PHILLIPS NIZER LLP

INTERNATIONAL PRACTICE COMPARATIVE CHARTS

with Annotations

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Prepared by

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INTERNATIONAL PRACTICE COMPARATIVE CHARTS*

CONTRACT LAW

		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
1.	Consideration	Yes	Yes	No	No	No	No	No
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	No	No	Yes	Yes	Yes	Yes
3.	Gift Contracts Enforceable	No	No	Yes	Yes	N/A	N/A	Yes
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Contract Law) Other Than Sale of Real Property and Certain Consumer Contracts	Yes	No	No	No	No	No	No
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	No	Yes	Yes	Yes	Yes	Yes
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	Yes	Yes	Yes	Yes	Yes	Yes
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	Yes	No	Yes	No	Yes	Yes
9.	"Formation of Contract:" for Sale of Goods:	No	Yes	Yes	Yes	Yes	Yes	Yes

* Assembled by Michael W. Galligan, Partner, Phillips Nizer LLP

		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
	Agreement on all Material Terms Required"							
10.	"Formation of Contract:" Agreement on All Non-Material Terms Required	No	Yes	Yes	No	No	No	No
11.	Good Faith as an Implied Term of Contracts, Generally	Yes	No	Yes	Yes	No	Yes	Yes
12.	Good Faith in Negotiation of Contracts	No	No	Yes	Yes	No	Yes	Yes
13.	Excuse of Impossibility	Yes	Yes	Yes	Yes	Yes	Yes	Yes
14.	Excuse of Hardship between private parties	No	No	Yes	Yes	Yes	Yes	Yes
15.	Excuse of Hardship between public and private parties	No	No	Yes	Yes	Yes	Yes	Yes
16.	"Highest" Good Faith for Business Partnerships	Yes	Yes	Yes	Yes	N/A	N/A	N/A
17.	Third Party Beneficiaries Pre-1999	Yes	No	Yes	Yes	No	Yes	N/A
18.	Third Party Beneficiaries Post-1999	Yes	Yes	Yes	Yes	No	Yes	Yes
19.	Perfect Tender Rule (Between Merchants)	Yes	Yes	Yes	No	No	N/A	N/A
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	No	No	Yes	Yes	Yes	Yes
21.	Passage of Title and Passage of Risk Coincide	Yes	No	No	Yes	N/A	N/A	N/A
22.	Contract Damages (excluding Product Liability) – Strict Liability	Yes	Yes	No	No	Yes	Yes	Yes

		NY LAW	ENGLISH	FRENCH	GERMAN	CISG	UNIDROIT	PECL
23.	Contract Damages (including Product Liability) – Fault	No	No	No	Yes	No	Yes	No
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	Yes	Yes	No	Yes	Yes	Yes
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	No	Yes	Yes	No	Yes	Yes
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	Yes	No	Yes	Yes	Yes	Yes
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	Yes	No	No	No	No	No
28.	Liquidated Damages As Penalty	No	No	Yes	Yes	No	No	Yes
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	Yes	Yes	Yes	Yes	Yes	Yes
30.	Anticipatory Breach	Yes	Yes	No	Yes	Yes	Yes	Yes
31.	Other Grants for Termination of Contract	Yes	Yes	Yes	Yes	Yes	Yes	Yes

COMMERCIAL LAW

		NEW YORK	ENGLISH	FRENCH	GERMAN
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	Yes	No	No
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	Limited	Yes	Yes
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	No	Yes	Yes
4.	Security Interests: Central Registration	Yes	Yes but limited	No	No
5.	Floating Lien: Creditor Can Appoint Receiver	No	Yes	No	No

CIVIL PROCEDURE

		NEW YORK	ENGLISH	FRENCH	GERMAN
1.	Pre-Trial Deposition To Preserve Evidence	Yes	Yes	No	No
2.	Pre-Trial Deposition To Discover or Clarify Evidence	Yes	No	No	No
3.	General Document Demands	Yes	Yes	No	No
4.	Parties Appoint Experts	Yes	Yes	No	No
5.	Court Appoints Experts	No	Yes	Yes	Yes
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	Yes	No	No
7.	Cross-Examination by Parties Permitted	Yes	Yes	No	Yes

NEW YORK CONTRACT LAW

		NY LAW	ANNOTATIONS
1.	Consideration	Yes	"[W]ithout consideration, there is no contract." See Express Industries v. Elsevier Sciences, Ltd., 927 F.Supp.2d. 2d 688, 703 (S.D.N.Y. 1996).
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See Section 90 of the First Restatement of Contracts. Although Section 90 nowhere mentions the term 'promissory estoppel,' courts invoking the doctrine often refer to that section to determine the elements of a valid claim. These are the core requirements: a promise, reasonably foreseeable reliance, actual inducement of reliance by the promise, and achievement of justice only through enforcement of the promise. See Advanced Refractory Technologies, Inc. v. Power Auth. of New York, 568 N.Y.S.2d 986 (App. Div. 1991). It should be noted that the N.Y. Court of Appeals has itself never formally applied relief on this basis in a purely commercial context. Glen Banks, New York Contract Law, New York (2017), Section 4:31.
3.	Gift Contracts Enforceable	No	A contract that does not require performance by each party is unenforceable for lack of consideration. See Baker's Aid, a Div. of M. Rasubvogel Co., Inc. v. Hussmann Foodservice Co., 730 F. Supp. 1209, 1219, 1990-1 Trade Cas. (CCH) P 68947 (E.D.N.Y. 1990).
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sale of Real Property and Certain Consumer Contracts	Yes	New York requires some written evidence as an additional requirement for the enforcement of many contracts. These include contracts that, of their nature, take more than a year to perform, contracts for the sale of real property, agreements regarding the debt of another and promises to pay a debt discharged in bankruptcy, finder's fees and fees for services payable other than to attorneys, and real estate brokerage fee arrangements. In addition, **NY UCC Section 2-201(1)** requires a writing in the case of contracts for the sale of goods in excess of $500.
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	New York law prohibits, in the case of a dispute about the terms of a written agreement, recourse to oral evidence of prior negotiations, representations and inconsistent understandings. New York is said to have a hard parol evidence rule as expressed in the "four corners" principle, under which a court must decide whether the terms of a contract are ambiguous on the basis of its analysis of the document itself and may only consider extrinsic evidence (written or oral) if it determines, as a matter of law and not of fact, that one or more of the contract terms are ambiguous. See Glen Banks, New York Contract Law, New York (2017), Sections 9:17, 9:28.

