

NEW YORK

# Contract Law:

A Guide for Non–New York Attorneys

**Glen Banks, Esq.**

 **NORTON ROSE FULBRIGHT**



NEW YORK STATE BAR ASSOCIATION

New York State Bar Association Continuing Legal Education publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: CLE Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2015  
New York State Bar Association  
All rights reserved  
ISBN: 1-57969-413-6  
Product Number: 4172

## CONTENTS

<b>Chapter I</b>	<b>New York Contract Law.....</b>	<b>1</b>
<b>Chapter II</b>	<b>A Contract Governed By New York Law.....</b>	<b>17</b>
<b>Chapter III</b>	<b>Contract Formation .....</b>	<b>57</b>
<b>Chapter IV</b>	<b>Reasons Why A Court May Refuse to Enforce a Contract .....</b>	<b>103</b>
<b>Chapter V</b>	<b>Giving Meaning to Contract Language .....</b>	<b>149</b>
<b>Chapter VI</b>	<b>Conditions and Implied Terms .....</b>	<b>189</b>
<b>Chapter VII</b>	<b>Repudiation .....</b>	<b>229</b>
<b>Chapter VIII</b>	<b>Termination .....</b>	<b>245</b>
<b>Chapter IX</b>	<b>Assignment .....</b>	<b>267</b>
<b>Chapter X</b>	<b>Performance And Breach .....</b>	<b>277</b>
<b>Chapter XI</b>	<b>Excuse .....</b>	<b>321</b>
<b>Chapter XII</b>	<b>Damages .....</b>	<b>345</b>
<b>Chapter XIII</b>	<b>Particular Agreements and Clauses .....</b>	<b>407</b>
<b>Chapter XIV</b>	<b>Counsel’s Work on a Transaction Governed by New York Law .....</b>	<b>473</b>

## DETAILED TABLE OF CONTENTS

Acknowledgments.....	xxi
Foreword.....	xxiii
About the Author .....	xxv
Introduction.....	xxvii

### Chapter I New York Contract Law

[I.0]	A. Why Is New York Contract Law Important to Practitioners Outside New York?.....	3
[I.1]	B. What Is New York Contract Law?.....	5
[I.2]	C. What Is the Basic Principle of New York Contract Law? .....	9
[I.3]	D. Why Choose New York Contract Law to Govern a Contract?.....	14

### Chapter II A Contract Governed by New York Law

[II.0]	A. What Is a “Contract”? .....	19
[II.1]	1. Can an Oral Agreement Be Enforced?.....	20
[II.2]	2. Can a Contract Exist if There Is No Oral or Written Agreement Between the Parties?.....	21
[II.3]	3. Can a Written Agreement Be Binding Upon a Party Named in the Agreement if That Party Did Not Execute the Agreement? .....	23
[II.4]	4. Can a Preliminary Agreement Have Binding Effect? .....	23
[II.5]	5. Can a Written Contract Be Found in More Than One Document? .....	26
[II.6]	6. Do the Prior Oral Agreements and Understandings of the Parties Still Have Effect After Execution of the Written Agreement? .....	29
[II.7]	7. Can a Contract Change Over Time? .....	30
[II.8]	B. Who Can Enforce, or Be Liable Under, a Contract?.....	32
[II.9]	1. When May a Third Party Enforce the Contract? .....	32
[II.10]	2. Can a Third Party Be Held Liable for Breach of the Contract?.....	35
[II.11]	3. Can an Entity Be Held Liable Under a Contract of an Affiliate? .....	36
[II.12]	4. Can a Signatory of a Contract Make the Agreement Binding Upon a Third Party? .....	37

[II.13]	5. Can a Person Who Executes a Contract on Behalf of an Entity Be Held Personally Liable Under the Contract? .....	38
[II.14]	C. How Can a Contract Between Foreign Parties in a Foreign Transaction Be Governed by New York Law? .....	39
[II.15]	1. Will a Choice-of-Law Clause Choosing New York Law Be Given Effect if Neither the Parties nor Their Agreement Has Any Connection to New York? .....	40
[II.16]	2. Is a Choice-of-Law Clause Necessary to Have New York Law Govern a Contract or a Claim to Enforce a Contract? .....	41
[II.17]	3. What Does It Mean to Characterize a Choice-of-Law Clause as Narrow or Broad? .....	43
[II.18]	4. Does Use of a Broad Choice-of-Law Clause Mean That All Issues Relating to Claims Concerning the Contract Will Be Governed by New York Law? .....	44
[II.19]	5. If the Parties Include a New York Choice-of-Law Clause in Their Contract, Is There Anything Else They Should Consider to Ensure That New York Law Is Applied to Determine Matters Concerning the Contract? .....	46
[II.20]	D. Can Foreign Parties Choose to Have Disputes Concerning Their Contract Adjudicated by a New York Court? .....	47
[II.21]	1. Can Parties to a Contract Choose Where Disputes Concerning Their Contract Will Be Adjudicated? .....	48
[II.22]	2. Will a Court Enforce a Choice-of-Forum Clause? .....	48
[II.23]	3. Can the Parties Choose to Have a New York Court Determine Disputes Concerning Their Contract if Neither the Parties Nor Their Agreement Has any Connection With New York? .....	49
[II.24]	4. If the Parties Want a New York Court to Determine Disputes Concerning Their Contract, Do They Need to Do More Than Select a New York Court in Their Forum-Selection Clause? .....	50

