial court denied the motion for reconsideration. The movant then filed another petition for writ of mandamus with the court of appeals.

The court held that "when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as agents of the corporation." *Id*. The court acknowledged that the plaintiff had alleged that the defendant was an agent of the signatory. However, the court determined that allegations alone were not sufficient: "we further hold that a nonsignatory may not invoke a jury waiver merely because it is alleged to be an agent of the signatory." *Id*. The court then held that because the defendant did not provide proof that it was an agent, the trial court did not abuse its discretion in denying the motion for reconsideration:

> Because Texas law does not presume that an agency relationship exists, the party alleging agency has the bur-den to prove it. An enforceable contract requires a "meeting of the minds" between both parties. Absent proof of CSFB's

> agency relationship with Mortgage Capital, we cannot assume that the parties intended to include CSFB in their contractual jury waiver.
>
> Therefore, we hold that the trial court did not abuse its discretion by declining to extend the jury waiver on the basis of allegations alone. Because the right to a jury trial implicates constitutional guarantees, we will not lightly infer or extend a contractual jury waiver absent proof that the parties intended it to include claims against nonsignatories.

Id.

E. Texas Supreme Court Addresses Which Party Has Burden To Establish Knowing and Voluntary Waiver

In *In Re Bank Of America, N.A.*, the Texas Supreme Court granted mandamus relief and ordered the court of appeals to enforce the trial court's order enforcing the contractual jury waiver. 278 S.W.3d 342 (Tex. 2009). The Court disagreed with the court of appeals's inference that a contractual jury waiver was not enforceable. *Id*.

The Court first held that a presumption against waiver would violate the parties' freedom to contract. The Court held that "a presumption against contractual jury waivers wholly ignores the burden-shifting rule" previously found by the Court that "a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it." *Id*. Courts presume that "a party who signs a contract knows its contents." *Id.* Therefore, the Court concluded that "as long as there is a conspicuous waiver provision, Mikey's Houses is presumed to know what it is signing." *Id*.

The Court then addressed what the test was for determining whether there was a conspicuous contractual jury waiver:

> Section 1.201(b)(10) of the Texas Business and Commerce Code provides that "[c]onspicuous . . . means so written, displayed, or presented that a reason-able person against which it is to operate ought to have noticed it." In *Prudential*, we noted that the waiver provision was "crystal clear" because "it was not printed in small type or hidden in lengthy text" and "[t]he paragraph was captioned in bold type." 148 S.W.3d at 134.

Id. The Court reviewed the contract at issue and found that the contractual jury waiver was conspicuous:

> In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty

> provisions included bolded introductory captions similar to the waiver provision in *Prudential*, and the "Waiver of Trial By Jury" caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word "waiver" and the words "trial by jury" within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both Prudential and General Electric, and therefore serves as prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to trial by jury.

Id. Because the contractual jury waiver was conspicuous, the Court found that the bank did not have the burden to establish a knowing and voluntary waiver.

Interestingly, the Court noted that if the party opposing the jury waiver had alleged fraud with regard to the jury waiver provision, that it would have shifted the burden to the party seeking to enforce the jury waiver to establish a knowing and voluntary waiver: "As for the extent of the allegation that would be necessary to shift the burden to Bank of America to prove knowledge and voluntariness, an allegation could be sufficient to shift the burden if there is fraud alleged in the execution of the waiver provision itself." *Id*.

Finally, the Court noted that the court of appeals's presumption was contrary to the fact that contractual jury waivers were similar to arbitration agreements:

> We also note the similarity between arbitration clauses and jury-waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential's* jurisprudence with regard to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that "arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion." Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals' analysis errs by distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial

> presumption against jury waivers. Statutes compel arbitration if an arbitration agreement exists, and more importantly, "Texas law has historically favored agreements to resolve such disputes by arbitration." We see no reason why there should be a different rule for contractual jury waivers.

Id. The court then conditionally granted the petition for writ of mandamus, holding that that trial court's enforcement of the contractual jury waiver provision was correct.

There is no question that contractual jury waivers are enforceable in Texas under the right circumstances. The issue facing Texas courts is whether the clause is something different from an arbitration clause or a forum-selection clause and thus should be judged by different standards. Does Texas law require a conspicuous jury waiver clause? Does the clause have to be entered into by both parties on a knowing and voluntary basis? If so, whose burden is it to prove a knowing and voluntary waiver? Are there any presumptions in favor of or against jury waivers? What factors will Texas Courts look to in determining a voluntary and knowing waiver?

The opinion in *In re Bank of America* could be read narrowly. Just as the Court determined in *In re General Electric*, the jury waiver clause was conspicuous, and therefore, the burden was on the party opposing the waiver to prove that it was not entered into knowingly and voluntarily. The Court did not deal with a non-conspicuous clause and did not expressly hold that the party opposing a non-conspicuous clause would have that initial burden of proving a knowing and voluntary waiver. Therefore, there is still a question as to whether the burden of proving a knowing and voluntary waiver is on the party attempting to enforce a non-conspicuous jury waiver clause.

Most recently, the Texas Supreme Court held in *In re Frank Kent Motor Co.*, that an employer can require an employee to sign a jury-waiver in fear of termination without that constituting coercion. 361 S.W.3d 628 (Tex. 2012). The Court held:

> There is no reason to treat the effect of the at-will employment relationship on a waiver of jury trial differently from its effect on an arbitration agreement. Arbitration removes the case from the court system almost altogether, and is every bit as much of a surrender of the right to a jury trial as a contractual jury waiver. Additionally, refusing to allow the enforcement of jury trial waivers in the context of the at-will employment relationship would create a practical problem. Since employers can fire at-will employees for almost any reason, employers could resort to firing all employees when they wanted to implement new dispute resolution procedures and rehiring

only those employees who signed the waiver.

Id. at 632. The Court concluded: "An employer's threat to exercise its legal right [to fire an employee for any reason] cannot amount to coercion that invalidates a contract." *Id*.

F. Should The Enforcement Of A Jury-Waiver Clause Differ From An Arbitration Clause And A Forum-Selection Clause?

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter a party's right to dispute resolution. They can all waive a party's right to a jury trial. However, those clauses seemingly have different tests for their enforcement.

Texas courts liberally enforce arbitration clauses notwithstanding the fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. In Texas, arbitration agreements are interpreted under general contract principles. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *See In re Oakwood Mobile Homes, Inc*., 987 S.W.2d 571, 573 (Tex. 1999). Further, there are instances where Texas courts have enforced arbitration agreements against nonparties under the theory of estoppel. *See, e.g., In re Weekley Homes,* 189 S.W.3d 127 (Tex. 2005); *In re Kellog, Brown & Root,* 166 S.W.3d 732 (Tex. 2005). Absent narrow exceptions, there is no requirement that the party relying on the arbitration agreement prove that it is conspicuous or that all parties entered into the agreement voluntarily or knowingly. In addition to a strong presumption in favor of an arbitration clause, the enforcement of an arbitration clause is a mere contract-based analysis with normal contract-based defenses.

Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *See In re AIU Ins. Co*., 148 S.W.3d at 112. Though there is ostensibly an "unreasonable and unjust" exception to enforcing a forum-selection clause that does not exist for arbitration agreements, the Texas Supreme Court has seemingly enforced forum-selection clauses the same as arbitration agreements.

Courts have not held that there has to be any showing of a knowing or voluntary agreement to enforce a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d 605, 622-24. Moreover, Texas courts apply arbitration precedent to forum-selection clauses. The Supreme Court's forum-selection clause cases liberally cite to and refer to arbitration precedent.

Contractual jury waivers are clauses in contracts that state that the parties waive the right to a jury and will submit their disputes to the court. However, a plaintiff still gets to have its choice of Texas as the jurisdiction for dispute resolution and is still entitled to full discovery, cross examination, and,

importantly, appellate review of the trial court's decision. The same cannot be said of arbitration, and may not be able to be said for forum-selection clauses depending on the forum. Because contractual jury waivers are less intrusive than arbitration or forum-selection clauses, common sense would lead to the conclusion that they are enforced with the same contractual analysis and are at least as easily enforced as arbitration agreements.

However, contractual jury waivers are not enforced under the same standards as arbitration or forum-selection clauses, parties have a more difficult burden to enforce jury waivers. In *In re Prudential*, the Texas Supreme Court for the first time held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The Court held that such an agreement may be unenforceable where it was not entered into voluntarily, knowingly, and intelligently. *Id*. Oddly, despite creating a "voluntary, knowing, and intelligent" requirement, the Court acknowledged that a contractual jury waiver was less of a depravation of constitutional rights than an arbitration clause.

Texas intermediate courts of appeals have been understandably conflicted on the meaning and use of the "voluntary, knowing, and intelligent" requirement. *See, e.g., See In re Wild Oats Mkts*., No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App.—Beaumont Apr. 2, 2009, orig. proceeding) (contractual jury waiver treated the same as arbitration clause); *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, No. 14-08-00132-CV, 2008 Tex. App. LEXIS 4661 (Tex. App.—Houston [14th Dist.] June 17, 2008, orig. proceeding) (court would "not use equitable estoppel as a vehicle to circumvent the required 'knowing and voluntary' waiver standard."); *Mikey's Houses, LLC v. Bank of Am., N.A.*, 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.) (presumption against enforcement of contractual jury waiver); *In re Wells Fargo*, 115 S.W. 3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

The Texas Supreme Court has not discussed why there are different standards for contractual jury waivers than for arbitration agreements or forum-selection clauses. However, in *In re Prudential* the Court clearly stated that contractual jury waivers were less intrusive than arbitration agreements and forum-selection clauses. One reason that arbitration clauses are favorably viewed is that there are federal and state statutes extolling arbitration's virtue while there is no such statute for jury waivers. Of course, a statute should not be able to trump a constitutional right.

But that begs the main question – why does a party fighting a contractual jury waiver have a "knowing and voluntary" defense when similar parties fighting arbitration and forum-selection clauses do not? If the "knowing and voluntary" requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments. *See, e.g., Walker v. Ryan's Family Steak Houses, Inc*., 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to "knowing and voluntary" standard); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (concluding that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to

submit such disputes to arbitration"). *See also, e.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 675 (2001) (arguing for harmonization under the knowing and voluntary standard of waiver); *accord* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102-08 (1992); Richard Reuban, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1019-34 (2000); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996). *But see* Andrew M. Kepper, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine To Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345, 1365 (2006) (arguing that harmonization of differing standards for enforceability between arbitration and jury waivers is not necessary); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167-97 (2004) (arguing for harmonization under the contract-law standard of waiver).

Yet, most courts have held that the "knowing and voluntary" requirement does not apply to arbitration clauses. *See, e.g., Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (knowing and voluntary requirement does not apply to arbitration agreements); *accord Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005) (same); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (same); *Sydnor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (same); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (same).

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other countries of the world has a huge impact on parties' constitutional rights. Few countries provide a right to a jury. Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. For example, in *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). Why should a different, more strenuous, standard apply when jury waiver clauses are not included in arbitration agreements?

Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights – however, as courts acknowledge, a party can waive those rights. They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher "knowing and voluntary" standard. Further, equitable estoppel should apply to all of these clauses or to none of them. There is no logical difference between them.

V. Personal Jurisdiction Clauses

A. Form

The Parties hereby unconditionally consent to the jurisdiction of the state of [location] and waive any and all objections to the exercise of personal jurisdiction over them by the courts of the state of [location].