		NY LAW	ANNOTATIONS
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Courts can supply the missing term based on custom in the relevant industry or reasonable commercial practice in that area of business or the past practice of the parties themselves. See Cobble Hill Nursing Home, Inc v Henry and Warren Corp., 74 N.Y. 2d 475, 438, 548 N.Y.S. 2d 920, 923, 548 N.E. 2d 203 (1989).
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	At least in the absence of a merger or 'entire agreement' clause, when an essential term is missing, there is a general trend in New York law, perhaps encouraged by the policies embedded in the NY UCC, towards supplying the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business. See Point Developers Inc. v. F.D.I.C., 921 F. Supp. 1014 (E.D. N.Y. 1996); Glen Banks, New York Contract Law, New York (2017), Section 8:35.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	New York courts give high protection against extrinsic evidence (including collateral agreements) regarding the terms of a contract if the parties have agreed to merge or integrate their agreement. Such provisions are given almost exclusive deference by New York courts. See, e.g., Caiolo v. Citibank, N.A., New York, 295 F.3d 312, 317–18 (2d Cir. 2002).
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	No	The NY UCC provides in **Section 2-207(1)** that *"[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."* Under this approach, acceptance of an offer to buy by delivery of the goods, even if the delivery is accompanied by different terms and conditions, represents an acceptance of the offer so that a contract has been established. The statute does not distinguish between material and non material terms.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See above.
11.	Good Faith as Implied Term of Contracts Generally	Yes	New York courts were the first in the United States to introduce the implied covenant of good faith into contract law jurisprudence. See New York Central Iron Works Co.. v. United States Radiator Co., 174 N.Y. 331 (1903). **NY UCC Section 1-203** provides that *"[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."* **NY UCC Section 2-103** defines good faith for purposes of the sale of good as *"honesty in fact and the observance of reasonable commercial standards*

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			of fair dealing in the trade".
12.	Good Faith in Negotiation of Contracts	No	While New York law may be more open to enforcing express agreements to negotiate in good faith where a contract already exists or where sufficient terms have already been agreed to, New York law does not seem inclined to extend the duty of good faith and fair dealing in any significant way outside the contours of concluded contracts, see American Broadcasting Companies, Inc. v. Wolf, 52 N.Y. 2d 394 (1981); Baird v. Gamble Brothers, 64 F.2d 344 (2d Cir. 1933). Certain "binding commitment letters" may give rise to a duty to negotiate in good faith to conclude the "open" terms of the contract. See Teachers Ins. and Annuity Ass'n of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1997).
13.	Excuse of Impossibility	Yes	The Court of Appeals for the Second Circuit stated that "*Impossibility may be equated with an inability to perform as promised due to intervening events such as an act of state or destruction of the subject matter of the contract.* U.S. v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 381 (2d Cir. 1974). Such acts or events must in general be unforeseeable. Glen Banks, New York Contract Law, New York (2017) Section 20:4.
14.	Excuse of Hardship between private parties	No	The doctrines of impossibility and frustration of purpose generally offer very little relief to a party for whom performance may have become extremely burdensome or ruinous because of the limited circumstances to which they apply, see no 13.
15.	Excuse of Hardship between public and private parties	No	New York Law does not make a distinction on this basis.
16.	"Highest" Good Faith for Business Partnerships	Yes	There is a very high standard of conduct New York law imposes on business partners in regard to each other. This standard amounts to the duty of a fiduciary and was memorably articulated by Justice Benjamin Cardozo, then sitting as a Judge of the New York Court of Appeals, when he wrote: "*Joint venturers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty.*" Meinhard v. Salmon, 249 NY 458, 463-464 (1928).
17.	Third Party Beneficiaries Pre-1999	Yes	In 1985, the Court of Appeals adopted the principles put forth in **Section 302**

		NY LAW	ANNOTATIONS
			of the Restatement (Second) of Contracts regarding third party beneficiaries. Under this test, a third-party beneficiary has the burden of demonstrating that *(1) a valid and binding contract exists, (2) that it was an intended beneficiary of the contract, and (3) that the benefit to it is sufficiently immediate to indicate that the contracting parties intended to compensate the third party if it lost its benefit.* See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 66 N.Y.2d 38 (1985) and State of California Public Employees' Retirement System v. Sherman & Sterling, 95 N.Y.2d 427 (2000).
18.	Third Party Beneficiaries Post-1999	Yes	See above.
19.	Perfect Tender Rule (Between Merchants)	Yes	See NY UCC **Section 2-601(a);** *"if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest."*
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	This is a remedy not available under NY law.
21.	Passage of Title and Passage of Risk Coincide	Yes	**NY UCC 2-401(2)** provides a presumptive rule that title passes *"at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."*
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	"Contract liability is strict liability." This core regime is based on two key prongs: (1) the promisor is liable to the promisee for breach, and that liability is unaffected by the promisor's exercise of due care or failure to take efficient precautions; and (2) the promisor's liability is unaffected by the fact that the promisee, prior to the breach, has failed to take cost-effective precautions to reduce the consequences of nonperformance. See Restatement (Second) of Contracts, Chapter 11, Introductory Note at 309–12 (1981). E.g., breaking a promise creates liability even in the absence of fault, and the remedies available to the victim are not dependent on the breaching party's culpability.
23.	Contract Damages (including Product Liability)– Fault	No	See above. Fault is not a relevant issue under New York Law; *"[w]hen a contract is breached, the non-breaching party may assert a claim to recover*