[II.25]	5. Should any Particular Court Be Chosen in a Forum-Selection Clause That Chooses New York as a Forum?.....	51
[II.26]	6. Are There Different Types of Forum-Selection Clauses?.....	52
[II.27]	7. Can a Non-Signatory to a Contract Force a Signatory to Litigate Claims in the Jurisdiction Chosen in the Forum-Selection Clause? .....	53
[II.28]	8. Can a Non-Signatory to a Contract Be Bound by a Forum-Selection Clause? .....	54
[II.29]	9. Should the Contract Have a Forum-Selection Clause if Disputes Will Be Arbitrated?.....	54

**Chapter III Contract Formation**

[III.0]	A. Assent—a Meeting of the Minds .....	59
[III.1]	1. What Constitutes Assent? .....	59
[III.2]	2. How Is Assent Objectively Manifested?.....	60
[III.3]	3. Must the Parties Assent to all the Terms of Their Agreement? .....	62
[III.4]	4. Can Assent Be Objectively Manifested by Offer and Acceptance?.....	64
[III.5]	5. Is It Possible That There Can Be No Contract if the Parties Executed a Writing That Stated all the Essential Terms of Their Bargain?.....	67
[III.6]	B. Definiteness.....	69
[III.7]	1. What Is Definiteness? .....	69
[III.8]	2. What Does a Court Do When a Term Is Indefinite?.....	72
[III.9]	3. Can a Contract Be Formed if a Term Is Left Open?.....	72
[III.10]	4. Can the Parties Form a Contract Without Expressing a “Price” Term or the Time for Performance?.....	74
[III.11]	C. Consideration .....	75
[III.12]	1. What Is Consideration?.....	75
[III.13]	2. What Can Constitute Consideration? .....	76
[III.14]	3. Does Any Promise Constitute Consideration Necessary for an Enforceable Agreement? .....	78
[III.15]	4. In a Case Involving Commercial Parties, Will a Court Evaluate the Adequacy of Consideration Provided by a Party? .....	78

[III.16]	5. What Is Mutuality of Obligation? .....	79
[III.17]	6. What Is an Illusory Agreement?.....	80
[III.18]	D. The Statute of Frauds .....	81
[III.19]	1. What Is the Statute of Frauds? .....	81
[III.20]	2. What Is an Agreement That Cannot Be Performed Within a Year?.....	83
[III.21]	3. What Constitutes a Writing That Satisfies the Statute of Frauds?.....	84
[III.22]	4. If the Statute of Frauds Applies and Has not Been Satisfied, Can a Court Still Find an Enforceable Agreement?.....	86
[III.23]	E. Implied Contracts .....	88
[III.24]	1. What Is an Implied-in-Fact Contract?.....	88
[III.25]	2. What Is an Implied-in-Law Contract?.....	89
[III.26]	a. Can a Quasi-Contract Claim Be Pursued With a Breach of Contract Claim? .....	90
[III.27]	b. What Is a Claim for Unjust Enrichment? .....	91
[III.28]	c. What Is a Claim for Quantum Meruit?.....	94
[III.29]	d. What Is a Claim for Promissory Estoppel? ....	95
[III.30]	e. What Is a Claim for Restitution?.....	97
[III.31]	f. What Is a Claim for Common-Law Indemnification?.....	98
[III.32]	g. What Is a Claim for Money Had and Received? .....	99
[III.33]	h. What Law Will Be Applied to Determine a Quasi-Contract Claim? .....	100

#### **Chapter IV Reasons Why a Court May Refuse to Enforce a Contract**

[IV.0]	A. Fraud.....	105
[IV.1]	1. What if a Signature on an Agreement Is Forged?.....	105
[IV.2]	2. What Is Fraud in the Execution? .....	106
[IV.3]	3. What Is Fraud in the Inducement? .....	109
[IV.4]	a. Reliance .....	110
[IV.5]	b. Disclaimers.....	112
[IV.6]	c. Scierter.....	113
[IV.7]	d. Damages .....	113
[IV.8]	4. Can a Failure to Disclose Constitute Fraud?.....	113
[IV.9]	B. Mistake .....	115
[IV.10]	1. What Is a Mutual Mistake of Fact? .....	116
[IV.11]	2. What Is Scrivener's Error?.....	117