B. Analysis

Personal jurisdiction is a waivable requirement. *See Halabu v. Petroleum Wholesale, LP.*, No. 01-07-00614, 2008 Tex. App. LEXIS 3852 (Tex. App.—Houston [1st Dist.] May 22, 2008, no pet.); *PCC Sterom, S.A. v. Yuma Exploration & Prod. Co.*, No. 01-06-00414-CV, 2006 Tex. App. LEXIS 8702 (Tex. App.—Houston [1st Dist.] October 5, 2006, no pet.). "A forum-selection clause is one of several ways in which a litigant may expressly or impliedly consent to personal jurisdiction." *Abacan Technical Servs. Ltd. v. Global Marine Intern. Servs. Corp.*, 994 S.W.2d 839, 843 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Accordingly, if the parties' contract has a clause that designates Texas as a forum for conflict resolution, a plaintiff should raise that fact in defending against a defendant's special appearance or objection to personal jurisdiction. *See, e.g., First ATM, Inc. v. Onedoz, Inc.*, No. 03-08-00286-CV, 2009 Tex. App. LEXIS 1020 (Tex. App.—Austin February 13, 2009, no pet.) (affirmed denial of special appearance due to forum-selection clause).

Conversely, if a defendant that is sued in Texas has a contract that names another state as a permissive forum for conflict resolution, then the defendant may raise that as a factor in convincing the trial court that it did not have sufficient contacts in Texas to satisfy personal jurisdiction. *See J.A. Riggs Tractor Co. v. Bentley*, 209 S.W.3d 322 (Tex. App.—Texarkana 2006, no pet.). For example in *Bentley*, the court of appeals stated:

> In light of the scant[] evidence in support of Riggs' purposeful availment, we note that the forum selection clause in the credit agreement suggests that Riggs anticipated suit in Arkansas and further suggests that Riggs was not availing itself of the benefit of Texas' laws. Although forum-selection clauses are not dispositive, they "should not be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws.'"

Id. (internal citation omitted). *See also Alstom Power Inc. v. Infrasure, Ltd.*, No. 03-07-00670-CV, 2010 Tex. App. LEXIS 1012 (Tex. App.—Austin February 12, 2010, no pet.).

Further, one court has held that a non-mandatory consent to jurisdiction clause should have the same impact as a forum-selection clause regarding an objection to personal jurisdiction. *See Parrot-Ice Drink Products of America, Ltd., v. K&G Stores, Inc.*, No. 14,09-00008-CV, 2010 Tex. App. LEXIS 2345

(Tex. App.—Houston [14th Dist.] March 30, 2010).

VI. Venue-Selection Clause

A. Form

The Parties agree that any and all disputes between them shall be solely filed in state courts of _____ County, Texas, the courts of which shall be the exclusive venue for any and all claim. The Parties stipulate that this Agreement concerns a major transaction as defined in Section 15.020 of the Texas Civil Practice and Remedies Code.

B. Introduction

There is a distinction between clauses that require a suit to be brought in another state—forum-selection clauses—and those that require a suit to be brought in a particular county in Texas—venue-selection clauses. "Forum" relates to the jurisdiction, generally a nation or State, where suit may be brought. *See Liu v. CiCi Enters., LP*, No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). "Venue," on the other hand, generally refers to a particular county or a particular court. *See Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Thus, a "forum"-selection agreement is one that chooses another state or sovereign as the location for trial, whereas a "venue"-selection agreement chooses a particular county or court within that state or sovereign." *See In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 72-79 (Tex. App.—Corpus Christi 2008, orig. proceeding) (trial court properly refused to enforce agreement contracting away mandatory venue).

As shown herein, forum-selection clauses are generally enforceable. However, a court may not enforce a venue-selection clause if doing so is inconsistent with Texas's venue statutes. *See In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d at 72-79. Venue-selection clauses are generally enforceable by statute if they arise out of ''major transactions" as defined by the statute. Tex. Civ. Prac. & Rem. Code § 15.020; *In re Medical Carbon Research Inst., L.L.C.*, No. 14-08-00104-CV, 2008 Tex. App. LEXIS 2518 (Tex. App.—Houston [14th Dist.] April 9, 2008, original proceeding) (agreement was not enforceable where it was entered into after suit was filed). Otherwise stated, venue-selection clauses are generally unenforceable in Texas unless the contract evinces a "major transaction" as defined in the venue rules. *See In re Tex. Ass'n of Sch. Bds.*, 169 S.W.3d 653, 660 (Tex. 2005) (venue-selection clause in contract that was not a major transaction unenforceable); *Yarber v. Iglehart*, 264 S.W.2d 474, 476 (Tex. Civ. App.—Dallas 1953, no writ) (real-estate agent committed no actionable wrong in contract or in tort by refusing to perform an unenforceable oral agreement).

Section 15.020 of the Civil Practice and Remedies Code is a mandatory venue provision. *In re Royalco Oil & Gas Corp.*, 287 S.W.3d 398, 399, n.2 (Tex. App.—Waco 2009, orig. proceeding). It provides that "[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county." Tex. Civ. Prac. & Rem. Code

Ann. § 15.020(b). Further, it defines a "major transaction" as "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $ 1 million." *Id*. at § 15.020(a).

The Texas Supreme Court has recently granted mandamus relief to enforce a valid venue-selection clause. *In re Fisher*, 433 S.W.3d 523 (Tex. 2014).

One case enforced a venue-selection clause and addressed arguments concerning whether the clause was permissive or mandatory and whether fraud and unconscionability were defenses to the enforcement of the clause. *In Re Railroad Repair & Maintenance, Inc*., No. 05-09-01035-CV, 2009 Tex. App. LEXIS 8404 (Tex. App.—Dallas November 2, 2009, orig. proceeding). The court held that the clause was mandatory because it used the term "exclusive" venue, and held that the fraud and unconscionability defenses were not applicable because there was no evidence to support them at the venue hearing. *See id.*

If a venue provision is enforceable, but a trial court does not grant a motion to transfer venue, then a party may seek mandamus relief. Indeed, "mandatory venue provisions trump permissive ones." *Airvantage, L.L.C. v. TBAN Properties # 1, L.T.D.*, 269 S.W.3d 254, 257 (Tex. App. —Dallas 2008, no pet.). Where a party seeks to enforce a mandatory venue provision under Chapter 15 of the Texas Civil Practices and Remedies Code, a party is not required to prove the lack of an adequate appellate remedy, and is only required only to show that the trial court abused its discretion by failing to transfer the case. *See In re Tex. DOT*, 218 S.W.3d 74, 76 (Tex. 2007).

VII. Service-Of-Process Clause

A. Form

All parties hereto irrevocably consent to the service of process in any suit, action or proceeding in court by the mailing thereof, by registered or certified mail, postage prepaid, to its address for notices set forth in this Agreement. Service shall be deemed effective five days after such mailing. If requested to do so by any party, each party hereto agrees to waive service of process and to execute any and all documents necessary to implement such waiver in accordance with the Texas Rules of Civil Procedure.

B. Analysis

There is no Texas statute that addresses the issue of a method of service provision in a contract. In *National Equipment Rental, Ltd. v. Szukhent*, the United States Supreme Court considered whether a party to a private contract can appoint an agent to receive service of process even though the party may not have complied with state law requirements for establishing an agency relationship. 375 U.S. 311 (1963). In dicta, the Court noted that "it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id*. at 315-16. Other state courts cite this as case for contractual service of process notice provisions.

The Fort Worth Court of Appeals approved the use of a manner of service provision in a contract to effectuate service in *Nussbaum v. Builders Bank*, 2015 Tex. App. LEXIS 6883 (Tex. App.—Fort Worth, July 2, 2015). The case involved a guaranty agreement with a provision that all notices should be given to the guarantor by registered or certified mail at an address in California. The guarantor moved from that address, but failed to provide the lender with an updated notice address. Pursuant to the Texas long-arm statute, the lender served the Secretary of State and provided it with the notice address from the guaranty. Because the guarantor failed to respond to the lawsuit, the lender obtained default judgment against the guarantor.

Even though the guarantor never received actual notice of the petition, the court of appeals still held that service of process was completed: "Parties who contractually agree to a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed." *Id*. at *10 (quoting *Lease Fin. Grp., LLC v. Moore*, 42 Misc. 3d 135[A], 984 N.Y.S.2d 632, 2014 NY Slip Op 50074[U], 2014 WL 300800, at *1-2 (N.Y. App. Div. 2014) (declining to set aside default judgment when service of process was attained in accordance with provision of parties' equipment finance lease/guaranty agreement). "When a party to a contract agrees or consents to a certain manner of service and service is accomplished in that manner, 'if there has been any denial of due process, . . ., it is the result of a self-inflicted wound.'" *Id*. at *10-11 (quoting *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 683 S.E.2d 486, 491 (S.C. 2009) (holding default judgment was not void for lack of service of process when defendant was served in accordance with service-of-process provisions defendant consented to in a guaranty agreement)). The court concluded that "[t]he parties to the guaranty were free to agree to this contractual provision; it is not against any law and does not violate any public policy." See also *Nat'l Equip. Rental, Ltd. v. Polyphasic Health Sys., Inc*., 141 Ill. App. 3d 343, 490 N.E.2d 42, 46, 95 Ill. Dec. 569 (Ill. App. Ct. 1986) (explaining that Illinois recognizes service of process through agreed means; the parties to a guaranty agreed to the method of service).

The South Carolina Supreme Court reached the same conclusion when reviewing the requirements on serving process in Texas. *Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 683 S.E.2d 486, 491 (S.C. 2009). In that case, a lender initiated foreclosure proceedings against a guarantor in a South Carolina court under a default judgment issued by a Texas federal court. The guarantor challenged the foreclosure arguing that Texas default judgment was void due to a lack of personal jurisdiction. The South Carolina Supreme Court concluded that due process requirements were satisfied based on the guaranty executed by the creditor. The creditor provided financing to the debtor, a South Carolina corporation, for the purchase of equipment. The guaranty signed by the guarantor provided for venue in Texas, that the creditor would be the guarantor's attorney-in-fact and agent to accept or waive service of process, and that written notice of such service or waiver would be sent to the guarantor. The Texas complaint was served on an officer of a corporation related to the creditor, as the guarantor's attorney-in-fact and agent, and the suit was mailed

to the guarantor by certified mail. The guarantor did not respond, resulting in a default judgment.

The guarantor argued his due process rights were violated and that there was no personal jurisdiction to obtain the Texas judgment because the creditor had merely served itself. The court held that although the creditor did essentially serve itself, it did so with the express consent of the guarantor. He specifically and expressly agreed to the manner of service and, further, he even waived personal service altogether. The creditor followed all of the agreed-upon procedures for service, and service also complied with Texas and federal law. Specifically, the court noted that under the Texas Rules of Civil Procedure, pleadings "may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address . . . or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper . . . in a post office . . . ." *Id*. at 492-93. "Thus, under Texas law, FFC Inc. gave proper service, even without the use of the agent, when it sent notice of the pleadings to Brown's last known address, the address he supplied in the Guaranty for service of process, by certified mail." *Id*.

VIII. Negotiation/Mediation Clauses

A. Form

No party to this Agreement shall institute a proceeding in any court, arbitration, or administrative agency to resolve a dispute between the Parties arising out of or related to this Agreement before that Party has sought to resolve the dispute through direct negotiations with the other Party. If the dispute is not resolved within three (3) weeks after a demand for direct negotiation, the Parties shall attempt to resolve the dispute through mediation in [location], administered by the American Arbitration Association under its commercial mediation rules and procedures then in effect. If the mediator is unable to facilitate a settlement of the dispute within a reasonable period of time, as determined by the mediator, the mediator shall issue a written statement to the Parties to that effect and the aggrieved Party may then seek relief in the [forum, i.e., state or federal courts or arbitration] located in [location].