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			damages for the loss it suffered as a result of the breach." Banks, NYCL 22:1.
24.	Damages for Loss Foreseeable at Time of Contract was Signed	Yes	New York law permits recovery of damages for a breach of contract in the form of lost profits if: 1. the damages were caused by the breach; 2. the claimed loss can be proved with reasonable certainty or at least the establishment of a stable foundation for a reasonable estimate of the amount of damages; and 3. the particular damages were within the contemplation of the parties to the contract at the time it was executed– the foreseeability rule. Glen Banks, New York Contract Law, New York (2017), Section 23:5. Under the foreseeability rule, the breaching party is legally responsible for the risks it foresaw or reasonably should have foreseen when the contract was executed. The plaintiff need not show that the breaching party foresaw either the specific breach that occurred or the specific manner in which the loss came about, see e.g., Honeywell International Inc. and Gem Microelectronic Materials, L.L.C., v. Air Products & Chemicals, Inc., 872 A.2d 944 (Supreme Court of Delaware 2005, New York Law).
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	This concept is only relevant in tort law.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	Mitigation requires a showing that plaintiff took reasonable steps to cut its losses, not that plaintiff did what the defaulting defendants would have had it do, or what in hindsight seems most effective to reduce the defaulting defendants' damages. See e.g., Carrols Equities Corp. v. Villnave, 57 A.D.2d 1044, 1045; 395 N.Y.S.2d 800, 803 (4th Dep't 1977).
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	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 carefully delineated in the parties' contract Sokoloff v. Harriman Estates Development Corp., 96 N.Y. 2d 409, 415, 729 N.Y.S. 2d 425, 429, 754

		NY LAW	ANNOTATIONS
			N.E.2d 184 (2001).
28.	Liquidated Damages As Penalty	No	Under New York law, LDs are enforceable as a remedy for breach of contract if: (1) the parties intended to liquidate damages and not to provide for a penalty; (2) the LD clause fixes an amount that bears a reasonable relationship to the anticipated loss suffered by the non-breaching party; and (3) actual loss is difficult to ascertain or incapable of estimation. See Vernitron Corp. v CF 48 Associates, 478 N.Y.S.2d 933, 934 (N.Y. App. Div. 1984).
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	New York courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach determined as of the date of the contract, especially under circumstance where establishing the cost of breach may not be easy. McKinley Associates, LLC v. McKesson HBOC, Inc., 110 F. Supp. 2d 169, 178 (W.D. N.Y. 2000). Glen Banks, New York Contract Law, New York (2017), Section 22:63.
30.	Anticipatory Breach	Yes	Under the doctrine of anticipatory breach, where one party clearly and unequivocally repudiates his contractual obligations under a contract prior to the time performance is required, the non-repudiating party may deem the contract breached and immediately sue for damages; see American List Corp. v. U.S. News & World Report, 75 NY2d 38, 550 NYS2d 590, 549 NE2d 1161 [1989].
31.	Other Grounds for Termination of Contract	Yes	In the case of material breach by a party to a contract, the non-breaching party must elect either to let the contract continue or to terminate the contract and sue for damages. Marathon Enterprises, Inc. v. Schroter GMBH & Co, 2003 WL 355238 (S.D.N.Y. 2003); see also Glen Banks, New York Contract Law, New York (2017), Section 17:19. See UCC Section 2-106. *(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.*

COMMERCIAL LAW

		NY LAW	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	Under the NY UCC, at least in regard to instruments made out to a payee, a thief can never be a holder because an individual qualifies as a holder only by showing that the person is in possession of the instrument and that the order or promise on the bill "runs" to that person. Since, by definition, the instrument cannot be made to the order of a person who is not the payee, the thief cannot be a holder within the meaning of NY UCC **Section 1-102(20)** and therefore the thief cannot endorse the instrument to someone else within the meaning of **NY UCC Section 3-302.** Chan-Hung Chung, "A Holder in Due Course of Commercial Paper Under the UCC and a Good Faith Purchaser of Bills and Checks Under the Geneva Uniform Law," 18 Korean Journal of Comparative Law (1990), p. 1.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	Following the lead of the Supreme Court of New York County in Sztejn v. J. Henry Schroder Banking Corp et al., 31 NYS 2, 631-34 (Sup. Ct. N.Y. Cty., 1941) New York courts have made an exception to the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary where a bank has received notice of actual fraud on the applicant. There, the Court distinguished between a breach of warranty and an intentional failure to deliver the goods and denied a defendant's motion to dismiss the claim of the buyer to stop the payment where there was credible evidence that the bill of lading had been falsified.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	In New York, bills of lading are governed by NY UCC **Article 7**. The Comments to UCC Section 7-507 provides that the carrier who issues a bill of lading is liable for the bill when the carrier's agent has received no goods. See also Daniel Murray, "History and Development of the Bill of Lading," University of Miami Law Review, Vol. 37:689, p. 689.
4.	Security Interests: Central Registration	Yes	NY UCC **Article 9** provides a uniform filing system for perfecting security interests by providing that a secured party may register its security interest at a designated depositary and need not give individual notice to all actual or suspected creditors of the debtor. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in

			Common Law and Civil Law Jurisdictions.
5.	Floating Lien: Creditor Can Appoint Receiver	No	NY UCC **Article 9** provides for various forms of self-help in the event a security interest holder needs to execute against the collateral, but not in the form of a right to appoint an receiver. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."

