

Why Choose New York Law?

By Michael W. Galligan

New York offers international commercial businesses, investors and co-venturers, as well as exporters and importers around the world, the choice of one of the most sophisticated and developed bodies of contract, commercial, and business partnership law available anywhere to govern their transactions and investments. New York law includes an almost inexhaustible set of rules and precedents covering a wide spectrum of business transactions, ranging from purchases, sales and leases of goods, property rights and business interests, to business collaborations, partnerships, and joint ventures. New York, as more fully explained below, makes it easy for participants in international commerce to enjoy the benefits of New York law even if their business has little or no current connection to the state or city of New York.

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New York law stands in the common law tradition: New York courts have interpreted and developed the principles of New York law in a body of case law that has addressed issues arising from many, if not all, of the most sophisticated commercial transactions to take place since the beginning of the Industrial Revolution. At the same time, New York contract and commercial law, as noted in greater detail in this article, offers important points of contact with the tradition of the civil law that are not found in many other leading common law jurisdictions.¹

New York contract and commercial law has three fundamental components: (1) the New York common law of contracts, partnerships and business obligations, (2) comprehensive rules governing the sale of goods, commercial leases, payment systems, securities and security interests contained in the New York Uniform Commercial Code, and (3) rules of international commercial law incorporated in international treaties to which the United States of America, of which New York has been a state since the nation’s founding, is a party.

New York contract law is private-party driven. It provides a broad framework for honoring, interpreting and enforcing agreements shaped and negotiated by private parties without attempting to dictate the content of such agreements. New York courts, as evidenced by the jurisprudence that makes up the great body of New York contract law, advisedly give great deference to the business

terms of contracts that private business parties negotiate among themselves. New York courts are loathe to substitute their judgment for the business decisions of parties to commercial transactions. This holds equally for cross-border transactions as well as for domestic transactions.²

Strict Adherence to the Written Terms of Agreements

At the heart of New York contract law is the importance New York places on written expressions of commercial agreements and careful adherence to the written terms of the transaction to which the parties have voluntarily agreed. New York’s requirement that many forms of commercial contracts be in writing, while more rigorous than the requirements of many civil (and even some common) law jurisdictions, reflects good commercial practice as well as the requirements of most civil as well as common law jurisdictions for proving a contract in court. More to the point, New York courts pride themselves on their rigorous respect for the terms of agreements private parties have negotiated and to which they have subscribed. New York contract law, as a matter of substantive law, disallows consideration of prior negotiations and representations between parties in interpreting and enforcing their agreements. New York contract law also strictly disallows evidence of collateral agreements when the parties have incorporated an “entire agreement” or “merger” clause in their agreements. New York law requires that a written contract be interpreted according to its written terms and that oral evidence be considered in interpreting a contract only if the provisions are so ambiguous that they do not allow a reasonable construction on their own terms.³

“Good Faith” and Fiduciary Duty

As already noted, New York law, consistent with the common law condition, resolutely upholds the duty of contracting parties to fulfill their obligations to each other and disfavors excusing parties when the fulfillment of their obligations becomes difficult or costly. At the same time, New York law, consistent with the civil law tradition, implies a covenant of good faith and fair dealing in contracts between independent parties and implies a fiduciary duty of utmost care, loyalty and diligence among business partners, co-venturers, and collaborators.

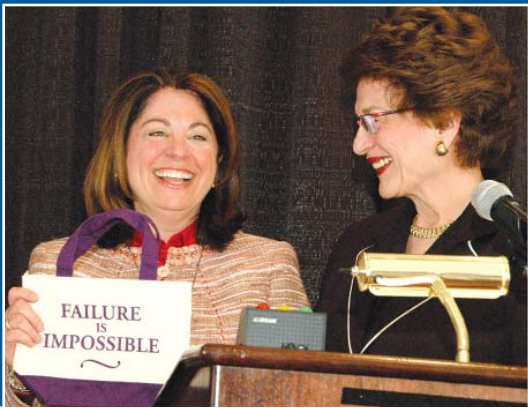
New York was the first U.S. jurisdiction to adopt the implied covenant of good faith and fair dealing into its law of contracts, which it defines, at a minimum, as a duty of honesty in commercial dealings, and in many contexts, as a duty, in the performance of contracts, to act