B. Analysis

Courts routinely enforce negotiation and mediation clauses. A court may dismiss a suit or deny a motion to compel arbitration due to the fact that a party has not complied with a contractual requirement of a negotiation and mediation before the filing of suit. "Courts routinely uphold agreements to mediate in good faith as a condition precedent to arbitration or litigation." *Pazol v. Tough Mudder Inc.*, 100 F.Supp. 3d 74 (D.C. Mass. 2015), *rev'd on other grounds*, 819 F.3d 548 (1st Cir. 2016) (citing *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41, 43-44 (1st Cir. 2003)). *See, e.g., Allen v. Apollo Group, Inc.*, No. H-04-3041m, 2004 U.S. Dist. LEXIS 26750 (S.D. Tex. November 9, 2004) (denied arbitration because party failed to follow grievance procedure); *Ziarno v. Gardner Carton & Douglas, LLP*, 2004 U.S. Dist. LEXIS 7030, No. 03-3880, 2004 WL 838131, at *3 (E. D. Pa. April 8, 2004) (holding

court lacked subject matter jurisdiction because the parties failed to submit their dispute to contractually mandated mediation/arbitration); *Darling's v. Nissan N. Am., Inc.*, 117 F. Supp. 2d 54, 61 (D. Me. 2000) (holding plaintiff was required to make written demand for nonbinding mediation as a prerequisite to filing its lawsuit); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 208 (6th Cir. 1995) (holding that claim that franchisor did not adequately reimburse franchisee for warranty repairs was barred by franchisee's failure to seek mediation); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) (substantial compliance with dispute resolution provisions did not excuse the plaintiff's failure to present claim to defendant's policy board as condition precedent to suit); *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (the court held that owner could not compel arbitration where neither party had requested mediation because the contracting parties conditioned an arbitration agreement upon the request by either party for mediation); *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (under the contract, to invoke the arbitration provision, either party had to request mediation and provide notice of the request to the other party, where neither condition was met, arbitration was precluded); *Mortimer v. First Mount Vernon Indus. Loan Ass'n*, 2003 U.S. Dist. LEXIS 24698, No. 03-1051, 2003 WL 23305155, at *2 (D. Md. May 19, 2003) (dismissing plaintiff's claim when plaintiff failed first to submit to mediation in accordance with the contract); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (court dismissed suit where parties failed to first mediate as required by the contract); *Ventre v. Ventre*, 2001 Conn. Super. LEXIS 187, No. 377148S, 2001 WL 100326, at *1 (Conn. Super. Ct. Jan. 9, 2001) (dismissing case where court found mediation was a condition precedent for bringing suit); *Gould v. Gould*, 240 Ga. App. 481, 523 S.E.2d 106, 108 (Ga. App. 1999) (determining that relief was precluded by mother's failure to comply with provision in divorce decree requiring parties to submit disputes concerning their minor children to mediator or family counselor before litigating); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 890 P.2d 1071, 1076 (Wash. Ct. App. Div. 1 1995) (finding that the contract provided a mandatory procedure to resolve claims for extra work caused by deficient plans and specifications and found the plaintiff waived the claim by failing to follow those procedures).

IX. Choice-Of-Law Clause

A. Form

This Agreement shall be construed and enforced in accordance with the laws of the State of [_____], without giving effect to the principles of conflicts of law that could otherwise result in application of the laws of another jurisdiction, and the rights and obligations of the Parties shall be governed by the laws of the State of [_____].

B. Introduction

Parties may want to agree on the law that will be used by the parties to interpret and enforce their agreement. This is a good way to limit risk and ensure that the terms and clauses that a

party uses will be given the interpretation that was intended.

Determining which state's law governs is a question of law for a court to decide. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000). Texas courts look to sections 187 and 188 of the Restatement (Second) of Conflict of Laws to determine what state's laws should judge a contract. *See Maxus Exploration Co. v. Moran Bros., Inc*., 817 S.W.2d 50, 53 (Tex. 1991). In a contract without an express choice-of-law clause, the contract is governed by the law of "the state which, with respect to that issue, has the most significant relationship to the transaction," applying the principles stated in Restatement section 6 to the contacts listed in Restatement section 188(2). But in a contract with an express choice-of-law clause, the contract is governed by the law chosen by the parties unless certain factors are present. *See DeSantis v. Wackenhut Corp*., 793 S.W.2d 670, 677-78 (Tex. 1990).

The most basic policy of contract law is the protection of the justified expectations of the parties. *See Chase Manhattan Bank, N.A. v. Greenbriar N. Section II*, 835 S.W.2d 720, 723 (Tex. App.—Houston [1st Dist.] 1992, no writ).

> "The parties' understanding of their respective rights and obligations under the contract depends in part upon how certain they are about how the law will interpret and enforce their agreement." *Id*. When "the parties reside or expect to perform their respective obligations in different jurisdictions, they may be uncertain about which jurisdiction's law will govern the construction and enforcement of the contract." *Id*. "In an attempt to avoid this uncertainty, they may express in their agreement their choice that the law of a specified jurisdiction will apply to their contract." *Id*. "Judicial respect for their choice promotes the policy of protecting their expectations." *Id*.

"However, the parties' freedom to choose which jurisdiction's law will apply to their agreement is not unlimited." *Id*. "They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatsoever to them or their agreement." *Id*. "Nor can they, in their agreement, thwart or offend the public policy of the state whose law would otherwise apply." *Id*.

These principles are embodied in section 187 of the Restatement (Second) of Conflicts of Law, which the Texas Supreme Court has adopted for review of choice-of-law clauses. *See DeSantis*, 793 S.W.2d at 677-78. Section 187 provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one

> which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

Under this approach, choice-of-law clauses in contracts are enforced if the particular issue in dispute is one that the parties could have resolved by an explicit provision in their agreement directed to that issue. *Id*. at § 187(1); *see, e.g., Lemmon v. United Waste Sys., Inc*., 958 S.W.2d 493, 498-499 (Tex. App.—Fort Worth 1997, pet. denied); *Salazar v. Coastal Corp*., 928 S.W.2d 162, 166 (Tex. App.—Houston [14th Dist.] 1996, no writ). Many rules of contract law are designed to fill gaps in a contract that the parties could themselves have filled with express provisions. This is generally true of rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance, and to excuse for nonperformance, including questions of frustration and impossibility. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c. In one case, for example, the court applied a contractual choice-of-law provision when the issue was what conditions the plaintiff would have to fulfill before recovering a deficiency from the defendant. *See, e.g., Chase Manhattan v. Greenbriar N.S. II*, 835 S.W.2d 720, 724-725 (Tex. App.—Houston [1st Dist.] 1992, no writ). In the *DeSantis case*, the Texas Supreme Court held that Section 187(2)(a) does not apply where the issue is whether a contractual provision is enforceable. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-678 (Tex. 1990); *See also Chase Manhattan v. Greenbriar N.S. II*, 835 S.W.2d 720, 724-725 (Tex. App.—Houston [1st Dist.] 1992, no writ). "The issue before us – whether the noncompetition agreement in this case is enforceable – is not 'one which the parties could have resolved by an explicit provision in their agreement.' We therefore apply section 187(2)." *Id*. (internal citation omitted).

The first exception that allows a court to disregard the parties' choice-of-law clause is where the parties and the transaction have no substantial relationship to the chosen state. Which state has a more significant relationship with the parties and the transaction is not the proper inquiry under Restatement section 187(2)(a). *See Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 749-50 (5th Cir. 1981) (in applying Texas law under similar Business and Commerce Code standard, stating, "While the Texas contacts are indeed the most significant, nevertheless the determinative issue is, for reasons to be stated, whether there is a reasonable relationship between Mississippi and the transaction . . . ."); *Saturn Capital Corp. v. Dorsey*, No. 01-04-00626-CV, 2006 Tex. App. LEXIS 5633 (Tex. App.—Houston [1st Dist.] June 29, 2006, pet. denied); *Bradt v. W. Publ'g Co.*, No. 14-89-00694-CV, 1991 Tex. App. LEXIS 2646, 1991 WL 230182, at *4 (Tex. App.—Houston [14th Dist.] Oct. 31, 1991, writ denied) (not designated for publication) (in suit to collect for sale of goods, to which similar Business and Commerce Code standard applied, stating, "The determinative issue here is not which state has the 'most significant' contacts, but whether there is 'a reasonable relationship' between [the chosen state] and the transaction.").

Analyzing this exception in the *DeSantis*, the Texas Supreme Court held: "Florida has a substantial relationship to the parties and the transaction because Wackenhut's corporate offices are there, and some of the negotiations between DeSantis and George Wackenhut occurred there." *DeSantis*, 793 S.W.2d at 677-678. Courts have generally held that a choice-of-law clause is enforceable where one of the parties' principal place of business is located in the forum selected by the parties. *In re J. D. Edwards World Solutions Co.*, 87 S.W.3d 546 (Tex. 2002). *See also Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 170, n.11 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

As described by the Texas Supreme Court in the *DeSantis* case, whether Section 187(2)(b) applies depends upon three determinations:

> 1) whether a state has a more significant relationship with the parties and their transaction than the state they chose;
>
> 2) whether that state has a materially greater interest than the chosen state in deciding whether [the] agreement should be enforced; and
>
> 3) whether that state's fundamental policy would be contravened by the application of the law of the chosen state in this case.

DeSantis, 793 S.W.2d at 677-678. Restatement section 188 provides that "an issue in contract [is] determined by the local law of the state which, with

respect to that issue, has the most significant relationship to the transaction and the parties" taking into account the following five contacts: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the contract's subject matter; and (5) the parties' domicile, residence, nationality, place of incorporation, and place of business. *See 3M v. Nishika Ltd*., 953 S.W.2d 733, 735-36 (Tex. 1997); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). *See also Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 170 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (noting that Restatement section 187 incorporates Restatement section 188). A court evaluates these contacts not by their number, but by their quality. *See 3M v. Nishika Ltd*., 955 S.W.2d 853, 856 (Tex. 1996); *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex. 1979).

There are also policy factors that should be considered: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 180, no pet.); *3M v. Nishika Ltd*., 955 S.W.2d at 856.

The real issue is often whether under Section 187(2)(b), Texas fundamental policy supports using its law over that of another jurisdiction regarding an indemnity agreement. If so, a court should ignore the choice-of-law clause and apply Texas law. Generally speaking, application of another jurisdiction's laws is not contrary to the forum state's fundamental public policy merely because application of the other state's law leads to a different result from the result that would be obtained if the forum state's law were applied. *DeSantis*, 793 S.W.2d at 680. Likewise, the fact that the other state's law differs materially from that of the forum state does not itself show that application of the other state's law would offend Texas public policy. *See id.* Rather, in determining whether public policy would be violated by the application of another state's law, the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction. *Id*. Moreover, if the public policies in the forum state and the parties' chosen state "are the same, different approaches do not contravene [the policies] just because one [approach] is somewhat stricter than the other." *Nabors* ,94 S.W.3d 163, 178.