[IV.12]	3.	Can a Unilateral Mistake Be the Basis for Not Enforcing a Contract? .....	118
[IV.13]	4.	Can the Mistake Be a Mistake of Law? .....	119
[IV.14]	5.	Can a Mistake Involve Performance? .....	120
[IV.15]	C.	Duress .....	120
[IV.16]	1.	What Is Economic Duress? .....	120
[IV.17]	2.	What Is a Threat That Can Be the Basis for a Finding of Economic Duress? .....	123
[IV.18]	3.	What Is Undue Influence? .....	124
[IV.19]	D.	Unconscionability .....	125
[IV.20]	1.	What Is Unconscionability? .....	126
[IV.21]	2.	What Is Procedural Unconscionability? .....	126
[IV.22]	3.	What Is Substantive Unconscionability? .....	127
[IV.23]	E.	Addressing a Voidable Contract .....	128
[IV.24]	1.	What Is Ratification? .....	129
[IV.25]	2.	What Is Rescission? .....	129
[IV.26]	3.	How Is a Claim for Rescission Asserted? .....	132
[IV.27]	4.	What Is Reformation? .....	133
[IV.28]	5.	What Is Declaratory Relief? .....	135
[IV.29]	F.	Illegality .....	135
[IV.30]	1.	What Types of Illegality Can Impact Enforcement of a Contract? .....	137
[IV.31]	2.	What Law Is Applied to Determine Illegality? .....	138
[IV.32]	3.	How Will a Court Analyze the Effects of Illegality? .....	140
[IV.33]	4.	What if Only Some Portion of the Contract Involves Illegality? .....	142
[IV.34]	G.	Public Policy .....	142
[IV.35]	1.	What Public Policy Issues Have Been Raised in Connection With Enforcement of a Contract? .....	143
[IV.36]	2.	How Does Public Policy Impact Commercial Transactions? .....	144
[IV.37]	a.	Exculpatory Clauses .....	144
[IV.38]	b.	Clauses Restricting Compensation .....	145
[IV.39]	(i)	Business Contracts .....	145
[IV.40]	(ii)	Employees .....	146
[IV.41]	(iii)	Contracts for the Sale of a Business .....	146
[IV.42]	3.	Can a Court Enforce a Contract That Contains a Provision That Is Contrary to Public Policy? .....	148



<b>Chapter V</b>		<b>Giving Meaning to Contract Language</b>	
[V.0]	A.	Clear, Unambiguous Language .....	151
[V.1]	1.	What Is the Fundamental Principle of New York Law Concerning Contract Language?.....	151
[V.2]	2.	What Do Courts Look at When Giving Meaning to Contract Language? .....	153
[V.3]	3.	In Giving Meaning to Contract Language, Should a Court Consider the Purpose of the Agreement? .....	154
[V.4]	4.	What Is the “Plain Meaning” Rule? .....	155
[V.5]	5.	What Is the Parol Evidence Rule?.....	157
[V.6]	B.	Inconsistent Language.....	160
[V.7]	1.	How Does a Court Approach Inconsistent Contract Language?.....	160
[V.8]	a.	Give Meaning.....	161
[V.9]	b.	Harmonize .....	161
[V.10]	2.	What Does the Court Do if the Inconsistent Clauses Cannot Be Harmonized?.....	162
[V.11]	3.	Can the Parties Agree That a Provision in the Contract Will Take Precedence Over any Conflicting Provision?.....	163
[V.12]	4.	What Happens if the Inconsistent Clauses Cannot Be Harmonized and Neither the Contract nor the Rules of Construction Shed Light on How to Address the Inconsistency? .....	163
[V.13]	C.	Ambiguity.....	164
[V.14]	1.	When Is Contract Language Ambiguous? .....	164
[V.15]	2.	How Does a Court Determine Whether Contract Language Is Ambiguous? .....	166
[V.16]	3.	What Does a Court Look at if It Finds Contract Language Is Ambiguous?.....	169
[V.17]	a.	Prior Communications Between the Parties Concerning the Contract.....	170
[V.18]	b.	Practical Construction—How the Parties Performed Under the Contract .....	171
[V.19]	c.	Prior Course of Dealing.....	173
[V.20]	d.	Custom and Usage.....	174
[V.21]	e.	Expert Testimony .....	176
[V.22]	f.	Subjective Intent.....	177
[V.23]	D.	Rules of Contract Construction .....	178
[V.24]	1.	What General Principles Have Courts Applied to Give Meaning to Contract Language? .....	179

[V.25]	a.	Construction Consistent with the Agreement as a Whole .....	179
[V.26]	b.	Construction to Achieve a Reasonable Meaning.....	179
[V.27]	c.	Construction Against Forfeiture.....	180
[V.28]	d.	Construction in Favor of the Lesser Obligation.....	180
[V.29]	e.	Construction in Favor of Contract Enforceability .....	181
[V.30]	f.	Construction in the Public Interest.....	181
[V.31]	g.	Construction Against the Draftsman .....	182
[V.32]	h.	Construction in Favor of Promisee .....	183
[V.33]	2.	Focusing on the Entire Agreement, Have Courts Applied to Give Meaning Contract Language? .....	183
[V.34]	a.	Construction to Further the Purpose of the Contract .....	183
[V.35]	b.	Construction to Avoid Inconsistency .....	184
[V.36]	c.	Construction to Avoid Surplusage .....	184
[V.37]	d.	Construction to Aid the Realization of the Parties' Reasonable Expectations .....	185
[V.38]	3.	What Rules of Contract Construction Have Courts Applied to the Particular Language at Issue?.....	185
[V.39]	a.	Consistency of Usage.....	185
[V.40]	b.	<i>Expressio Unius</i> .....	186
[V.41]	c.	<i>Ejusdem Generis</i> .....	187
[V.42]	d.	<i>Noscitur a Sociis</i> .....	187
[V.43]	e.	The Rule of the Last Antecedent.....	188
[V.44]	f.	Conditions Are Disfavored .....	188