CIVIL PROCEDURE

		NY LAW	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	Yes	New York procedure rules require that the parties should have access to all relevant, non-privileged documents, including those of their adversary. See the rules of deposition, which are set out in *the uniform rules for the conduct of depositions.*
2.	Pre-Trial Deposition To Discover or Clarify Evidence	Yes	See Hon. Harold Baer, Jr.; Robert C. Meade, Jr., Esq., "Depositions: Practice and Procedure in Federal and New York State Courts," Second Edition.
3.	General Document Demands	Yes	Under the rules of procedure of New York, a party can obtain access to a range of documents without which it is unlikely the fraud could be discovered or proven. See Caslav Pejovic, " Civil Law and Common Law," Section IV(C).
4.	Parties Appoint Experts	Yes	Under New York law, the court does not generally choose a single expert but the parties choose their own experts, with the court having the opportunity to hear the testimony and advise of each side's expert. See Federal Rules of Evidence, Rule 706.
5.	Court Appoints Experts	No	See above.
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	Under New York Law, oral testimony by witnesses is usually a key component in the proof because affidavits do not present the opportunity for cross-examination nor for the exploration of questions that the litigating parties or the judges themselves may think important to resolve the matter. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Yes	Cross-examination is available in New York courts to test written evidence. See Hon. Harold Baer, Jr.; Robert C. Meade, Jr., Esq., "Depositions: Practice and Procedure in Federal and New York State Courts," Second Edition.

ENGLISH LAW CONTRACT LAW

		ENGLISH	ANNOTATIONS
1.	Consideration	Yes	English law requires that an agreement, to be valid and enforceable, must reflect some exchange of value which can consist of promises or performances- that constitutes consideration. See Thomas v Thomas (1842) 2 QB 851, 859 and Currie v Misa [1875] LR 10 Ex 153, Lush LJ.
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	No	Under English Law, promissory estoppel has been thought to be incapable of raising an independent cause of action, so that one may only plead another party is estopped from enforcing their strict legal rights as a 'shield', but cannot bring a cause of action out of estoppel as a 'sword', see eg Combe v Combe [1952] EWCA Civ 7. There is an exception for real property contracts ("proprietary estoppel").
3.	Gift Contracts Enforceable	No	A gratuitous promise is not binding for lack of consideration. See no 2. There is an exception under English law for contracts "by Deed."
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sale of Real Property and Certain Consumer Contracts	Generally no	English law has eliminated the requirement of a writing for all contracts except real estate contracts. See Section 2 of the Law of Property Act 1989: *"A contract for the sale or other disposition of an interest in land can only be made in writing (..)."*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	No	Under English Law, the focus of the interpretation is the document itself. When a contract is written down, there is a basic presumption that the written document will contain all the terms of an agreement, see City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129.
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	In Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 (HL) Lord Steyn emphasized that *"the rules of interpretation of written contracts in a commercial context, must reflect commercial expectations."*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	In the absence of a merger or 'entire agreement' clause, when an essential term is missing, courts tend to supply the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business. See Investors Compensation Scheme Ltd v. West Bromwich

		ENGLISH	ANNOTATIONS
			Building Society, [1985] AC 191, 201, discussed in Cartwright, Contract Law, pp. 186-188.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	If the parties have included in their written contract an 'entire agreement' clause, such as one that provides that 'this agreement constitutes the entire agreement between the parties', there cannot be any claim based on collateral contract. See Exxonmobil Sales and Supply Corporation v Texaco Ltd [2003] EWHC (1964).
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	In the case of a 'battle of the forms' it is still necessary somehow to find a contract by finding an offer which was accepted, based on the strict 'offer and acceptance' analysis, to determine whether a contract was concluded. See Gibson v Manchester City Council [1979] 1 WLR 294 (HL) 297.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	Yes	See no 9; Gibson v Manchester City Council [1979] 1 WLR 294 (HL) 297. The majority of the courts still apply the traditional approach mentioned above, under which an acceptance of an purported offer does not constitute an effective acceptance if the acceptance is subject to the change of *any terms* proposed in the offer, but rather is viewed as a new offer proposed to the original offeror.
11.	Good Faith as Implied Term of Contracts Generally	No	English law to date steadfastly declines to adopt the principle of good faith into its contract law. English courts, it is said, have a reluctance to *"generalize abstract principles"* and a preference *"to work with particular instances of duty which can be identified in particular cases."* John Cartwright, Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer, p. 59. Secondly, English judges have expressed concerns *"about the lack of certainty in defining the duty of good faith in the context of the relationship between contracting parties"* – particularly as this may apply to negotiations between parties before agreement is reached. Cartwright, Contract Law, p. 60.
12.	Good Faith in Negotiation of Contracts	No	See no 11. Also, under English law, a party generally has the right to withdraw from negotiations at any time up to the point where a contract or agreement has been reached. See Walford v Miles, [1992] AC 128 (HL) 138.
13.	Excuse of Impossibility	Yes	English courts developed the doctrine of *frustration.*