For example, in the *DeSantis* case, the Court followed these principles to invalidate a choice-of-law clause in a noncompetition agreement because (1) the enforceability of a non-competition covenant was not a matter the parties could resolve by a contract provision; (2) Texas had a materially greater interest than the other state in determining the validity of the noncompetition agreement; (3) Texas law would control

the enforceability of the covenant in the absence of an enforceable choice-of-law provision; and (4) application of the law of another state to determine the validity of a noncompetition agreement to be performed in Texas would be contrary to fundamental policy of Texas.

C. Choice-Of-Law Clause May Impact Other Dispute Clauses

Another issue is the application of choice-of-law clauses on the interpretation and enforcement of other dispute resolution clauses. For example, It is not uncommon for forum-selection clauses to also provide that all of the contractual clauses will be construed by a foreign jurisdiction's law. For example, a clause may state: "The validity, construction, interpretation, and effect of this Contract will be governed in all respects by the law of England."

The issue then becomes whether the clause should be governed by the law chosen by the parties to the contract. Does the foreign law control the enforcement of the clause (who can enforce) and does the foreign law control the interpretation of the clause (i.e., scope)?

Texas has a strong policy of enforcing contracts as written. The freedom to contract is one of the founding principles of our legal system. *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 370 (Tex. 2001). The freedom of contract is so important in Texas that it is expressly included in the state constitution. TEX. CONST. ART. I, § 16. The Texas Supreme Court has consistently recognized this state's strong public policy in favor of preserving the freedom of contract. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008); *Churchill Forge, Inc. v. Brown*, 61 S.W.3d at 371. The Court has noted this state's paramount public policy that contracts are sacred and shall be enforced as written:

> [Public policy requires that] men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Fairfield, 246 S.W.3d at 664 (quoting *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (Tex. 1951)). A contract is an attempt by market participants to allocate risks and opportunities, and courts should enforce those allocations rather than redistribute them. WILLISTON ON CONTRACTS § 31:4 (4th ed. 1999 & Supp. 2008).

"The most basic policy of contract law is the protection of the justified expectations of the parties." *Clair v. Brooke Franchise Corp.*, No. 02-06-216-CV, 2007 Tex. App. LEXIS 2805 (Tex. App.—Fort Worth April 12, 2007, no pet.) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990)). Further, in construing a contract, a court must determine the parties' true intentions as expressed in

the contract by examining the entire writing "in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

As noted above, Texas courts generally respect the parties' contractual choice-of-law and apply the law that the parties choose. *Ill. Tool Works, Inc. v. Harris*, 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("The parties contractually agreed to apply the law of Illinois to this contract. Texas courts will respect that choice and apply the law the parties choose."). Specifically, Texas courts uphold choice-of-law provisions in the context of the enforceability of arbitration provisions. *See, e.g., In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 480-81 (Tex. App.—Dallas 2006, no pet.); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. App.—San Antonio 2000, orig. proceeding). *See also West Tex. Positron, Ltd. v. Cahill*, No. 07-05-0297-CV 2005 WL 3526483, at *2 (Tex. App.—Amarillo 2005, no pet.) (parties' choice of Texas law pointed to Texas interpretation of waiver). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. Tex. 1999) (parties can choose state arbitration law via a choice-of-law clause).

Where the issue has been raised, some courts hold that forum-selection clauses are to be construed under the law of the forum on which the parties have contractually agreed. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003); *Lambert v. Kysar*, 983 F.2d 1110, 1118 (1st Cir. 1993); *Nutter v. New Rents, Inc.*, 1991 U.S. App. LEXIS 22952 (4th Cir. 1991); *Instrumentation Assocs. v. Madsen Elecs.*, 859 F.2d 4, 7 (3d Cir. 1988); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357-58 (3d Cir. 1986); *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148 (2d Cir. 1984); *Eisaman v. Cinema Grill Sys. Inc.*, 87 F.Supp.2d 446 (D. Md. 1999); *Triple Quest Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 384 (N.D. 2001); *Jacobson v. Mailboxes, Etc. U.S.A., Inc.*, 419 Mass. 572, 575 (1995). *See also Hooks Indus., Inc. v. Fairmont Supply Co.*, No. 14-00-00062-CV, 2001 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] April 19, 2001, pet. denied) (not designated for publication) (court interpreted contract with forum-selection clause under law designated by parties).

The parties' choice of law should determine the interpretation (scope) of the clause. For example, in *Felman Products v. Bannai*, the plaintiff sued the non-signatory defendant for fraud and unjust enrichment based on a contract containing an arbitration clause and also containing an English choice-of-law clause. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The plaintiff asserted that the defendant could not enforce the arbitration agreement because English law controlled the scope of the clause, and under that law, the plaintiff's claims did not fall within the scope. Based on plaintiff's expert declaration that the scope of the clause under English law would not include the plaintiff's claims, the court concluded: "The arbitration clause, under the choice of law

provision, does not extend to claims by [plaintiff] against [defendant] under the [contract]." *Id*. at 589.

Further, the parties' choice of law should determine whether a non-signatory can enforce such a clause. For example, in *Motorola Credit Corporation v. Uzan*, the defendants sought to compel arbitration pursuant to agreements that had been signed by plaintiffs and by certain companies controlled by the defendants' family, but to which the defendants themselves were not parties. 388 F.3d 39, 42-43, 49 (2nd Cir. 2004). Relying on federal common law, the defendants asserted that they could enforce the arbitration clause under estoppel and agency theories. However, the agreements in question contained Swiss choice-of-law clauses. The trial court denied the motion to compel arbitration on an alternative basis of unclean hands. On appeal, the court of appeals held that "if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the … choice-of-law clauses that govern those agreements." *Id*. The court described why honoring a choice-of-law clause was important:

> [W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention. Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA.

Id. Based on the plaintiffs' expert evidence that Swiss law strictly interpreted privity of contract and would not allow third parties to enforce the arbitration clause, the court concluded "that under Swiss law … defendants, as nonsignatories, have no right to invoke those agreements." 388 F.3d at 53.

Similarly, another court denied a motion to compel arbitration because the English law concept of privity of contract precluded a non-signatory from enforcing an arbitration clause. Once again, in *Felman Products v. Bannai*, the plaintiff submitted expert evidence that the defendant could not enforce the arbitration agreement because English law would not allow a non-party to do so. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The court stated: "English arbitration law is governed by the Arbitration Act of 1996. Plaintiffs' experts state that it is a general principle of arbitration law that the agreement only binds the parties to the agreement to arbitration." *Id*. The court concluded: "Under English law [the defendant] lacks standing to compel arbitration." *Id*.

In *Yavuz v. 61 MM, Ltd*, the court of appeals dealt with how to interpret a forum-selection clause when the contract contained a choice-of-law provision. 465 F.3d 418, 426-32 (10th Cir. 2006). The court stated that there were several issues that had to be addressed: "(1) Is

the forum-selection clause provision mandatory? … (2) Are all of Mr. Yavuz's claims governed by the provision, or only some? … (3) Does the clause bind Mr. Yavuz with respect to claims against all the defendants, or with respect to only his claims against FPM, or perhaps only those against FPM and Mr. Adi?" *Id*. at 427. The last issue dealt with which parties could enforce the forum-selection clause. The court then analyzed in depth what law controlled and concluded that these issues should be determined under the law chosen by the parties. *See id.* at 430-31.

Determining how a foreign country would interpret or enforce a clause may require the admission of evidence. Under Texas Rule Evidence 203, a trial court may consider affidavits in determining the law of a foreign nation. Tex. R. Evid. 203; *Dankowski v. Dankowski,* 922 S.W.2d 298, 302-03 (Tex. App.—Fort Worth 1996, writ denied). A trial court will likely not abuse its discretion in believing one credible expert witness over another. *See Phoenix Network Techs. Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 618 n. 15 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (in the context of whether a foreign jurisdiction would enforce a forum-selection clause, a trial court did not abuse discretion in being advised on foreign law by one party expert's affidavit over the opponent's expert's affidavit).

X. Indemnity Clauses

A. Form

Indemnity solely for party's own negligence:

Party A hereby agrees to release, defend, indemnify and hold the Party B and Party B's agents, representatives, and affiliates harmless from and against any and all claims, demands, and causes of action of every kind and character (including without limitation, fines, penalties, remedial obligations, court costs and reasonable attorney's fees, including attorney's fees incurred in the enforcement of this indemnity) (collectively the "Indemnifiable Claims") arising out of, without limitation, [triggering event, i.e., any physical or mental injury, illness and/or death of anyone, loss of or damage to property or interests in property of anyone] connected with or arising out of the negligence or breach of contract by Party A.

Indemnity for all parties' conduct:

Party A hereby agrees to release, defend, indemnify and hold the Party B and Party B's agents, representatives, and affiliates harmless from and against any and all claims, demands, and causes of action of every kind and character (including without limitation, fines, penalties, remedial obligations, court costs and reasonable attorney's fees, including attorney's fees incurred in the enforcement of this indemnity) (collectively the "Indemnifiable Claims") arising out of, without limitation, [triggering event, i.e., any physical or mental injury, illness and/or death of anyone, loss of or damage to property or interests in property of anyone] connected with or arising out of the performance of the work or this transaction. This obligation is without regard to the cause or causes of such harm and includes, but is not limited to, Indemnifiable Claims resulting from any

sole, gross, joint or concurrent negligence, Gross Negligence (as defined herein) willful misconduct (including willful misconduct as defined herein), strict liability, breach of warranty, breach of contract, breach of statute or other fault or form of liability of Party B.

B. Introduction

Parties to transactions often negotiate risk of litigation at the front end of the transaction. The shifting of litigation risk can have a substantial impact on the transaction. Parties effectuate the shifting of litigation risk through an indemnity clause. An indemnity clause states that one party will indemnify the other from litigation. The scope of what the party will indemnify is determined by the wording of the clause. A party can only indemnify for the amount of the claim or it can also indemnify for defense expenses. A party can indemnify for any and all claims, including claims that arise from the indemnitee's own negligence, or it can by more narrowly tailored.

C. Duty To Defend Versus The Duty To Indemnify

An indemnitor may have two distinct and different duties – the duty to defend an indemnitee against a covered claim and a duty to indemnify an indemnitee in the event of an adverse judgment based upon a covered claim. Although these duties are created by contract, they are rarely coextensive. *See Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co*., 141 S.W. 3d 198, 203, 47 (Tex. 2004) (observing that duty to defend and duty to indemnify are distinct and separate); *Whatley v. City of Dallas*, 758 S.W.2d 301, 304 (Tex. App. — Dallas 1988, writ denied) (duty to defend is defined by the terms of the contract). Even if there is no duty to defend, there can still be a duty to indemnify. *D.R. Horton-Texas Ltd. v. Markel International Insurance Co. Ltd*., No. 06-1018, 2009 Tex. LEXIS 1042 (Tex. December 11, 2009).

Texas courts rely on the "Eight Corners" or "Complaint Allegations" rule. *Fid. & Guar. Ins. Underwriters v. McManus*, 633 S.W.2d 787 (Tex. 1982). The focus is on the factual allegations underlying the claimed injury, not the legal theories involved. *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 770 (5th Cir. 1999) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997)). Under this rule an indemnitor may look solely at the pleadings without reference to facts outside the pleadings to make a determination of whether a duty to defend exists. *Am. Alliance Ins. v. Frito Lay*, 788 S.W.2d 152 (Tex. App. — Dallas 1990, writ dism'd).