## **Chapter VI Conditions and Implied Terms**

[VI.0]	A.	Conditions .....	191
[VI.1]	1.	What Is a Condition?.....	191
[VI.2]	2.	What Are the Various Types of Conditions That Can Be in a Contract? .....	193
[VI.3]	3.	How Is an Express Condition Created? .....	195
[VI.4]	4.	How Do Courts View Conditions? .....	196
[VI.5]	5.	Can a Court Excuse Compliance With a Condition? .....	196
[VI.6]	6.	Can Satisfaction of a Condition Be Waived?.....	197

[VI.7]	7. What Obligation Does a Party Have With Respect to the Fulfillment of a Condition? .....	198
[VI.8]	B. The Implied Covenant of Good Faith and Fair Dealing .....	200
[VI.9]	1. What Has the New York Court of Appeals Said Concerning the Implied Covenant of Good Faith and Fair Dealing?.....	201
[VI.10]	2. What Obligations Are Created by the Implied Covenant?.....	205
[VI.11]	3. When a Contract Gives a Party the Right to Take (or Refrain From Taking) Action, Can a Claim for Breach of the Covenant Be Based on the Allegation That the Party Acted in Bad Faith? .....	207
[VI.12]	4. Can the Implied Covenant Limit the Exercise of Discretion Accorded Under a Contract? .....	212
[VI.13]	5. In What Circumstances Is the Implied Covenant Inapplicable? .....	214
[VI.14]	6. What Is the Relationship Between a Breach of Contract Claim and a Claim for Breach of the Implied Covenant? .....	217
[VI.15]	C. Other Implied Terms .....	217
[VI.16]	1. Can a Court Construing a Contract Imply a Term the Parties Did Not Express? .....	217
[VI.17]	2. May a Court Imply the Time for Performance?....	219
[VI.18]	3. May a Court Imply the Duration of an Agreement? .....	223
[VI.19]	4. What “Efforts” Obligation May Be Implied in a Contract? .....	224
[VI.20]	5. Is Existing Law Implied in a Contract?.....	226
[VI.21]	6. What Is the Implied Duty of Cooperation? .....	227

## **Chapter VII Repudiation**

[VII.0]	A. Repudiation .....	231
[VII.1]	1. What Is a Repudiation? .....	231
[VII.2]	2. What Type of Contract Can Be Repudiated?.....	232
[VII.3]	3. What Constitutes a Repudiation? .....	234
[VII.4]	4. If the Contract Has Been Repudiated, What Must the Non-Repudiating Party Do?.....	236
[VII.5]	5. Can a Repudiation Be Retracted?.....	238
[VII.6]	6. What Is Adequate Assurance?.....	239
[VII.7]	B. Damages for Repudiation.....	241

[VII.8]	1. What Is the Remedy for Repudiation? .....	241
[VII.9]	2. Must the Non-Repudiating Party Show It Could Have Performed the Contract Had It Not Been Repudiated?.....	242

**Chapter VIII Termination**

[VIII.0]	A. Unilateral Termination .....	247
[VI I.1]	1. May a Contract Be Terminated for Breach? .....	247
[VIII.2]	2. May a Party Unilaterally Terminate a Contract That Has Not Been Materially Breached? .....	248
[VIII.3]	3. When a Contract Has a Termination Provision, Can There Be Conditions Precedent to the Exercise of the Right to Terminate?.....	250
[VIII.4]	4. Must a Party Exercising a Right to Terminate a Contract Act in Good Faith? .....	251
[VIII.5]	5. What Is a Notice and Cure Provision? .....	252
[VIII.6]	6. When a Contract Is Terminable on Reasonable Notice, What Amount of Notice Is Reasonable?.....	255
[VIII.7]	7. What Is the Erroneous Date Rule? .....	256
[VIII.8]	8. Can a Party Waive the Right to Terminate?.....	256
[VIII.9]	9. Can an Agreement Be Terminated by the Court?.....	258
[VIII.10]	B. Mutual Termination.....	259
[VIII.11]	1. What Is Abandonment?.....	259
[VIII.12]	2. What Is a Mutually Agreed Rescission? .....	261
[VIII.13]	3. What Is a Novation?.....	262
[VIII.14]	C. Expiration .....	263
[VIII.15]	1. What Is the Effect of the Parties Continuing to Perform After Expiration? .....	263
[VIII.16]	2. What Is an Automatic Renewal Clause?.....	265

**Chapter IX Assignment**

[IX.0]	A. Assignment.....	269
[IX.1]	1. What Is an Assignment?.....	269
[IX.2]	2. Are Contract Rights Assignable?.....	270
[IX.3]	3. Does an Assignment of a Contract Right Require the Consent of the Non-Assigning Party?.....	271
[IX.4]	4. Does an Assignment Also Include a Delegation of Duties? .....	273