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in accordance with commercial standards of fair practice in the trade. Not intended to provide a separate cause of action, the incorporation of the good faith obligation into New York contract law provides courts with the ability to penalize party conduct intended to subvert another party's performance of its obligations and, in limited circumstances, to supply missing terms to an otherwise enforceable contract.⁴

The higher and more exacting fiduciary duty imposed on business collaborators by New York law is intended to provide a context of trust and confidence without which long-term partnerships and joint ventures cannot be expected to succeed. In some of the most eloquent words of commercial jurisprudence, Judge Benjamin Cardozo, writing for the New York Court of Appeals (the apex court of the New York court system), ruled that "something more than the morals of the market place is required in the relations of business partners to each other" and that "only the punctilio of an honor most sensitive" would suffice. New York has steadfastly resisted a tendency evident in some other U.S. jurisdictions to weaken the legal duties of business partners to each other.⁵

Contrasts with Civil Law

1. *Pre-Contract Negotiations.* Some civil law jurisdictions combine contract law and tort law under the general rubric of "obligations" and therefore are more willing than New York to allow that contract-like obligations can arise among negotiating parties even if the negotiations do not result in a concluded contract. New York, which insists on the distinct legal nature of contracts, does not generally recognize claims in contract until a contract has actually been formed, although New York courts have enforced obligations to negotiate in good faith where parties to an existing contract have expressly agreed to negotiate extensions or modifications.⁶
2. *Consideration.* Under New York law, consideration (rather than the civil law concepts of "object" and "cause") is the main requirement, in addition to an offer and acceptance, for the formation of a valid contract. Consideration (roughly, an exchange of some value expressed in some form of action, obligation or forbearance) need not be adequate or sufficient to meet the requirement of New York law. Perhaps most importantly, New York, by statute, has abolished the requirement of consideration for all written contractual amendments, written assignments of contractual rights and written releases of contractual obligations.⁷

3. *Economic Hardship.* Parties cannot, under New York law, be easily excused from their contractual obligations because of economic hardship, although there is a possibility of limited relief under contracts for the sale of goods when an obligation has become "impracticable." New York law has not adopted the notion of "collapse of the foundation of a contract" or "change of fundamental circumstances" found in some civil law codes. However, parties may provide in their contracts for an adjustment mechanism in the event of a fundamental shift in economic circumstances, provided they provide unambiguous criteria for determining when such an adjustment should be available and provide clear guidance as to the nature of the available adjustments. Ideally, they will also delineate a form of arbitral procedure to be followed in the event of any dispute regarding implementation of the adjustment provision.⁸

4. *Remedies.* New York law, in contrast to the civil law tradition, makes a sharp distinction between remedies for contractual breach and remedies for tortious or "delictual" conduct. New York imposes strict liability for contractual breach; issues of fault are not relevant although, in many circumstances, compensation for economic loss may be reduced if the non-breaching party fails to take steps to "cover" or mitigate losses arising from breach.

- (a) Punitive damages are not available for contractual breach and New York also strongly disfavors penalty clauses. Parties may provide for "liquidated damages" in the event of a breach as long as the amount of the damage bears a reasonable relationship to the loss likely to be suffered by the non-breaching party.
- (b) New York law disfavors the remedy of specific performance except in the case of real property sales; however, private parties may stipulate to the availability of the remedy of specific performance provided the criteria for determining when and how such a remedy should be administered are clearly delineated in the parties' contract.⁹

Contrasts with English Law

1. *Consideration.* New York law does not incorporate "contracts by deed," which, under English law, are exempt from the common law requirement of consideration and also double the statute of limitations on party obligations; under New York law, contracts retain their distinct legal identity and the statute of limitations can be extended only by express agreement. England has not comprehensively and by statute abolished the requirement of

consideration for written contract modifications, assignments, and releases, as has New York.¹⁰