D. Texas Precedent On Interpreting Indemnity Provisions

In Texas, indemnity agreements are construed under normal rules of contract construction. *See Gulf Ins. Co. v. Burns Motors, Inc*., 22 S.W.3d 417, 423 (Tex. 2000). The primary goal is to ascertain, and give effect to, the parties' intent as expressed in the instrument. *See Ideal Lease Service v. Amoco Production Co.*, 662 S.W.2d 951, 953 (Tex. 1983). Whether the agreement is ambiguous is decided by the court as a matter of law, as is the meaning of an unambiguous agreement. *See Gulf Ins.*

Co. v Burns Motors, Inc., 22 S.W.3d 417, 423 (Tex. 2000). Once the parties' intent has been discerned through ordinary rules of construction, the substantive doctrine of *strictissimi juris* ordinarily applies. Under that doctrine, the agreement is to be strictly construed in favor of the indemnitor. *See Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex. App.—Dallas 1992, den.).

E. Indemnifying A Party For Its Own Negligence

In Texas, a party may agree to indemnify, reimburse, or "hold harmless" another party to the contract for any liability arising out of performance of the contract, even though liability results from the negligence of the party to be indemnified. *See Ohio Oil Company v. Smith*, 365 S.W.2d 621, 626 (Tex. 1963), *overruled on other grounds, Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). If the enforceability of the indemnity agreement is judged by Texas law, the indemnity clauses must meet certain fair notice requirements. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993). To give fair notice, an exculpatory indemnity clause must be express and conspicuous. *See id*. at 508-09. Compliance with these requirements is a question of law for the court. *See id*. at 510.

1. Express Negligence Doctrine

Under the express negligence doctrine, parties seeking to provide for indemnification from the consequences of the indemnitee's own negligence must express that intent in specific terms within the four corners of the contract. *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d at 707-708. If an agreement does not meet the express negligence test, the indemnitor will not be required to indemnify the indemnitee in connection with liability arising from the indemnitee's own negligence or for the costs of defending against any claim based on the indemnitee's alleged negligence. *See Fisk Elec. v. Constructors & Associates*, 888 S.W.2d 813, 814-816 (Tex. 1994). The express negligence doctrine requires that an intent to indemnify a party from the consequences of that party's own negligence be expressed in specific terms within the four corners of the contract. *See Gulf Ins. Co. v. Burns Motors, Inc*., 22 S.W.3d 417, 423 (Tex. 2000); *Dresser*, 853 S.W.2d at 508. The express negligence requirement is a rule of contract interpretation and thus a question of law for the court. *See Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 814 (Tex. 1994).

"General, broad statements of indemnity are not effective to shift the consequences of the indemnitee's own negligence to the indemnitor." *Quorum Health Resources, L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 461 (5th Cir. 2002) (applying Texas law). The Texas Supreme Court has held that an indemnity provision was not enforceable where it "did not clearly and unequivocally require the subcontractor to indemnify the company for its own negligence." *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 705 (Tex. 1987). In contrast, a provision requiring a subcontractor to indemnify a contractor "regardless of cause or of any fault or negligence of [contractor]" was held to satisfy the rule. *See B-F-W*

Constr. Co., Inc. v. Garza, 748 S.W.2d 611, 613 (Tex. App.—Fort Worth 1988, no writ).

2. Conspicuousness Requirement

In addition to the express negligence doctrine, a provision indemnifying a party for its own negligence must meet the fair notice requirement of conspicuousness. If the agreement does not meet the conspicuousness requirement, the indemnitor will not be required to indemnify the indemnitee in connection with liability arising from the indemnitee's own negligence or for the costs of defending against any claim based on the indemnitee's alleged negligence. Whether a provision is conspicuous is determined by an objective, not a subjective, analysis. *See Douglas Cablevision v. SWEPCO*, 992 S.W.2d 503, 509 (Tex. App.—Texarkana 1999, pet. denied).

A provision is ordinarily conspicuous when a reasonable person against whom it is to operate ought to have noticed it. Accordingly, provisions located on the back of a contract in a series of paragraphs in the same font, typeface, and color as the rest of the agreement are not conspicuous. *See Am. Home Shield Corp. v. Lahorgue,* 201 S.W.3d 181, 184-185 (Tex. App.—Dallas 2006, pet. denied). In contrast, language in capital headings, contrasting type or color, or in an extremely short document, such as a telegram, is conspicuous. *See Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993); *Amtech Elevator Services Co. v. CSFB 1998-P1 Buffalo Speedway Office Ltd. P'ship*, 248 S.W.3d 373, 377-379 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (capitalized heading using term "INDEMNIFICATIONS," followed by language in all capitals, attracts attention of reasonable person and is therefore conspicuous). The Texas Supreme Court held that indemnity clauses must satisfy the criteria for conspicuousness in the Texas Uniform Commercial Code, Texas Business & Commerce Code Annotated § 1.201(10). *Dresser*, 853 S.W.2d at 511.

The fair notice requirements are immaterial if a party admits to having actual knowledge of the indemnity clause. *See Cate v. Dover Corp*., 790 S.W.2d 559, 561-62 (Tex. 1990). *See also Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004) (if both parties have "actual knowledge" of terms, agreement can be enforced even in absence of fair notice); *Dresser Industries, Inc. v. Page Petroleum, Inc*., 853 S.W.2d 505, 508 n.2 (Tex. 1993) ("actual notice or knowledge" sufficient).

F. Gross Negligence

Texas law will not enforce an indemnity agreement that purports to indemnify a party for its own gross negligence or willful misconduct. *Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98 (Tex. 2014) (indemnification against gross negligence or intentional misconduct in Texas is void as against public policy).

XI. Insurance Requirements

A. Form

Party A will secure and maintain during the term of this Agreement the following insurance coverage

requirements and limits not less than the amounts specified and will furnish certificates of such insurance satisfactory to Party B. [list typos of insurance products and limits]. Party B may at any time upon prior written notice require Party A to increase the limits set forth above to such amounts as inflation, industry practice, or other factors indicate are reasonable. All insurance policies and coverage requirements listed herein will extend to and protect Party B to the full extent and amount of such coverage, including excess or umbrella insurance and will be primary to and receive no contribution from any other insurance or other self-insurance programs maintained by Party B. Party A will name Party B as an additional insured and will obtain a waiver on the part of the insurer, by subrogation or otherwise, of all rights against Party B.

B. Analysis

A party to a contract may want the other party to obtain and maintain insurance coverage for claims. Further, the party may want to be listed as an additional insured. This will provide an additional level of protection for any claims. If the party obligated to obtain insurance as provided in the agreement fails to do so, the other party could have a breach of contract action. *Diamond Offshore Co. v. A&B Builders, Inc.*, 75 F.Supp.2d 676 (S.D. Tex. 1999).

XII. As-Is, Waiver-Of-Reliance, and Merger Clauses

A. Form

As-Is:

Buyer accepts the Property in its present condition and as-is.

Waiver Of Reliance:

By entering into this Agreement, the Parties expressly disclaim and waive any reliance on any written or oral representations that have been given or that will be given other than those explicitly stated herein. The Parties represent and warrant that they have conducted their own investigation and are solely relying on their own judgment and/or investigation in entering into this Agreement. The Parties further represent that their respective counsel have read and explained to each of them the entire contents of this Agreement, as well as its legal consequences. This clause is not a boilerplate provision and has been specifically negotiated by the Parties.

B. Introduction

Since the beginning of recorded time, civilized societies abhor lying and untruthfulness. *See, e.g.*, Leviticus 19:11; Proverbs 12:22, 13:5. Fundamentally, "no one seems to debate that lying is almost always morally indefensible." Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 494 (1999).

Due to the strong public policy against lying and to deter that conduct, Texas has common-law and statutory claims that allow a defrauded party to recover its damages as against the liar or otherwise void the underlying transaction.

Needless to say, Texas like every other jurisdiction wishes to discourage fraud regarding contractual relations. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d

41, 47 (Tex. 1998). The Texas Supreme Court long ago held in *Graham v. Roder*, that tort damages were recoverable based on the plaintiff's claim that he was fraudulently induced to exchange a promissory note for a tract of land. 5 Tex. 141, 149 (1849).

"Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations. As a rule, a party is not bound by a contract procured by fraud." *Formosa*, 960 S.W.2d at 46. Fraud vitiates whatever it touches, and a contract is subject to avoidance on the ground of fraudulent inducement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 327, 331 (Tex. 2011); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 810 (Tex. 1979).

Consistent with its strong public policy against lying, Texas did not historically allow a party to escape its fraud by relying on a term of the contract that was itself the product of fraud. "One who is entitled to avoid an entire written contract because it lacked his assent, can no longer be held bound by any of its stipulations including those relating to representations or guaranties which induced its execution." *Edward Thompson Co. v. Sawyers*, 111 Tex. 374, 234 S.W. 873, 874-75 (Tex. 1921).

For example, in *Dallas Farm Machinery Co. v. Reaves*, a plaintiff sued a defendant for fraudulently inducing a contract. 307 S.W.2d 233, 249 (Tex. 1957). This Court held that public policy against fraud trumps contract formation: "In obedience to the demands of a larger public policy, the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it." *Id*. The Court held that public policy voids any attempt by a crafty contractual clause to escape fraud liability: "public policy . . . strikes down all attempts to circumvent that policy by means of contractual devices." *Id*.

The Court acknowledged that it was possible for "a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement." *Id*. To ignore this fact was to ignore real life "where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the" other party's statements. *Id*. This Court rejected the attempt to allow a contractual clause to "thwart public policy" and "open the door to a multitude of frauds." *Id*.

C. As-Is Clause

A valid "as is" clause negates the elements of causation and reliance, including but not limited to causes of action involving the DTPA, fraud, and negligence. *Williams v. Dardenne*, 345 S.W.3d 118, 124 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). *See also Prudential Ins. Co. of Am.*, 896 S.W.2d 156; *Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 726 (Tex. App.—Dallas 2006, no pet.)("In general, a valid 'as is' agreement negates the element of causation necessary to recover on claims regarding the physical condition of the property."); *Larsen v. Carlene Langford & Assocs., Inc.*, 41 S.W.3d 245, 253

(Tex. App.—Waco 2001, pet. denied)(holding that "as is" clause in earnest money contract conclusively negated causation and reliance elements of plaintiff's fraud, negligence and DTPA claims); *Boehl v. Boley*, 2011 Tex. App. LEXIS 528 (Tex. App.—Amarillo 2011, pet. denied)(affirming summary judgment on ground that "as is" clause in TREC residential resale contract negated causation as to buyer's DTPA, fraud and negligence claims).

In fact, the words "as-is" do not need to be used, the following has been held to be sufficient: "Buyer accepts the Property in its present condition." *Williams v. Dardenne*, 345 S.W.3d 118, 123 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Richey v. Pinnell*, 324 S.W.3d 815, 817 (Tex. App.—Texarkana 2010, no pet.); *Sims v. Century 21 Capital Team, Inc.*, 2006 Tex. App. LEXIS 7990 (Tex. App.—Austin 2006, no pet.); *Cherry v. McCall*, 138 S.W.3d 35 (Tex. App.—San Antonio 2004, pet denied); *Fletcher v. Edwards*, 26 S.W.3d 66, 75 (Tex. App.—Waco 2000, pet. denied).

A buyer who purchases property "as is" chooses to "rely *entirely* upon his own determination" of the property's value and condition without any assurances from the seller. *Williams*, 345 S.W.3d at 123-24 (citing *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex.1995)) (emphasis added). In short, the buyer "assumes responsibility of assessing the property's condition as well as the resulting risk that the property is worth less than the price paid." *Id*. at 124.