[IX.5]	5. Does an Assignment and Delegation Release the Assignor From Its Obligations Under the Contract? .....	273
[IX.6]	B. Particular Types of Assignments.....	274
[IX.7]	1. What Is an Assignment of a Right to Receive a Payment Pursuant to a Contract?.....	274
[IX.8]	2. What Is a Security Assignment? .....	275

**Chapter X Performance and Breach**

[X.0]	A. Performance.....	279
[X.1]	1. When Must Performance Take Place? .....	279
[X.2]	2. How Does a Court Treat a Clause in a Contract Between Commercial Parties That Sets a Time for Performance? .....	281
[X.3]	3. Can a “Time-Is-of-the-Essence” Obligation Be Imposed After the Parties Have Entered Into Their Contract?.....	282
[X.4]	4. If the Contract Does Not Specify a Time for Performance, Does Action Need to Be Taken Before a Claim Is Asserted for Failure to Perform? .....	283
[X.5]	5. Can a Requirement of Timely Performance Be Waived? .....	284
[X.6]	6. Where Will a Contract Be Performed? .....	284
[X.7]	B. Breach.....	285
[X.8]	1. What Constitutes a Breach of Contract? .....	285
[X.9]	2. How Can Performance of a Contract Be Defective?.....	286
[X.10]	3. Are There Different Types of Breach of Contract? .....	286
[X.11]	4. When Is a Breach Material? .....	287
[X.12]	5. What Are the Consequences of a Material Breach?.....	289
[X.13]	a. Substantial Performance.....	290
[X.14]	b. Partial Performance .....	292
[X.15]	6. What Is an Election in Response to a Breach?.....	293
[X.16]	7. Can Contract Provisions Impact How the Non-Breaching Party Responds to a Material Breach?.....	295
[X.17]	8. What Is the Impact of a “Satisfaction” Clause? ....	298
[X.18]	a. Satisfaction Clause .....	298
[X.19]	b. Third-Party Approval .....	299

[X.20]	C.	A Claim for Breach of Contract .....	300
[X.21]	1.	Who Can Assert, or Be Liable on, a Claim for Breach of Contract?.....	300
[X.22]	2.	What Must a Claim for Breach of Contract Allege? .....	301
[X.23]	a.	A Valid Contract .....	302
[X.24]	b.	The Non-Breaching Party Performed Its Obligations Under the Contract .....	304
[X.25]	c.	Breach .....	305
[X.26]	d.	Damages.....	305
[X.27]	3.	Can a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Be Asserted With a Breach of Contract Claim?.....	306
[X.28]	4.	What Is the Statute of Limitations for a Breach of Contract Claim? .....	308
[X.29]	5.	Can a Claim for Breach Be Waived? .....	310
[X.30]	6.	Can the Court Order the Breaching Party to Perform a Contract? .....	310
[X.31]	D.	Warranties .....	312
[X.32]	1.	What Is a Warranty?.....	312
[X.33]	2.	What Is a Warranty of Fact? .....	313
[ .34]	3.	What Are the Warranties Concerning a Product?.....	315
[X.35]	a.	Express Warranties.....	315
[X.36]	b.	Warranty of Future Performance .....	316
[X.37]	c.	Warranty of Title .....	317
[X.38]	d.	Implied Warranty of Merchantability .....	317
[X.39]	e.	Implied Warranty of Fitness for a Particular Purpose .....	318
[X.40]	4.	Can Warranties Be Disclaimed? .....	319

## Chapter XI Excuse

[XI.0]	A.	Excuse Resulting From an Event Beyond the Parties' Control .....	323
[XI.1]	1.	What Is the Defense of Impossibility?.....	323
[XI.2]	2.	What Type of Events Have Excused Performance Because of Impossibility? .....	327
[XI.3]	3.	Can Impossibility Result from a Change in Economic Conditions? .....	329
[XI.4]	4.	What Is the Defense of Impracticability?.....	331
[XI.5]	5.	What Is the Defense of Frustration of Purpose? ...	333
[XI.6]	B.	Excuse Resulting From the Other Party's Conduct ....	335

[XI.7]	1. Does One Party's Breach Excuse the Other Party's Performance? .....	335
[XI.8]	2. Does a Failure of Consideration Excuse Performance?.....	336
[XI.9]	3. What Is Frustration of Performance? .....	338
[XI.10]	C. Contract Language That Relieves a Party of Its Obligation to Perform.....	340
[XI.11]	1. What Is a Force-Majeure Clause? .....	341
[XI.12]	2. What Clauses Address Changes During the Passage of Time Between the Time of Contracting and the Time of Performance? .....	343