2. *Reliance.* New York law and English law recognize that detrimental reliance can be a defense to a claim for contractual breach but only New York law recognizes that reliance can give rise to a cause of action in contract. While claims on the basis of reliance in the commercial context may not be common, in some cases not related to sub-contractor bidding, a claim for detrimental reliance may offer relief if a party to pre-contractual negotiations, in bad faith, induces another party to act or refrain from acting in a matter related to the proposed transaction.¹¹
3. *Transfer of Title.* Under English as well as French law—title to sold goods passes to the purchaser when the agreement of sales is entered into. Under New York law, there is a presumption that title—and with it, usually risk of loss—passes when the seller has completed its obligations regarding physical delivery of the goods.¹²
4. *Third Party Beneficiaries.* Since at least 1918, New York has recognized that the common law doctrine of contractual privity could be set aside in the case of contracts that benefit a third party so that third parties could have a right to enforce contracts from which they benefited. England’s recognition of the exception dates back only to legislation passed in 1999, which imposes express conditions for allowing third party beneficiaries the right to enforce contracts.¹³

International Sales of Goods

New York offers, for many international merchants, a choice between two alternative legal regimes: the rules of the United Nations Convention on the International Sale of Goods (the “CISG”), to which the United States of America is a party, and the rules of Article 2 of the New York Uniform Commercial Code:

1. *Contract Formation.* Under the CISG, an acceptance of an offer that varies a material term of the offer constitutes a counter-offer, while under the Code, the same acceptance will generally cause a contract to be formed but the divergent term is construed as a proposal for an addition to the contract.¹⁴
2. *Contract Terms.* The CISG does not require any writing as a condition to the enforcement of a sales contract while the Code requires a writing for any sales contract in excess of \$500. The CISG does not limit the use of oral evidence to augment or interpret the terms of a contract while the Code bars oral evidence of contemporaneous terms of a written contract.¹⁵

3. *Contract Performance.* Under the CISG, a buyer may reject delivered goods only if the seller’s failure to perform an obligation under the contract of sale is a “fundamental breach” of the contract. Under the Code, a buyer may generally fail to accept delivered goods if they fail in any respect to conform to the contract. On the other hand, the CISG enables a buyer to unilaterally adjust the price of goods that do not completely conform with the contract whereas the Code does not offer any such parallel remedy of “self-help.”¹⁶

The legal default regime under New York law where all of the parties to a transaction for a sale of goods have their places of business in jurisdictions that have ratified the CISG (83 as the end of 2014) are the rules of the CISG itself. The legal default regime under New York law for transactions in which one or more of the parties has its place of business in a jurisdiction that has not ratified the CISG is Article 2 of the New York Uniform Commercial Code. The CISG allows parties to opt out of some (or even all) of the CISG rules and Article 2 of the Code also allows parties to opt out of virtually any of the Code’s rules except for the obligation of good faith, diligence, reasonableness and care prescribed by the Code. Therefore, New York offers legal practitioners a unique opportunity to create combinations of CISG and Code rules that best meet the needs and concerns of their clients.¹⁷

Payment and Security Systems

New York was one of the first U.S. jurisdictions to adopt the Uniform Commercial Code, which constitutes the law of New York on major forms of commercial payment as well as commercial leases, securities and security interests. As to payment systems, the Code reflects the fundamental requirement of “good faith” or “honesty in fact” among merchants that pervades the entire Code. Thus, under New York law, someone who has stolen a note or draft cannot be a “holder” and therefore cannot be a “holder in due course” or endorse or negotiate a note or draft to someone else; payment on a letter of credit can, subject to certain requirements, be withheld in the face of evidence of the seller’s fraud on the buyer; and a carrier who issues a bill of lading when the shipmaster misrepresents that the master has received the goods is protected from liability on the bill. Article 9 of the Code, which governs security interests, allows for floating liens and allows a security interest to be perfected by registration without requiring actual notice to the debtor’s creditors.¹⁸