This evaluation by the buyer "constitutes a new and independent basis for the purchase, one that disavows any reliance on representations made by the seller." *Id*. (citing *Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Serv. Inc.*, 572 S.W.2d 308, 313 (Tex.1978) (in "as is" contract, buyer "has taken the entire risk as to the quality of the [property] and the resulting loss.")).

The seminal case on this subject is *Prudential Insurance Co, of America v. Jefferson Assoc, Ltd*., where the Texas Supreme Court concluded an "as is" agreement may negate the element of causation necessary to recover on misrepresentation and DTPA claims regarding the physical condition of the property. 896 S.W.2d 156, 161 (Tex. 1995). In that case, the parties executed the standard preprinted TREC form at issue in this case. *Id*. That contract provided "Buyer accepts the Property in its present condition; provided Seller, at Seller's expense, shall complete the following specific repairs and treatments" with no repairs noted. *Id*. The Court held:

> By agreeing to purchase something "as is", a buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong. The seller gives no assurances, express or implied, concerning the value or condition of the thing sold.

Id. at 161 (internal citations omitted). *See also Cherry v. McCall*, 138 S.W.3d 35 (Tex. App.—San Antonio 2004, pet. denied).

A court should consider the totality of the circumstances when

considering the enforceability of an "as is" clause, including: (1) the sophistication of the parties; (2) whether they were represented by counsel; (3) whether the contract was an arm's length transaction; (4) the relative bargaining power of the parties; (5) whether the contractual language was freely negotiated; and (6) whether that language was an important part of the parties' bargain as opposed to being a "boilerplate" provision. *Volmich*, 2013 Tex. App. LEXIS 2722.

The Court, however, held that an "as-is" clause does not foreclose all fraud claims. *Prudential*, 896 S.W.2d at 156. The Court stated: "A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." *Id*. "A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is,' and then disavow the assurance which procured the 'as is' agreement." *Id*. Examples of when a party can assert a fraud claim even though there was an as-is clause in the contact are when the seller inhibits a purchaser's investigation or when the purchaser's investigation revealed the issue made the basis of the fraud claim. *Id*.

D. Waiver-Of-Reliance

The Texas Supreme Court has held that waiver-of-reliance clauses can prove no reliance on prior representations and can defeat fraud and misrepresentation claims.

In *Schlumberger*, the Court upheld a disclaimer of reliance clause and determined that there was a clear intent to disclaim reliance where the contract provided, "[N]one of us is relying upon any statement or representation by any agent of the parties being released hereby. Each of us is relying on his or her own judgment." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997). The Court emphasized that the principle that fraud vitiates a contract must be weighed against the competing concern that parties should be able to fully and finally resolve their disputes by bargaining for and executing a release barring all further disputes. *Id*. at 179. Based on this latter concern, the Court held that "a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement." *Id*. at 181. The Court further remarked, however, that a disclaimer will not always preclude a fraudulent inducement claim. *Id*.

In *Forest Oil Corp. v. McAllen*, the parties previously settled a long-running lawsuit over oil and gas royalties and leasehold development and included an arbitration agreement for environmental claims not covered by the settlement. 268 S.W.3d 51 (Tex. 2008). The settlement agreement stated: "[T]hat none of them is relying upon any statement or any representation of any agent of the parties being released hereby. Each of the Plaintiffs and Intervenors is relying on his, her, or its own judgment..." 268 S.W.3d at 57, n. 4 (emphasis added). Later the landowner sued for environmental damage, and the defendant sought to compel arbitration under the settlement agreement. The landowner argued that the arbitration agreement was induced by fraud and was

unenforceable because the defendant had allegedly promised that there was no environmental contamination on the property at the mediation.

The Texas Supreme Court held that the landowner's fraudulent-inducement claim was barred because the waiver-of-reliance clause in the contract conclusively negated reliance on representations made by either side. The Court found that the case was controlled by *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997), which held "where the parties' intent is clear and specific, [a no-reliance clause] should be effective to negate a fraudulent inducement claim." *Id*. The Court noted:

> Our decision in *Schlumberger* assumed that (1) the company knew during negotiations that it was misrepresenting the value of the interest, and (2) the misrepresentations were made with the intent of inducing the Swansons to settle. Despite these assumptions, we held as a matter of law that the Swansons could not show fraudulent inducement. . . .
>
> Essentially, *Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract.

Id. at 57. The Court cited to the disclaimer language in *Schlumberger* and emphasized the operative provision: "Each of us is relying on his or her own judgment." *Id*. The Court held that even where the disclaimer-of-reliance clause is clear that "Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." *Id*. at 60.

The Court suggested the following non-exclusive factors in analyzing whether to enforce a waiver clause: "1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the . . . language was clear." *Id*. at 60.

The Court concluded by providing the policy reason – freedom of contract – as to why a waiver clause should be enforced:

> After-the-fact protests of misrepresentation are easily lodged, and parties who contractually promise not to rely on extra-contractual statements—more than that, promise that they have in fact not relied upon such statements—should be held to their word. Parties should not

> sign contracts while crossing their fingers behind their backs.... If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties advised by the most knowledgeable legal counsel, is grievously impaired.

Id. The Court again limited the reach of its decision by stating:

> Today's holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim, but we hold today, as in *Schlumberger*, that 'on this record,' the disclaimer of reliance refutes the required element of reliance."

Id. at 61.

The Texas Supreme Court has more recently held that a clause must have clear and unequivocal language to be a dispositive waiver-of-reliance clause. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323 (Tex. 2011). The court restated the factors and indicated that if a clear and unequivocal disclaimer of reliance clause is determined to exist, the analysis then proceeds to the factors that consider the circumstances surrounding the contract's formation to determine whether the provision is binding. 341 S.W.3d at 337 n.8. The clause stated, "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein." *Id*. at 336. Regarding the provisions in *Schlumberger* and *Forest Oil*, the Court stated: "In each case, the intent to disclaim reliance on others' representations—*that is to rely only on one's own judgment*—was evident from the language of the contract itself." *Id*. at 335 (emphasis added).

The court held that the clause was actually nothing more than a standard merger clause and that if the parties had actually intended to disclaim reliance, they did not do so by clear and unequivocal contractual language. 341 S.W.3d at 333-34, 336. The Court held that additional scrutiny is required when analyzing a clause contained in a commercial agreement: "lest we forgive intentional lies regardless of context." *Id*. at 335. The Court held that the clause did not bar a fraud claim because it did not meet the elevated requirement of disclaiming reliance on representations in "clear and unequivocal language." *Id*. at 336.

Courts of appeals have similarly enforced such clauses. *See Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc*., 290 S.W.3d 554 (Tex. App.—Dallas 2009, no pet.); *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 795 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Int'l Bank of Commerce*, No. 13-07-00693-CV, 2008 Tex. App. LEXIS 519, 2008 WL 192260, at *16

(Tex. App.—Corpus Christi Jan. 18, 2008, orig. proceeding). *See also Prime Income Asset Mgmt. v. One Dallas Ctr. Assocs. LP*, 358 Fed. Appx. 569, 2009 U.S. App. LEXIS 28300 (5th Cir. Tex. 2009); *Margaux Warren Park Partners, Ltd. v. GE Bus. Fin. Servs*., 2009 Bankr. LEXIS 4128 (Bankr. E.D. Tex. Dec. 15, 2009).

This includes contracts for real estate transactions. *See Chesson v. Hall*, No. H-01 315, 2007 WL 1964538, at *19 (S.D. Tex. July 3, 2007) (enforcing a reliance disclaimer in a residential real estate contract); *Biosilk Spa, L.P. v. HG Shopping Ctrs., L.P.*, No. 14-06-00986-CV, 2008 Tex. App. LEXIS 3361, at 7-9 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.) (enforcing a reliance disclaimer in a shopping-center lease); *Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex.*, 249 S.W.3d 480, 490 (Tex. App.—Beaumont 2008, no pet.) (enforcing a reliance disclaimer in a contract for the sale of a steel building); *Simpson v. Woodbridge Props., L.L.C.*, 153 S.W.3d 682, 684 (Tex. App.—Dallas 2004, no pet.) (enforcing a reliance disclaimer in a residential real estate sales contract). Moreover, all of the factors do not have to be present before a court can enforce such a clause as a matter of law. *See Matlock Place Apartments, L.P. v. Druce*, 369 S.W.3d 355 (Tex. App.—Fort Worth 2012, pet. denied); *McDougal v. Stevens*, 2009 Tex. App. LEXIS 9182 (Tex. App.—San Antonio Jan. 30, 2009) (enforced clause and affirmed summary judgment where parties were not represented by counsel); *Garza v. State & County Mut. Fire Ins. Co.*, No. 2-06-202-CV, 2007 Tex. App. LEXIS 3070, 2007 WL 1168468 at *6 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied) (finding that waiver provision conclusively negated justifiable reliance even though plaintiff was not a sophisticated party); *Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex*., 249 S.W.3d at 490 (enforcing a reliance disclaimer in a "boilerplate" contract); *Simpson v. Woodbridge Props., L.L.C.*, 153 S.W.3d at 684 (same).

However, there is a currently a disagreement in the courts of appeals regarding whether language that sits between *Forest Oil* and *Italian Cowboy* is sufficient. In other words, is the clause sufficient to defeat reliance as a matter of law where the clause states that a party is not relying on the other party's statements, but does not state that the party is solely relying on its own judgment or investigation?

In *Mercedes-Benz USA, LLC v. Carduco*, the court of appeals rejected a disclaimer-of reliance clause argument. No. 13-13-002960-CV, 2016 Tex. App. LEXIS 3254 (Tex. App.—Corpus Christi March 31, 2016, pet. filed). In *Carduco*, the language stated, "Dealer acknowledges that no representations or statements other than those expressly set forth therein were made by MBUSA or any officer, employee, agent, or representative thereof, *or were relied upon by Dealer in entering into this Agreement*." *Id*. *58-59. The court of appeals cited to this Court's *Italian Cowboy* opinion that focused on the phrase "each of us is relying on his or her own judgment" and held that the language in *Carduco* did not show that "the parties clearly and unequivocally disclaimed reliance in the contract." *Id*.

In *Community Mgmt., LLC v. Cutten Dev., L.P.*, the contract provided:

> Purchaser shall have the benefit of, and is not relying upon any information provided by Seller or Broker or statements, representations, or warranties … made by or enforceable directly against Seller or Broker, including, without limitations, any relating to the value of the Property, the physical or environmental condition of the Property … or any other attribute or matter of or relating to the Property... Purchaser represents and warrants that as of the date hereof and as of the Closing Date, it has and shall have reviewed and conducted such independent analysis, studies, reports, investigations and inspections as it deems appropriate in connection with the Property…

No. 14-14-00854-CV, 2016 Tex. App. LEXIS 6771 (Tex. App.—Houston June 28, 2016, pet. filed). The court compared the language in this case to the language that the Texas Supreme Court reviewed in its previous cases, admitted that it was not as clear as *Shlumberger* and *Forest Oil*, but nevertheless held that the language in this case "*appears* to clearly and unequivocally disclaim reliance." *Id*. at *16-18 (emphasis added). The court also held that the absence of the important phrase "the buyer was solely relying on its own investigation" did not matter. *Id*. at *17-20.