**Chapter Damages**

[XII.0]	A. Introduction .....	347
[XII.1]	B. The Two Facets of a Claim for Damage .....	350
[XII.2]	1. What Is the Fact of Damage? .....	350
[XII.3]	2. What Is the Amount of Damage?.....	351
[XII.4]	C. Causation .....	352
[XII.5]	1. What Is the Causation Element in a Claim for Breach of Contract Damages?.....	352
[XII.6]	2. Is It Possible That a Loss Traceable to the Breach Cannot Be Recovered as Damages? .....	354
[XII.7]	D. Types of Damage.....	355
[XII.8]	1. What Are General Damages?.....	356
[XII.9]	2. What Are Special Damages?.....	357
[XII.10]	3. What Are Incidental Damages?.....	358
[XII.11]	4. What Are Nominal Damages?.....	359
[XII.12]	5. Are Punitive Damages Available for a Breach of Contract?.....	359
[XII.13]	E. The Measure of Damages.....	360
[XII.14]	1. What Are Expectancy Damages?.....	361
[XII.15]	2. What Are Reliance Damages?.....	364
[XII.16]	3. What Are Restitution Damages? .....	366
[XII.17]	4. What Damages Can Be Recovered on a Quantum Meruit Claim?.....	367
[XII.18]	F. The Amount of Damages .....	368
[XII.19]	1. What Does "Reasonable Certainty" Mean? .....	369
[XII.20]	2. How Is the Amount of a Damage Award Determined When the Damage Results From a Failure to Make a Payment in a Foreign Currency? .....	370
[XII.21]	G. Mitigation .....	372

[XII.22]	1. What Is the Doctrine of Mitigation? .....	372
[XII.23]	2. When Must the Non-Breaching Party Take Action to Minimize Its Damages?.....	375
[XII.24]	3. How Is the Mitigation Issue Presented in the Adjudication of a Breach of Contract Claim?.....	376
[XII.25]	H. The Terms of the Contract .....	377
[XII.26]	1. What Is a Liquidated Damage Clause? .....	377
[XII.27]	a. Will a Court Enforce a Liquidated Damage Clause? .....	379
[XII.28]	b. When Is the Clause an Unenforceable Penalty? .....	380
[XII.29]	2. Can the Parties Limit the Damages for a Breach of Their Contract? .....	384
[XII.30]	3. Can a Contract Prescribe and/or Limit the Remedies for Breach? .....	391
[XII.31]	a. Prescribed Remedies .....	391
[XII.32]	b. Exclusive Remedy.....	393
[XII.33]	I. Interest.....	394
[XII.34]	1. Will Interest Be Added to an Award of Breach of Contract Damages?.....	394
[XII.35]	2. Can the Contract Set the Interest Rate After Breach?.....	396
[XII.36]	3. Can Interest Be Awarded on Damages Resulting From a Failure to Make an Interest Payment When Due?.....	398
[XII.37]	J. Lost Profits .....	398
[XII.38]	1. What Are the Elements of a Lost-Profits Claim? .....	399
[XII.39]	2. What Has the New York Court of Appeals Said Concerning Lost-Profit Damages?.....	401
[XII.40]	3. What Are “Lost-Asset” Damages?.....	403

### **Chapter XIII Particular Agreements and Clauses**

[XIII.0]	A. Guaranty .....	409
[XIII.1]	1. What Is a Guaranty?.....	409
[XIII.2]	2. How Is a Guaranty Affected by Subsequent Events? .....	411
[XIII.3]	a. Modification of Primary Obligation.....	411
[XIII.4]	b. Changes in the Primary Obligor.....	412
[XIII.5]	c. Revocation.....	413
[XIII.6]	3. Can a Guaranty Encompass Obligations Incurred After Its Execution?.....	414



[XIII.7]	4. What Does It Mean if a Guaranty Is Absolute and Unconditional? .....	415
[XIII.8]	5. In an Action to Enforce a Guaranty, May the Guarantor Assert Defenses Available to the Primary Obligor?.....	417
[XIII.9]	6. What Is the Difference Between a Guaranty of Payment and a Guaranty of Collection? .....	418
[XIII.10]	B. Agreement to Arbitrate.....	419
[XIII.11]	1. What Is an Agreement to Arbitrate? .....	419
[XIII.12]	2. What Is the FAA?.....	421
[XIII.13]	3. How Does a Court Decide Whether the Parties Agreed to Arbitrate?.....	424
[XIII.14]	4. What Is the Issue of Arbitrability? .....	425
[XIII.15]	5. What Does an Arbitration Clause Contain? .....	426
[XIII.16]	6. Can a Person Be Required to Arbitrate Even Though He Is Not a Party to Any Agreement to Arbitrate?.....	426
[XIII.17]	C. Indemnification .....	428
[XIII.18]	1. What Is an Agreement to Indemnify? .....	428
[XIII.19]	2. How Is an Agreement to Indemnify Construed?... ..	430
[XIII.20]	3. Are Attorney Fees an Indemnifiable Loss?.....	432
[XIII.21]	D. Agreements Concerning Claims.....	433
[XIII.22]	1. What Is a Settlement Agreement? .....	434
[XIII.23]	2. What Is a Release? .....	439
[XIII.24]	3. What Is a Covenant Not to Sue? .....	442
[XIII.25]	E. Option Contracts.....	442
[XIII.26]	1. What Is an Option?.....	442
[XIII.27]	2. How Does the Option Ripen Into a Valid Bilateral Contract?.....	443
[XIII.28]	F. Right of First Refusal .....	446
[XIII.29]	1. What Is a Right of First Refusal? .....	446
[XIII.30]	2. What Triggers a Right of First Refusal? .....	448
[XIII.31]	3. Does the Grantor Have an Obligation to Act in Good Faith? .....	449
[XIII.32]	G. Output and Requirements Contracts.....	449
[XIII.33]	1. What Is the Quantity the Buyer Must Buy and the Seller Must Sell?.....	450
[XIII.34]	2. Can a Buyer Be Liable for Breach if Its Requirements Decrease? .....	451
[XIII.35]	3. What if the Seller's Output Varies? .....	452
[XIII.36]	H. Contract Clauses.....	453