Dispute Resolution

1. *Arbitration.* New York was the first jurisdiction in the United States to make private arbitration awards enforceable with the same force and effect

as court judgments. It is therefore fitting that the 1958 United Nations Convention on the Enforcement and Recognition of Arbitral Awards was negotiated and signed in New York, from which follows the common practice of calling it “the New York Convention.” New York hosts headquarters or offices of leading international arbitral institutions in the world and its bar includes many of the most distinguished international commercial arbitrators and agents in the world. Parties electing arbitration have the ability not only to choose arbitrators or arbitral institutions but to elect the procedural rules that will govern the arbitration, including the rules that will govern pre-hearing disclosure. Parties may insure that pre-hearing disclosure is conducted in accordance with “international standards” rather than the more elaborate and extensive possibilities for discovery in New York court proceedings by adopting the 2011 New York State Bar Association Guidelines for International Arbitrators or the rules proposed by the International Bar Association on the Taking of Evidence in International Arbitrations. The spring of 2013 saw the opening of the New York International Arbitration Center, located at 150 East 42nd Street in New York City, which now offers state-of-the-art facilities for international arbitrations sited in New York City as well as resources and support for the use of New York as an arbitral venue.¹⁹

2. *New York Courts.* The Commercial Division of New York State Supreme Court (New York State’s court of first instance) offers to commercial litigants a judicial chamber whose judges devote themselves exclusively to the adjudication of domestic and international commercial disputes. The Court’s procedural rules are designed to facilitate the effective and efficient disposition of cases: most cases are resolved by dispositive motion and settlement with only a tiny percentage of cases going to trial. Parties may ask that a judge be assigned to the case upon commencement of the case, even if no dispositive motion is pending, to set a schedule for pre-trial disclosure and the eventual disposition of the case. The same judge will be in charge of adjudicating the case to final disposition. Court papers are filed electronically and every effort is made to process cases in a manner that will enable business litigants to resolve their disputes and return to productive commercial endeavors outside the courthouse.²⁰

New York, as is well known, offers the possibility of more extensive pre-trial discovery than is common in civil law jurisdictions and many common law jurisdictions; for parties for whom resolution

of a case carries “life and death” business consequences or where parties cannot assume each other’s good faith, it can be argued that recourse to the full panoply of New York discovery mechanisms offers the only realistic possibility that the claims will be decided based on a full disclosure of all relevant facts. In cases of less significance or greater mutual trust, a more restrained use of pre-trial discovery may be appropriate; New York courts can be expected to defer to agreements between parties to limit or even proscribe pre-trial depositions and other discovery mechanisms. Parties can always agree to waive jury trial and awards of punitive damages in civil disputes.²¹

3. *Federal Courts.* Another alternative for court-assisted dispute resolution is offered for some parties by the Federal District Courts that sit in New York State. To meet the Courts’ jurisdictional requirements, a dispute must generally call for the application of a U.S. federal statute or a rule of international law recognized by the United States of America; alternatively litigants must meet the technical requirements of “complete” jurisdictional diversity among themselves as defined by Federal law. Federal courts have been long respected for the high quality of their judges and court staff, although they do not offer the judicial specialization in commercial law available in the Commercial Division of New York State Supreme Court.²²

Choosing New York Law

Parties who wish to adopt New York as the governing law of a commercial contract may do so in all cases where the agreement is in consideration of, or relates to an obligation arising from, a transaction covering in the aggregate not less than \$250,000, regardless of whether the agreement bears any reasonable relation to New York. Furthermore, parties, including non-New York individuals, entities and even “foreign states” whose disputes have no New York “nexus” may agree to submit to the jurisdiction of the state courts of New York any commercial dispute that arises from a contract, agreement or undertaking that is expressly governed by New York law and is in consideration of, or relates to, any obligation arising from a transaction covering, in the aggregate, not less than \$1,000,000.²³