		ENGLISH	ANNOTATIONS
			"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." Taylor v. Caldwell, [1863] 3 B & S 826; 122 ER 309.
14.	Excuse of Hardship between private parties	No	Under English Law, hardship is only possible in case of a *'material'* change of circumstance. This requires *"an adverse change of very considerable significance striking at the heart of the purpose of the transaction, analogous…to something that would justify frustration of a legal contract."* The rules governing changes of circumstances during the lifetime of a contract are therefore very limited. See Kirsten Birkett, "Untying the Knot: Material Adverse Change Clauses" and Suhrud Mehta (Milbank), "Material Adverse Change Clauses in Adverse Markets."
15.	Excuse of Hardship between public and private parties	No	English Law does not make a distinction on this basis.
16.	"Highest" Good Faith for Business Partnerships	Yes	The law of England knows the duty of business partners to each other as *'uberrimae fidei;'* meaning that in some cases the courts will require a party to act in "utmost good faith"- not because of the type of contract in question, but because of the type of relationship which already exists between the parties at the time when the contract is negotiated. Cartwright, Contract Law at 168.
17.	Third Party Beneficiaries Pre-1999	No	England overcame the traditional common law aversion to providing third parties the possibility of having rights under contracts by enacting "The Contracts (Rights of Third Parties) 1999." The Act provides that, subject to the provisions of the Act, *"…a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) subject to Section (2), the term purports to confer a benefit on him."*
18.	Third Party Beneficiaries Post-1999	Yes	See above.

		ENGLISH	ANNOTATIONS
19.	Perfect Tender Rule (Between Merchants)	Yes	Where commercial parties of equal bargaining power wish to insist on circumstances in which a deposit will be forfeit and insist precisely on the letter of their deal, the courts will not interfere, see Union Eagle Ltd v Golden Achievement Ltd [1997] UKPC 5, [1997] AC 514.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	No	No
21.	Passage of Title and Passage of Risk Coincide	No	Under English law, while title often passes on conclusion of the contract, passage of risk follows when the goods are transferred to the buyer. Sale of Goods Act (1979), Section 20(1).
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	English Law distinguishes between intentional and non intentional torts in its rule for remoteness of damage; but not in contract. The remedies of damages for breach of contract is designed to reflect the economic risk allocation as it was settled by the parties when they entered into the contract. It does not reflect the 'wrongfulness' of the breach. See Cartwright, Contract Law, p. 271.
23.	Contract Damages (including Product Liability)– Fault	No	See above.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See Hadley v. Baxendale, (1854) 9 Ex. 341. Under the rule of Hadley v. Baxendale, a breaching party's liability includes not only loss that would ordinarily flow 'in the normal course of things' from a breach at the time the contract was entered but also loss that follows in the ordinary course from breach due to special circumstances known to the parties at the time the contract was formed.
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	Comparative negligence is not generally available as a defense to a claim for breach of contract. It can only be raised in cases of concurrent liability in contract and tort, "*where the defense of contributory negligence is available to the defendant if sued in contract where he could equally have raised it had he been sued in tort*". see Forsikringsaktieselskapet Vesta v. Butcher, [1989] AC 852, 858-68,875,879 (CA).

		ENGLISH	ANNOTATIONS
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See principle of *mitigation of loss;* the defendant will not be required to pay any part of the claimant's loss which the claimant would not have suffered if he had taken such steps upon occurrence as he ought reasonably to have taken to avoid or reduce his loss. British Westinghouse Electric and Manufacturing Co v. Underground Electric Railways Co of London [1912] AC 673 (HL).
27.	Specific Performance Limited to Real Estate or Unique Goods	Yes	English law has resisted a tendency to give the remedy of specific performance a broader application, Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd., [1998] AC 1 (HL).
28.	Liquidated Damages As Penalty	No	Agreements may state that, as opposed to a sum fixed by the courts, a particular sum of 'liquidated damages' will be paid upon non-performance. However the courts place an outer-limit on liquidated damages clauses if they became so high, or 'extravagant' and unconscionable as to look like a penalty. Dunlop Pneumatic Tyre Co v. New Garage and Motor Co Ltd [1915] AC 79 (HL).
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	English courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach, especially under circumstance where establishing the cost of breach may not be easy. However, courts are very reluctant to interfere with liquidated damage clauses as between sophisticated commercial parties, see Hadley v. Baxendale, (1854) 9 Ex. 341.
30.	Anticipatory Breach	Yes	The courts have again recently confirmed that, in certain circumstances, and provided the ingredients of a repudiatory breach are present, the innocent party may treat the contract as repudiated as a result of an anticipatory breach of contract, see SK Shipping (S) Pte Ltd v Petroexport Ltd [2009].
31.	Other Grounds for Termination of the Contract	Yes	The primary way in which contracts are brought to an untimely end is through one party not performing the major primary obligations on her side of the bargain. If a breach of the contract is "fundamental" or goes "to the root of the contract", then the innocent party gets the right to elect to terminate his own performance for the future, see Boone v Eyre (1777) 1 H Bl 273.

COMMERCIAL LAW

		ENGLISH	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	Yes	See the English Bills of Exchange Act. Under this provision, at least in regard to instruments made out to a payee, a thief can never be a holder because an individual qualifies as a holder only by showing that the person is in possession of the instrument and that the order or promise on the bill 'runs' to that person. Since, by definition, the instrument cannot be made to the order of a person who is not the payee, the thief cannot be a holder and therefore the thief cannot endorse the instrument to someone else within the meaning of the provision.
2.	Letters of Credit: Protection Against Fraudulent Demands	Limited	The courts of England have been very firm in upholding the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary. Although recognizing an exception to the independent status of a letter of credit in principle, English courts have been very reluctant to give relief or to issue temporary injunctions in cases where credible allegations of fraud have been raised. Roberto Luis Frias Garcia, "The Autonomy Principle of Letters of Credit," Mexican Law Review, Vol. III, No. 1, p. 68, , 74-75.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	No	Under the leading English case of Grant v. Norway, 10 C.B. 665, 138 Eng. Rep. 263 (C.B. 1851), a shipping company could not be held responsible for the master's misrepresentation about goods the master never received. The English Carriage of Goods By Sea Act 1992 effectively repeals the rule of Grant v. Norway as to transferable bills of lading but not "straight bills of lading" and waybills made to specific consignees. See Indira Carr, International Trade Law, Fourth Edition, pp. 175-176.
4.	Security Interests: Central Registration	Yes but limited	While England has a central registration system, 'legal' charges over receivables only apply if account debtors have been given individual notice. Also, registering a security interest only satisfies the notice requirements for parties likely to search – so notice to specific creditors still remains preferable.
5.	Floating Lien: Creditor Can Appoint	Yes	English law does give the holder of a lien over substantially all of a