E. Merger Clause

Once again, the Texas Supreme Court has held that a mere merger clause is not sufficient to disclaim reliance. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323 (Tex. 2011). The clause stated, "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein." *Id*. at 336. Regarding the provisions in *Schlumberger* and *Forest Oil*, the Court stated: "In each case, the intent to disclaim reliance on others' representations—*that is to rely only on one's own judgment*—was evident from the language of the contract itself." *Id*. at 335 (emphasis added). The court held that the clause was actually nothing more than a standard merger clause and that if the parties had actually intended to disclaim reliance, they did not do so by clear and unequivocal contractual language. 341 S.W.3d at 333-34, 336. The Court held that the clause did not bar a fraud claim because it did not meet the elevated requirement of disclaiming reliance on representations in "clear and unequivocal language." *Id*. at 336.

XIII. No-Waiver Clause

A. Form

No waiver by any Party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and executed by the waiving Party. Except as otherwise explicitly set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall

any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

B. Analysis

The presence of a no-waiver clause in a contract does not automatically preclude a party from asserting the affirmative defenses of waiver and estoppel. *See Zwick v. Lodewijk Corp.*, 847 S.W.2d 316, 318 (Tex. App.—Texarkana 1993, writ denied); *see also Winslow v. Dillard Dept. Stores, Inc.*, 849 S.W.2d 862 (Tex. App.—Texarkana 1993, writ denied); *Regent Int'l Hotels, Ltd. v. Las Colinas Hotels Corp.*, 704 S.W.2d 101, 104 (Tex. App.—Dallas 1985, no writ). *In Zwick*, the Texarkana court relied on Corbin On Contracts, which states that:

> a provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the same extent that he would have had this power if there had been no such provision.

See Zwick, 847 S.W.2d at 318 (quoting 3A Arthur L. Corbin, CORBIN ON CONTRACTS § 763 (1960)). Thus, while a non-waiver provision in a contract may be "some evidence of nonwaiver, it may itself be waived like any other contractual provision." *Id.* Of course, although non-waiver clauses may themselves be waived, they are generally considered valid and enforceable. *See Allen v. Hines Ranches of Texas, Inc.*, 2003 WL 22908134 (Tex. App.—Austin 2003, no pet.).

In *Zwick*, a landlord terminated the lease and evicted its tenant following tenant's failure to timely pay rent. *Zwick*, 847 S.W.2d at 317. Tenant argued that landlord had accepted her late rental payments for several years and that landlord's express and implied representations, along with its long-standing course of conduct, led tenant to believe that rent was not considered late if it was paid within the month it was due. *Id.* The trial court concluded, as a matter of law, that the presence of a non-waiver provision in the lease precluded tenant from asserting the affirmative defenses of waiver and estoppel. *Id.* However, the court of appeals reversed, holding that a non-waiver provision would not automatically preclude any and all waivers by the contracting party, "no matter what the facts may be." *Id.* at 318. Rather, the non-waiver clause could be waived just like any other contractual provision, and the court remanded to the trial court for a factual determination on tenant's affirmative defenses. *Id.*

XIV. Statute-Of-Limitations-Shortening Clause

A. Form

The parties agree that no action, regardless of form, arising from or related to this Agreement or the relationship of the parties may be brought by either party more than two

years from the date that said claim accrues.

B. Analysis

Generally, the statute of limitations period for a breach of contract claim is four years from the date the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.004. However, the parties to a contract may agree shorten that time period. *See Jett v. Truck Ins. Exch.*, 952 S.W.2d 108, 109 (Tex. App.—Texarkana 1997, no writ). Texas Civil Practice and Remedies Code Section 16.070(a) provides that a person may not agree to a period shorter than two years: "[A] person may not enter a stipulation, contract, or agreement that purports to limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state." Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a). Therefore, courts have held that a contract that limits the time to bring suit to a period shorter than two years is void. *See, e.g., Webb v. Smith*, 288 S.W. 624, 625 (Tex. Civ. App.—Waco 1926, writ dism'd w.o.j).

Consequently, a contractual limitations period, to comply with section 16.070(a), cannot end until after two years after the day the cause of action for breach of the agreement has accrued. *Spicewood Summit Office Condos. Ass'n v. Am. First Lloyd's Ins. Co.*, 287 S.W.3d 461, 464-65 (Tex. App.—Austin 2009, pet. denied); *see also Holston v. Implement Dealers Mut. Fire Ins. Co.*, 206 F.2d 682, 684 (5th Cir. 1953) ("The clear meaning of the statute is that the plaintiff must be given at least two years after the accrual of his cause of action within which to file suit."); *Salazar v. Capitol County Mut. Fire Ins. Co.*, No. 04-96-00995-CV, 1998 Tex. App. LEXIS 2450, at *5-7 (Tex. App.—San Antonio Apr. 22, 1998, no pet.) (not designated for publication); *Culwell v. St. Paul Fire & Marine Ins. Co.*, 79 S.W.2d 914, 916 (Tex. Civ. App.—Eastland 1935, writ dism'd w.o.j.); *American Sur. Co. v. Martinez*, 73 S.W.2d 109, 112 (Tex. Civ. App.—El Paso 1934, writ ref'd); *Taylor v. National Life & Accident Ins. Co.*, 63 S.W.2d 1082, 1083 (Tex. Civ. App.—Amarillo 1933, writ dism'd w.o.j.).

XV. Remedy Clauses

A. Pro-Injunction Clauses

1. Form

The Parties agree that a remedy at law for any breach of this Agreement would be inadequate and they agree and consent that temporary or permanent injunctive relief may be granted without necessity of proof of actual damage.

2. Analysis

To obtain a temporary injunction, an applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

Courts have held that contractual clauses that expressly provide for injunctive relief are evidence that there is no adequate remedy at law, and that they will support a trial court's temporary injunction. *See, e.g., Wright v.*

Sport Supply Group, Inc., 137 S.W.3d 289 (Tex. App.—Beaumont 2004, no pet.); *Henderson v. KRTS, Inc.*, 822 S.W.2d 769 (Tex. App.—Houston [1st Dist.] 1992, no writ). For example, in *Henderson v. KRTS, Inc.*, there was a dispute over the attempted purchase and relocation of a radio station. 822 S.W.2d at 771. The parties signed a contract that included a provision that seller agreed that buyer's remedy at law would be inadequate, and that if seller breached the agreement buyer could seek temporary or permanent injunctive relief in any action to enforce the agreement. *Id.* at 772. The trial court granted a temporary injunction. On appeal, in response to an argument that the plaintiff had an adequate remedy at law, the court quoted the parties' contract, and held that defendant "by agreement, stipulated that [buyer] could seek injunctive relief without the necessity of proof of actual damages." *Id.* As a result, the court rejected defendant's argument that plaintiff had shown no inadequate remedy at law. *Id.*

However, in *W. R. Grace & Co.-Conn v. Taylor*, the court found that contractual provisions were not sufficient to support a trial court's finding of irreparable harm. No. 14-06-01056-CV, 2007 Tex. App. LEXIS 3779 (Tex. App.—Houston [14th Dist.] May 17, 2007); *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1266 (10th Cir. 2004); *Smith, Bucklin & Assocs., Inc v. Sonntag*, 317 U.S. App. D.C. 364, 83 F.3d 476, 481 (D.C. Cir. 1996); *Baker's Aid, Inc. v. Hussmann Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987); *Traders Int'l, Ltd. v. Scheuermann*, No. H-06-1632, 2006 U.S. Dist. LEXIS 61995, at *8 (S.D. Tex. Aug. 30, 2006) (not designated for publication); *Sec. Telecom Corp. v. Meziere*, No. 05-95-01360-CV, 1996 Tex. App. LEXIS 806, 1996 WL 87212, at *2 (Tex. App.—Dallas Feb. 28, 1996, no writ.) (not designated for publication).

B. Pro-Receivership Clauses

1. Form

> Alternatively, if an Event of Default has occurred and is continuing, regardless of the adequacy of Lender's security, without regard to Borrower's solvency and without the necessity of giving prior notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in the preceding sentence. If Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver ex parte if permitted by applicable law. Lender or the receiver, as the case may be, shall be entitled to receive a reasonable

fee for managing the Mortgaged Property.

2. Analysis

A court may appoint a receiver "in an action by a creditor to subject any property or fund to his claim," or "in any other case in which a receiver may be appointed under rules of equity." Tex. Civ. Prac. & Rem. Code §§ 64.001(a)(2), & (6). A court may appoint a receiver in an action by a creditor to subject any property or fund to his claim where the creditor has a probable interest in or right to the property or fund and the property or fund must be in danger of being lost, removed, or materially injured. *See id*. Often, the finding of "danger of being lost, removed, or materially injured" is difficult to meet.

Courts have held that by executing loan documents containing these types of clauses, all interested parties, in effect, have consented to the appointment of a receiver. *See New York Life Ins. Co. v. Watt West Inv. Corp.*, 755 F. Supp. 287, 292 (E.D. Calif. 1991) (fact that the parties agreed to the appointment of a receiver in a deed of trust is entitled to great weight when the court exercises its discretion to determine whether to appoint a receiver); *Riverside Properties v. Teachers Ins. & Annuity Ass'n of America*, 590 S.W.2d 736, 738 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (provisions in deed of trust and security agreements calling for appointment of a receiver pending foreclosure were adequate for trial court to order appointment of receiver). *See also Bank of Am. v. Quik-Way Foods of Dallas, Inc*., 2011 U.S. Dist. LEXIS 81262 (N.D. Tex. July 25, 2011).

C. Liquidated-Damages Clause

1. Form

If this Agreement is terminated early, the parties agree that the damages sustained by Party A will be substantial and difficult to ascertain. Therefore, if this agreement is improperly terminated by Party B prior to the applicable expiration date, or terminated by Party A for cause at any time, Party B will pay to Party A as liquidated damages and not as a penalty, the greater of [] or [].

2. Analysis

Parties may attempt to insert damages provisions in their contracts, such that if a party breaches the contract, the non-breaching party will be entitled to a certain damages amount. These provisions may be enforceable. However, as the basic principle underlying contract damages is compensation for losses sustained and no more, Texas courts will not enforce punitive contractual damages provisions. *See FPL Energy LLC v. TXU Portfolio Mgmt. Co. L.P.*, 426 S.W.3d 59, 69-70 (Tex. 2014*); Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952). There are two indispensable findings a court must make to enforce contractual damages provisions: (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages called for is a reasonable forecast of just compensation. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).

Under this test, a liquidated damages provision may be unreasonable because the actual damages incurred were much less than the amount

contracted for. 820 S.W.2d at 788. A defendant making this assertion may be required to prove the amount of actual damages before a court can classify such a provision as an unenforceable penalty. *Id*. While the question may require a court to resolve certain factual issues first, ultimately the enforceability of a liquidated damages provision presents a question of law for the court to decide. *Id*. The party asserting that a liquidated-damages clause is a penalty provision bears the burden of pleading and proof. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). A court views the reasonableness of the forecast from the time of contracting. *Mayfield v. Hicks*, 575 S.W.2d 571, 576 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

D. Damage-Limitation Clause

1. Forms

Company A's liability to Company B for any cause or combination of causes is in the aggregate, limited to an amount no greater than the fee earned under this agreement.

In no event will either Party be liable to the other under this Agreement for indirect, special, incidental, punitive or consequential damages, including, but not limited to, loss of profits, loss of use of assets or loss of product, loss or inability to use property and equipment or business interruption, losses resulting from failure to meet other contractual commitments or deadlines.

If the transaction contemplated by this Agreement is not consummated because of Party A's failure to perform its obligations hereunder, Party B shall be entitled, as its exclusive remedy, to (a) terminate the agreement, (b) waive the defect and close on the transaction, or (c) to enforce specific performance of Party A's obligations under this Agreement.