New York Law—A Legal Bridge

Choice of law in international commercial transactions often turns on a fundamental choice between a representative jurisdiction of the common law or a representative jurisdiction of the civil law; often in a case where common law is desired, the choice is often between New York law and English law. As noted above, New York

law offers a significant and well-entrenched respect for private party ordering in commercial transactions that equals or even surpasses that of English law, while incorporating concepts of good faith and fiduciary conduct that are in some ways closer in spirit to civil law. At the same time, the law of New York in most relevant areas related to payments as well as security interests—in addition to contracts for the sale of goods—is embodied in a code that is closer in spirit to the civil law preference for comprehensive statutory guidance. Thus, New York law, which has been forged in the crucible of one of the world’s greatest centers for cross-border trade, financing and investment, represents a dynamic bridge between the civil law and common law traditions and is a law that parties from all legal traditions will find hospitable and constructive for the long-term success of their business endeavors.²⁴

Endnotes

1. For general background on New York contract law, see Glen Banks, *New York Contract Law: A Guide for Non-New York Attorneys*, 2014; Michael W. Galligan, *Choosing New York Law as Governing Law for International Commercial Transactions*, 26 NYSBA International Law Practicum 79 (Autumn 2013).
2. Banks, *id.*, §I.1; Galligan, *id.*, at 1-2.
3. Banks, *id.*, §V.1; Galligan, *id.*, at 81-82.
4. Banks, *id.*, §VI.8-VI.13; Galligan, *id.*, at 83-85.
5. Galligan, *id.*, at 87-88. See *Meinhard v. Salmon*, 249 NY 458, 463-464 (1928).
6. Galligan, *id.*, at 85-86; See generally, Martin V. Vranken *Fundamentals Of European Civil Law*, 101-144 (2010).
7. Galligan, *id.*, at 79-80.
8. Galligan, *id.*, at 86-87.
9. Galligan, *id.*, at 90-92. For a more extensive comparison of New York contract and commercial law with French and German contract and commercial law, see Galligan et al., *International Practice Comparative Charts* (2012) at <http://goo.gl/k5zoz>.
10. Galligan, *Choosing New York Law, supra* at 80; See also John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 114-116 (2008).
11. Galligan, *id.*, at 86.
12. Galligan, *id.*, at 89-90.
13. Galligan, *id.*, at 88-89; see Cartwright, *supra* at 226. See also Banks, *id.*, §II.9 regarding indications of a trend under New York law to more strict conditions on allowing third-party beneficiaries to enforce a contract. For a more extensive comparison of New York contract and commercial law, with English contract and commercial law, see also Galligan et al., *International Practice Comparative Charts* (2012) at <http://goo.gl/k5zoz>.
14. Galligan, *Choosing New York Law, supra* at 95.
15. Galligan, *id.*, at 96.
16. Galligan, *id.*, at 97-98.
17. See discussion and citations in Galligan, *id.*, Appendix B, 108, note 3. For a more extensive comparison of New York law regarding the sale of goods with the law of the CISG, see Galligan et al., *International Comparative Charts* at <http://goo.gl/k5zoz>.
18. Galligan, *Choosing New York Law, supra* at 93-94.
19. James Carter & John Fellas, *International Commercial Arbitration In New York* (2013). For a rich source of materials on conducting arbitration in New York State, see the website of the New York International Arbitration Center at <https://www.nyiacc.org>.
20. For the rules of the Commercial Division of New York Supreme Court, New York County, see <http://nycourts.gov/courts/comdiv/ny/newyork.shtml>.
21. Final Report of the New York State Bar Association’s Task Force on New York International Law in International Matters, Section II(B) (25 June 2011).
22. *Id.*
23. NY General Obligations Law Sections 5-1401 and 5-1402.
24. For a discussion of proposals that would in some ways make New York law a more notable “bridge” between the common and civil law traditions, see Galligan *id.*, at 95-98.

Michael W. Galligan is a Partner (Trusts & Estates, Tax and Immigration) at Phillips Nizer LLP; Member-at-large of the Executive Committee of the New York State Bar Association; Member of the New York State Bar Association Task Force on New York Law in International Matters (2010-2011); and Past Chair of the New York State Bar International Section (2009-2010).