	Receiver		Borrower's assets a form of self-help in the form of a right to appoint an "administrative receiver" who answers to the secured lender and who can take control of the assets as long as an "ordinary receiver" has not been appointed by a court. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."

CIVIL PROCEDURE

		ENGLISH	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	Yes	English procedure rules require that the parties should have access to all relevant, non-privileged documents, including those of their adversary. See the rules of standard *disclosure*, which are set out by the Civil Procedure Rules 1998 (the CPR) Rule 31.6.
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	The routine practice of obtaining the oral evidence of a witness before trial is foreign to England's legal system.
3.	General Document Demands	Yes	The right to inspect documents in English civil procedure is governed by CPR Part 31.15. Upon written notice, the party to whom a document has been disclosed has the right to inspect that document (if such inspection would be proportionate given the nature of the case) except where the party making disclosure has the right to withhold inspection.
4.	Parties Appoint Experts	Yes	See The Civil Procedure Rules Part 35 provisions. The court can appoint a single, joint expert who will act for both parties. If the parties do not agree on who is to act as single, joint expert, the court can resolve the impasse by appointing from a list provided by the parties, or the court can direct that the expert shall be selected in some other fashion.
5.	Court Appoints Experts	Yes	See above
6.	Formal "Direct" Presentation of Claimant's Case Generally Required	Yes	In English civil procedures, oral testimony by witnesses is an important component in the proof because affidavits- although recognized as a form of deposition- do not present the opportunity for the exploration of questions

			that the litigating parties or the judges themselves may think important to resolve the matter. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Yes	Cross-examination is available in English courts to test written evidence.

FRENCH CONTRACT LAW

		FRENCH	ANNOTATIONS
1.	Consideration	No	Pursuant to section 1128 of the Civil Code, the only requirements of a contract are: 1- the consent of the parties 2- their capacity to contract 3- content which is lawful and certain
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	No	There are no provisions regarding promissory estoppel, but actions for breach of negotiations will be made under tort law (Section 1382 of the Civil Code). In France, the "théorie de l'apparence" as well as the "enrichissement sans cause" are possible claims for the injured party, based on the theory of restitution rather than contracts law.
3.	Gift Contracts Enforceable	Yes	Pursuant to section 932 of the Civil Code, a gift contract (inter-vivos gift) becomes binding once it is accepted by the beneficiary.
4.	Writing Required for Enforceable Contract	No	Writings are generally not part of the prerequisites (Section 1172 of the Civil Code). Section 1173 of the Civil Code states that formal requirements imposed for the purposes of proof of a contract or setting up a contract against another person have no effect on the validity of the contract. However, certain assumptions are made if there is no writing, such as in employment contracts regarding the employee benefits. Also, contracts in France are formed once there is an offer that has been accepted by the other party. French law, while also requiring written evidence for contracts above a certain amount set by regulation, exempts commercial contracts from this requirement.
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Unless falling under the threshold of section 1358 of the Civil Code (€800 or less), section 1359 of the Civil Code states that proof must be established in writing, whether privately signed or authenticated. Section 1359 of the Civil Code provides an exception in the case of physical or moral impossibility of the written evidence being obtained, if it is customary not to establish written evidence, or where the written evidence has been lost as a result of force majeure.
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	Pursuant to section 1188 of the Civil Code a contract is to be interpreted according to the common intention of the parties. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See point 5.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	No	No.
9.	"Battle of Forms" for Contract for Sale of Goods: "Mirror Image" as to material terms	Yes	Section 1188 of the Civil Code provides that the agreement has to state what the parties intend rather than the literal meaning of the contract. Sections 1189 – 1192 of the Civil Code continue in the same goal of interpreting the contract.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	Yes	Similar to the previous point. A distinction is not made between material and non-material terms.
11.	Good Faith as Implied Term of Contracts Generally	Yes	Section 1104 of the Civil Code states that agreements have to be negotiated, formed and performed in good faith.
12.	Good Faith in Negotiation of Contracts	Yes	Yes, under Sections 1104 and 1112 of the Civil Code. In addition, 1112-1 of the Civil Code provides that during the negotiations, a party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.
13.	Excuse of Impossibility	Yes	In the event of force majeure section 1218 of the Civil Code states that if the prevention of performance is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1 (Impossibility of performance).
14.	Excuse of Hardship between private parties	Yes	Section 1195 provides the possibility to adjust the contract when unforeseen circumstances have made the bargain unduly costly. Paragraph 1 provides that, if a change of circumstances that was unforeseeable at the time the contract was made renders performance excessively onerous for a party and that party had not accepted the risk of such a change, he may ask the other party to renegotiate the contract. Paragraph 2 sets out the consequences of the proposed renegotiation being refused or failing. The parties may agree to terminate the contract or ask the court to revise it.
15.	Excuse of Hardship between public and private parties	Yes	Similar to the previous point.
16.	"Highest" Good Faith for Business Partnerships	Yes	No distinctive section, however section 1104 of the Civil Code is interpreted fully as applying to "agreements of co-operation".
17.	Third Party Beneficiaries Pre-1999	Yes	Sections 1205 and 1206 of the Civil Code allow for third-parties to be beneficiaries and will be protected once they have agreed to take advantage of this benefit.
18.	Third Party Beneficiaries Post-1999	Yes	Similar sections as in the previous point.