2. Analysis

Limitation of liability clauses are generally not considered to violate public policy. *See e.g., Martin v. Lou Poliquin Ents., Inc*., 696 S.W.2d 180, 186 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) ("a limitation of liability clause may waive a party's right to recover under the common law theory of breach of contract"); *Brewer v. Myers*, 545 S.W.2d 235, 237 (Tex. App.—Tyler 1976, no writ) (citations omitted) ("Having thus bound himself to accept the sum for such damages as may be suffered by reason of nonperformance of the contract on the part of the purchaser, the seller cannot sue the proposed purchaser for actual damages."). If a plaintiff brings suit, the terms of the contract determine the relative positions of the parties and control the level of liability of either party. *Federated Dept. Stores, Inc. v. Houston Lighting & Power Co.*, 646 S.W.2d 509, 511 (Tex. App.—Houston [1st Dist.] 1982, no writ).

Damage-limitation clauses can take many different forms. For example, such a clause may forbid the recovery of consequential or loss profits damages. *Cont'l Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475-76 (Tex. App.—Eastland 2003, no pet.). Such a clause may be enforceable. *See id.*

Further, a contractual provision setting an upper limit on the amount recoverable is a limitation of liability

provision. *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys.*, 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.); *Fox Elec. Co. v. Tone Guard Sec., Inc.*, 861 S.W.2d 79, 83 (Tex. App.—Fort Worth 1993, no writ). Such a provision is enforceable if it does not violate public policy. *Vallance & Co. v. DeAnda*, 595 S.W.2d 587, 590 (Tex. App.—San Antonio 1980, no writ); *Allrights, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974). When determining whether a limitation of liability provision violates public policy, courts will generally consider whether there was a disparity in bargaining power between the parties. *Allright*, 515 S.W.2d at 267. Some courts have also applied an unconscionability analysis. *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748-749 (Tex. App.—Fort Worth 2005, no pet.). Under that analysis, courts will consider the bargaining process (procedural unconscionability aspect) and the fairness of the contractual provision in controversy, by determining whether there are legitimate commercial reasons that justify its inclusion as part of the agreement (substantive unconscionability aspect). *Id.*; *Am. Employers' Ins. Co. v. Aiken*, 942 S.W.2d 156, 160 (Tex. App.—Fort Worth 1997, no writ). A party relying on the defense of unconscionability carries the burden to show both procedural and substantive unconscionability. *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 376-77 (Tex. App.—Texarkana 1999, orig. proceeding). A contractual provision setting an upper limit on the amount recoverable applies even to non-contract claims, if the terms of the contract so provide. *Arthur's Garage*, 997 S.W.2d at 810.; *Fox Elec. Co.*, 861 S.W.2d at 82-83.

E. Attorney's Fees

1. Form

In the event either party hereto employs an attorney in connection with claims by one party against the other arising from the operation of this Agreement, the non-prevailing party shall pay the prevailing party all reasonable fees and expenses, including attorneys' fees, incurred in connection with such claims.

Liberal definitions of prevailing party:

The party who brings a claim will be the prevailing party under this Agreement even though it is not awarded monetary relief so long as it successfully asserts its liability claim and is awarded specific performance or injunctive relief.

The party who brings a claim will be the prevailing party under this Agreement even though it is not awarded monetary or other relief so long as it successfully asserts its liability claim.

The party who defends a claim will be the prevailing party under this Agreement if the party who brought the claim files a nonsuit with or without prejudice of that claim at any time after the filing of suit.

2. Analysis

Texas adheres to the American Rule with respect to attorney's fees. Under that rule, litigants may recover attorney's fees only if specifically provided for by statute or contract. *See Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011) (citing *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009)).

Texas Civil Practice and Remedies Code Chapter 38 allows for a recovery of attorney's fees in certain breach of contract actions. Section 38.001 provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . (8) an oral or written contract." Tex. Civ. Prac. & Rem. Code § 38.001(8). But this provision has certain limitations.

First, only a plaintiff may receive such an award. The Austin and Texarkana courts of appeals have concluded that attorney's fees under Chapter 38 may not be awarded to the prevailing party in a breach-of-contract case absent a monetary recovery. *Haubold v. Medical Carbon Research Inst.*, 2014 Tex. App. LEXIS 2863, 2014 WL 1018008 at *5-6 (Tex. App.—Austin March 14, 2014, no pet.) (mem. op.) (concluding that specific performance in enforcing Rule 11 agreement was not a recovery of actual damages and thus attorney's fees incurred in enforcing the agreement were not recoverable); *Berg v. Wilson*, 353 S.W.3d 166, 182 (Tex. App.—Texarkana 2011, pet. denied) (concluding that "because Wilson did not recover actual damages, she was not entitled to recover attorneys' fees on her [Rule 11] breach of contract claim," but affirming award on alternative basis). Other courts of appeals have held that a "valid claim" under section 38.001(8) is not limited to a claim for monetary damages, but also encompasses specific performance of the agreement to avoid actual damage. *Woody v. J. Black's*, L.P., 2013 Tex. App. LEXIS 13062, 2013 WL 5744359, at *6 (Tex. App.—Amarillo Oct. 18, 2013, pet. denied) (mem. op.) (recognizing that an "injunction enforcing specific performance of a contract is something of value" sufficient to support Chapter 38 attorney's fees and rejecting argument that an award of monetary damages were required); *Rasmusson v. LBC PetroUnited, Inc.*, 124 S.W.3d 283, 287 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that award of specific performance of arbitration agreement permitted recovery of Chapter 38 attorney's fees and rejecting argument that monetary damages were required); *Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (interpreting Chapter 38 to authorize an award of attorney's fees when a party "successfully prosecutes a claim founded on . . . written contracts.").

Second, certain defendants are exempt from the statute's reach. One court held that under the plain language of section 38.001, a court could not order a partnership (specifically a limited liability partnership) to pay attorney's fees. *Fleming & Associates, L.L.P. v. Barton*, 425 S.W.3d 560, 574-75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The same court later held that a limited liability company also could not be ordered to pay attorney's fees under Chapter 38. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Accordingly, contractual attorney's fees provisions may assist the parties in allocating the costs of later disputes more effectively than Chapter 38.

Normally, when a contractual attorney's fees clause allows for an award, a court must determine if the contract authorizes the trial court to

award fees because one party "prevailed." If a contract defines the term "prevailing," then that definition controls. *Kingsley Props., LP v. San Jacinto Title Servs. of Corpus Christi, LLC*, No. 13-15-00128-CV, 2016 Tex. App. LEXIS 10341 (Tex. App.—Corpus Christi September 22, 2016, no pet. history).

However, when the parties are silent on the meaning of "prevailing," a court must ascertain the meaning from other contexts. A court's primary concern when it construes a written contract is to ascertain the parties' true intent as expressed in the contract. *Epps*, 351 S.W.3d at 865-66. A court may look to the entire agreement in an effort to give each part meaning. *Id*. When a contract leaves a term undefined, a court must presume that the parties intended its plain, generally accepted meaning. *Id*.

A prevailing party is the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention." *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 637-38 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (citing *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, pet. denied)). Determination of whether a party is the prevailing or successful party is based upon success on the merits, and not on whether damages were awarded. *Glick*, 991 S.W.2d at 17; *see also Robbins v. Capozzi*, 100 S.W.3d 18, 27 (Tex. App.—Tyler 2002, no pet.). In other words, the prevailing party is the party who is vindicated by the trial court's judgment. *Glick*, 991 S.W.2d at 17.

The Texas Supreme Court has held that a plaintiff is not a prevailing party when it wins its breach of contract claim but does not receive an award of damages. *Epps*, 351 S.W.3d 865; *Intercontinental Grp. P'ship*, 295 S.W.3d at 653. In *KB Home*, the Texas Supreme Court held that a plaintiff who secured favorable jury findings but was awarded no damages was not a prevailing party because the plaintiff received no relief that materially altered the parties' legal relationship; the plaintiff's victory was simply illusory. *KB Home*, 295 S.W.3d at 652.

The Court explained that "[t]o qualify as a prevailing party, a . . . plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 295 S.W.3d at 654. In short, "[w]hether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable." *Id*. at 655.

Although the *KB Home* opinion is instructive with regard to when a plaintiff can be a prevailing party, the Court did not reach the issue of "whether the defendant in that case could instead be the 'prevailing party.'" *Silver Lion, Inc. v. Dolphin St., Inc.*, No. 01-07-00370-CV, 2010 Tex. App. LEXIS 3873, 2010 WL 2025749, at *18 (Tex. App.—Houston [1st Dist.] May 20, 2010, pet. denied) (mem. op.); *see also Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 629-30 (Tex. App.—San Antonio 2011, no pet.) (relying on *Silver Lion* and holding *KB Home* was inapplicable to question of

whether defendant was entitled to attorney's fees).

Later, in *Epps*, the Texas Supreme Court revisited the question of what it means to be a "prevailing party" and clarified that a defendant does not have to obtain affirmative relief from a court in order to "prevail." *Epps*, 351 S.W.3d at 868-70. In *Epps*, the plaintiff nonsuited its case with prejudice. *Id*. The Court held that a defendant is a prevailing party under such circumstances because "[t]he res judicata effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal relationship to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter." *Id*. at 868-69. Thus, a defendant who successfully defends against a plaintiff's claim is entitled to recover its attorney's fees pursuant to a contract's "prevailing party" clause. *See SEECO, Inc. v. K. T. Rock, LLC*, 416 S.W.3d 664, 674 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (awarding defendant its attorney's fees under "prevailing party" clause); *see also Bhatia v. Woodlands N. Hous. Heart Ctr., PLLC*, 396 S.W.3d 658, 670-71 (Tex. App.—[14th Dist.] 2013, pet. denied) (same); *Johnson v. Smith*, No. 07-10-00017-CV, 2012 Tex. App. LEXIS 393, 2012 WL 140654, at *2 (Tex. App.—Amarillo Jan. 18, 2012, no pet.) (mem. op.) (same).

Accordingly, a defendant is a prevailing party when a plaintiff nonsuits a case with prejudice. *Epps*, 351 S.W.3d 869. Further, a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits. *Id*.

The Texas Supreme Court has held that whether a party is a prevailing party under the contract is confined to disputes arising out of that written contract and do not include other disputes and seemingly went away from a "main issues" analysis. *KB Home*, 295 S.W.3d at 661. However, there is currently some confusion over whether the "main issue" test is still relevant for determining prevailing party status. *www.urban.inc. v. Drummond*, No. 01-14-00299-CV, 2016 Tex. App. LEXIS 9596 (Tex. App.—Houston [1st Dist.] August 30, 2016, no pet.). Courts have continued to use "main issue" analysis in cases involving contractual attorney's fees provisions. *See Silver Lion, Inc.*, 2010 Tex. App. LEXIS 3873, 2010 WL 2025749, at *18 (relying upon pre-KB Home authorities and holding defendant who prevailed on "main issue" was entitled to attorney's fees pursuant to contract provision); *see also SEECO, Inc.*, 416 S.W.3d at 674 (holding defendant who prevailed on "main issue" was entitled to attorney's fees pursuant to contract provision); *Bhatia*, 396 S.W.3d at 670-71 (same); *Johnson*, 2012 Tex. App. LEXIS 393, 2012 WL 140654, at *2 (same).

XVI. Conclusion

The parties to any contract have the freedom to agree to terms that may limit their risk upon a dispute arising. This paper was intended to provide basic guidance on many different types of clauses that can be utilized to limit risk. The Author hopes that this paper will be of use to the reader for future reference.