[XIII.37]	1. What Effect Is Given to Headings and Recitals? .....	453
[XIII.38]	2. Can an Agreement Specify When It Will Become Effective? .....	454
[XIII.39]	3. What Contract Clauses Address Claims Arising Under the Contract? .....	455
[XIII.40]	4. What Is a “Merger” Clause? .....	458
[XIII.41]	5. Negating Clauses.....	460
[XIII.42]	a. What Is a “No Reliance” Clause? .....	460
[XIII.43]	b. What Is a “Relationship Negating” Clause? .....	462
[XIII.44]	c. What Is a “No-Waiver” Clause? .....	462
[XIII.45]	d. What Is a “No-Oral Modification” Clause? ...	463
[XIII.46]	e. What Is a “No-Assignment” Clause? .....	464
[XIII.47]	f. What Is a “No-Third-Party-Beneficiary” Clause? .....	465
[XIII.48]	g. What Is a “No-Construction-Against-the-Draftsman” Clause? .....	466
[XIII.49]	6. What Is a “Best-Efforts” Clause?.....	466
[XIII.50]	7. What Is a “Satisfaction” Clause? .....	469
[XIII.51]	8. What Is an “Automatic Renewal” Clause? .....	470
[XIII.52]	9. What Other Clauses Are Often Found in Commercial Contracts?.....	471

**Chapter XIV Counsel’s Work on a Transaction Governed by New York Law**

[XIV.0] A.	What Is This Chapter About?.....	475
[XIV.1] B.	What Obligations Does New York Law Impose Upon a Sophisticated Party in a Commercial Transaction? .....	476
[XIV.2] C.	What Issues Should Counsel Consider in Connection With the Client Executing a Document Outlining the Terms of a Contemplated Transaction? .....	479
[XIV.3] D.	What Should Counsel Consider in Negotiating a Contract? .....	480
[XIV.4]	1. What Should Counsel Consider in Addressing the Unknown? .....	481
[XIV.5]	a. <i>Caveat Emptor</i> .....	481
[XIV.6]	b. Due Diligence.....	482
[XIV.7]	c. Representations and Warranties .....	483
[XIV.8]	d. The Client Decides How Much Risk It Will Assume.....	485

[XIV.9]	2. What Consideration Should Counsel Give to Foreseeable Future Events That Could Impact Performance?.....	485
[XIV.10]	3. How Can the Client Limit Its Exposure to Damages? .....	487
[XIV.11] E.	What Should Counsel Consider When Preparing Transaction Documents? .....	490
[XIV.12]	1. Be Careful Using Documents From the “Prior Deal” as a Model .....	490
[XIV.13]	2. Avoid Inconsistency in Transaction Documents.....	491
[XIV.14]	3. Be Careful of Clauses with Onerous Consequences .....	493
[XIV.15]	4. Be Consistent in the Use of Language .....	493
[XIV.16]	5. Avoid Language That Is Based Upon Assumptions or a Particular Understanding.....	494
[XIV.17]	6. Be Wary of “Private Understandings” of Contract Language .....	495
[XIV.18]	7. Be Careful Using Terms That Have a “Legal” Meaning” .....	495
[XIV.19]	8. Be Careful Using Technical Terms .....	496
[XIV.20]	9. The Client May Be Affected by Other Transaction Documents to Which It Is Not a Party .....	497
[XIV.21]	10. View the Document With a Critical Eye.....	498
[XIV.22] F.	What Should Counsel Do After Execution of the Agreement?.....	498
[XIV.23]	1. Make a Complete File .....	498
[XIV.24]	2. Respond to Failures to Comply With the Terms of the Contract .....	499
[XIV.25] G.	What Might Counsel Be Asked to Do During the Term of the Contract?.....	500
[XIV.26]	1. Disputes Over the Meaning of Contract Language .....	500
[XIV.27]	2. Issues Concerning Non-Compliance With the Contract .....	501
[XIV.28]	3. A Claim for Breach of Contract .....	502
	Appendix A.....	505
	Appendix B .....	507
	<b>2015 Update</b> .....	555
	Table of Authorities.....	573
	Index.....	591

## ACKNOWLEDGMENTS

This book has its roots in a conversation I had with Michael Galligan, a former Chair of the International Section of the New York State Bar Association who is currently a member-at-large of the Association's Executive Committee, in which we noted that although contracts involving parties outside the United States often contain a New York choice-of-law clause, a foreign practitioner had no resource to quickly and easily get a basic understanding of New York Contract Law. Michael undertook to remedy that situation. I am grateful that he approached me to create this work, which presents New York Contract Law to practitioners outside the United States.