19.	Perfect Tender Rule (Between Merchants)	Yes	Section 1217 of the Civil Code states that a party towards whom an undertaking has not been performed or has been performed imperfectly, may: - refuse to perform or suspend performance of his own obligations; - seek enforced performance in kind of the undertaking; - request a reduction in price; - provoke the termination22 of the contract; - claim reparation of the consequences of non-performance.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	Pursuant to sections 1221, 1223 and 1226 of the Civil Code the creditor must give notice to perform prior to seek performance, reduce the price or terminate the contract.
21.	Passage of Title and Passage of Risk Coincide	Yes	Section 1196 of the Civil Code states in paragraph 3 that the transfer of property entails the transfer of risk in the thing.
22.	Contract Damages – Strict Liability (Excluding Products Liability)	No	Such liability only derives from Products Liability and is not possible on a contractual basis, but rather trough a tort action.
23.	Contract Damages – Fault	No	Section 1231-1 of the Civil Code provides that a debtor is liable for the damages either on the ground of non-performance or a delay in performance of an obligation, unless he justifies this on the ground that performance was prevented by force majeure.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	Pursuant to section 1231-3 of the Civil Code a debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault.
25.	Damages of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	Section 1245-12 of the Civil Code states that a producer's liability for defective products may be reduced or excluded, having regard to all circumstances, where the harm is caused jointly by a defect in the product and by the fault of the victim or of a person for whom the victim is responsible.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	No	No duty to mitigate losses is imposed on the injured party.
27.	Specific Performance Limited to Real Estate or Unique Goods	No	Sections 1217 and 1221 of the Civil Code provide that a creditor of an obligation may seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.
28.	Liquidated Damages as Penalty	Yes	Section 1231-5 (paragraph 1) of the Civil Code allows for parties to agree to certain damages in case of breach.
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	Section 1231-5 (paragraph 2) of the Civil Code allows for the judge to increase or decrease the damages awarded to a reasonable approximation of the actual loss incurred if the damages written are ridiculously low or excessively high.
30.	Anticipatory Breach	No	Section 1305-2 of the Civil Code states that when the performance of an obligation is due only after a delay, its performance cannot be demanded until

			the time so fixed has passed. However, pursuant to section 1220 of the Civil Code a party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him.
31.	Other Grounds for Termination of the Contract	Yes	Section 1217 of the Civil Code provides that non-performance or imperfect performance of a contract for no external reasons is grounds for termination. In addition, the unforeseeable change of circumstances may be grounds for termination (section 1195 of the Civil Code).

COMMERCIAL LAW

		FRENCH	ANNOTATIONS
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	No	Such protection is only available through the Geneva Convention Uniform Law for Cheques.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	There is such protection under French Law pursuant to *Regles Usages Uniformes (RUU 600)*.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	Section L132-8 of the Commercial Code states that "the carriers shall have a direct claim for payment of their services to the consignor and the recipient who shall act as guarantors for the payment of the transport cost."
4.	Security Interests: Central Registration	No	Executing on collateral requires an application to a court. An insolvency administrator is then appointed, but it is a quicker method to have an attachment.
5.	Floating Lien: Creditor Can Appoint Receiver	No	Floating liens are not recognized under French Law, but the *Loi Dailly* does allow for liens to be placed on future accounts receivable, but only if the debtor regularly provides information and updates about them.

CIVIL PROCEDURE

		FRENCH	ANNOTATIONS
1.	Pre-Trial Deposition To Preserve Evidence	No	No
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	No
3.	General Document Demands – Court Intervention Not Needed	No	Such procedure is done through the court's intervention only.
4.	General Document Demands – Court Intervention Needed	Yes	A party may request a judge to order the other party or any third party to disclose any documents relating to a dispute when it has not been produced pursuant to Sections 9 and 11 of the New Code of Civil Procedure.
5.	Parties Appoint Experts	No	An expert (or judiciary expert) must be registered on a list of experts maintained by an Appeals court and can only be appointed by the Court.
6.	Court Appoints Experts	Yes	Pursuant to the Décret No 2004-1463 of December 23, 2004 regarding judiciary experts, they have to be on the experts list (as stated in the previous point) and are appointed by the Court.
7.	Direct Evidence at Trial Hearing (Formal Presentation of the claimant's case)	No	No
8.	Cross-Examination by Parties	No	Such examination methods are not allowed in French civil procedure. Interestingly, the Code of Civil Procedure of Quebec, which is strongly inspired from its French equivalent, does allow for the cross-examination by parties.