I am honored that Judith Kaye, the former Chief Judge of the New York Court of Appeals (the state's highest court), is writing the foreword to this book. While doing the research for this book, my appreciation grew for the judges in New York who have refined New York Contract Law while applying it to sophisticated commercial agreements.

I am grateful that my firm, Norton Rose Fulbright, let me pursue the opportunity to write this book. I appreciate my colleagues who encouraged me in the months it took to create this text. The book reflects insights gathered from working with my colleagues in my nearly 35 years of the practice of law.

I thank my assistant, Patricia Cassarino, and the staff at Norton Rose Fulbright who helped prepare this text. I give a special thank you to our Summer Associates, Amy Herrera and Leslie Hung, who helped finalize the text, and to Jay Smith, who meticulously cite-checked the text.

Finally, I am grateful to my wife and children for their support and patience while I worked on this book.

—G.B.

## FOREWORD

When Glen Banks phoned me with the news that his manuscript was complete, he described the subject of New York contract law as “a thing of beauty.” He knew that he would find no more enthusiastic affirmance—and he was entirely right, both as to his subject and as to his manuscript.

This foreword can only begin with a note of deep appreciation to the author on behalf of lawyers and students of law (New York, non-New York and worldwide), judges and people simply interested in having a clear, articulate answer to a question of New York contract law, whether English is their first, or a subsidiary, language.

At the outset, the author tells us that this book is intended as a reference tool particularly to assist non-New York practitioners advising clients regarding commercial transactions governed by New York law, and I can surely appreciate that the book has been conceived and formatted to achieve that objective. In brief sections, the book posits specific issues, starting with the glimmer of an agreement between parties all the way through to the consequences of the contract’s demise.

Each section addresses a particular question: Can a preliminary agreement have binding effect? Can a nonsignatory to a contract force a signatory to litigate claims in the jurisdiction specified in the forum-selection clause? What is an illusory agreement? How does public policy impact enforcement of commercial contracts? What is abandonment? Can the court order the breaching party to perform a contract? Can a loss traceable to the breach not be recovered as damages? What about arbitration? An agreement to indemnify? An option?

There are literally hundreds of questions, each in turn thoughtfully and articulately answered, supported by easily accessible references to New York law. What a resource for parties and counsel, however learned (or unlearned) in the law—even for judges—to be able to plunge right into a most nightmarish question at the heart of a dispute they are facing and learn the precise answer without plodding through a lot of preliminary turf. If there is any remaining shred of doubt after consulting the text, the reader can turn to Appendix A and Appendix B (actual clauses drawn from publicly filed agreements that show exactly how major companies in their contracts have addressed issues like waiver, liquidated damages, force majeure and countless other potential problems).

All told, a genuine gift to those in search of the ready, reliable New York contract law answer, whether they are located in, or beyond, our state's borders.

All of which brings to mind that I should really have begun with a note of personal disclosure. While the author intends this to be a handy reference tool for non-New York practitioners to answer particular questions—in other words for a “quick dip”—as a judge of New York State's high court, the Court of Appeals, for more than 25 years (15 of those years as Chief Judge), I could not resist—and thoroughly enjoyed—leafing through the entire volume, beginning to end. It's surely not a beach read, but it is a highly satisfactory insight into all of the rules and principles, how they have been carefully developed over the past two centuries, and why they are an excellent choice for dispute resolution today.

Most happily, I am reminded of dilemmas we faced at the Court's conference table—differing views on the application of an established principle, where clarification and harmonization were the objectives; statutory interpretation seeking sound implementation of legislative objectives; novel issues in our evolving global world where definitive law-making is a significant part of the role of our courts. A genuine trip down memory lane. It is the ultimate gratification to see the New York courts' commitment to clarity, certainty, predictability and stability—paramount in commercial dealings—across the spectrum of contract law.

Were I Mr. Banks's intended ideal reader (the non-New York lawyer looking for a “quick dip”), after ascertaining the specific answer I was seeking, I'd linger especially on the concluding chapter (advice to counsel) for special tips, and then return to the start of the book to be certain that I had done everything I needed to do to assure the choice of New York law and—yes—the forum too! A great choice: New York, and the book.

*Judith S. Kaye,*  
*Former Chief Judge of the State of New York*

## ABOUT THE AUTHOR

Glen Banks, a partner in the New York office of Norton Rose Fulbright, has practiced law in New York since 1980. His practice is focused upon matters concerning transaction documents, including handling disputes relating to commercial agreements and advising clients of their rights and obligations under an agreement.

Mr. Banks has given evidence as an expert witness on New York Contract Law in proceedings before tribunals outside the United States. He also has served as a consulting expert assisting counsel in addressing a dispute concerning a contract between foreign parties governed by New York law.

In addition to this book, Mr. Banks is the author of *New York Contract Law*, a text described in Appendix A to this book. He also writes a column on Contract Law that appears in the *New York Law Journal* and has written articles on Contract Law for journals.

Any comments you might have on this book would be welcome. Please email your comments to [glen.banks@nortonrosefulbright.com](mailto:glen.banks@nortonrosefulbright.com).