GERMAN CONTRACT LAW

		GERMAN	ANNOTATIONS
1.	Consideration	No	See various "gratuitous contracts": gift contracts and unilateral contracts established in the German Civil Code, e.g. **Section 662** (Mandate): *"By accepting a mandate, the mandatary agrees to carry out a transaction entrusted to him by the mandatory for the mandatory gratuitously."* or **Section 765** (Suretyship): *"By a contract of suretyship the surety puts himself under a duty to the creditor of a third party to be responsible for discharging that third party's obligation."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	In the context of pre-contractual negotiations Section 311(2) of the German Civil Code provides *"An obligation with duties under section 241 (2) also comes into existence by* *1. the commencement of contract negotiations* *2. the initiation of a contract where a party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or* *3. similar business contacts."*
3.	Gift Contracts Enforceable	Yes	See **Section 518** of the German Civil Code: *"(1)For a contract by witch performance is promised as a donation to be valid, notarial recording of the promise is required.* *(2) A defect of form is cured by rendering the performance promised."* No contract required if gift is given before/without promise.
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than for Sales of Real Property and Certain Consumer Contracts	Generally no	See Palandt-Weidenkaff, 71. Aufl. 2012, § 125 Rn. 1. German contract law is based on the principle of *"Formfreiheit"* (freedom of form). Pursuant to this principle, contracts generally may be concluded without complying with any formal requirement, unless the law provides for a specific formal requirement, or the parties to the contract have agreed on such.

		GERMAN	ANNOTATIONS
			The Law provides for exceptions from the principle of freedom of contract inter alia in cases where a person is to be protected from rushing into a contractual obligation (e.g. personal securities); where the contractual document is the basis for entering information into a register (e.g. purchase of real state); or where a formal requirement is necessary for reasons of publicity and legal certainty (e.g. assignment).
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Extrinsic evidence may be used to prove true intention in case an issue was not (conclusively) addressed in the contract. See **Section 133** of the German Civil Code: *"When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration."*
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See **Section 157** of the German Civil Code: *"Contracts are to be interpreted as required by good faith, taking customary practice into consideration."*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See above; **Section 133** of the German Civil Code.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	Due to the principle of personal autonomy in German Law, parties can generally agree to exclude extrinsic evidence in the written contract. However, the trial court has some discretion to admit extrinsic evidence to fill unintended gaps in a contract. See Palandt-Weidenkaff, 71. Aufl. 2012, § 157 Rn. 8
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Section 150 (3), 154** of the German Civil Code The German Civil Code provides, in Section 150 (3), that *"[a]n acceptance with amplifications, limitations or other alterations is deemed to be a refusal coupled with a new offer."* Article 154 of the German Civil Code provides that *"So long as the parties have not agreed upon all points of a contract upon which agreement is essential, according to the declaration of even one party, the contract is, in*

		GERMAN	ANNOTATIONS
			case of doubt, not concluded." All of these approaches focus on agreement as the key factor in determining if a contract exists– with the focus on searching for the "mirroring" of the subjective intentions of the parties, at least as to material or essential terms.
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See no 9; Section 154 of the German Civil Code. See also **Section 155** of the German Civil Code: *"If the parties to a contract which they consider to have been entered into have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is applicable if it is to be assumed that the contract would have been entered into even without a provision concerning this point."*
11.	Good Faith as Implied Term of Contracts Generally	Yes	See **Section 242** of the German Civil Code, which provides that all contractual obligations must be performed according to the requirement of good faith. ("Treu und Glauben", literally "faith and trust")
12.	Good Faith in Negotiation of Contracts	Yes	See no 11. more detailed: Squire Sanders, "The Notion of Contractual Good Faith: Perspectives from Comparative Law," Section on German Law. In advance of concluding the contract, parties can be held liable e.g. for termination of contract negotiations, see **Section 311 (2)** of the German Civil Code: *"An obligation with duties under section 241 (2) also comes into existence by* *1. the commencement of contract negotiations* *2. the initiation of a contract where a party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or* *3. similar business contacts."*
13.	Excuse of Impossibility	Yes	See **Section 275** of the German Civil Code:

		GERMAN	ANNOTATIONS
			"A claim of performance is excluded to the extent that performance is impossible for the obligor or for any other person."
14.	Excuse of Hardship between private parties	Yes	See **Section 313** of the German Civil Code, which addresses the *"collapse of the foundation of a contract"* ("Wegfall der Geschaeftsgrundlage"): *"If circumstances at the basis of the contract formation have substantially changed and the parties would not have entered into the contract at all or with different contents if they could have anticipated this change, a claim for an adjustment of the contractor can be made, provided that, given all circumstances of the individual case, especially the contractual or statutory risk distribution, one cannot be expected to continue with the contract as it is."*
15.	Excuse of Hardship between public and private parties	Yes	See above
16.	"Highest" Good Faith for Business Partnerships	Yes	German law does not speak in this exact terminology but interprets the principle of good faith that way. See Palandt-Weidenkaff, 71. Aufl. 2012, § 242 Rn. 23.
17.	Third Party Beneficiaries Pre-1999	Yes	See **Section 328** of the German Civil Code, which provides that *"a contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance."* A third party may also, under German law, seek damages for failure of a party to perform its duty under the contract. See also Karsten Keilhack, "Third Party Rights: A Comparison of English and German Law with Respect to the UNIDROIT Principles on International Commercial Contracts," Section B(II).
18.	Third Party Beneficiaries Post-1999	Yes	See above
19.	Perfect Tender Rule (Between Merchants)	No	See **Section 434 et seq.** of the German Civil Code *"The thing is free from material defects, if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been*

		GERMAN	ANNOTATIONS
			agreed, the thing is free of material defects *1. if it is suitable for the use intended under the contract.* *2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing."* Also, the legal consequences differ; under German law the "defective" performance would lead to warranty claims (specific performance) rather than to the payment of damages.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See the German concept of "Nachfrist" ("Extension of time"), e.g.: **Section 281 (1)** of the German Civil Code *"To the extent that the obligor does not render performance as owed, the obligee may […] demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure."* Palandt-Weidenkaff, 71. Aufl. 2012, § 281 Rn. 9
21.	Passage of Title and Passage of Risk Coincide	Yes	See **Section 446** of the German Civil Code: *"The risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the thing sold."* The Law provides for exceptions though, see e.g. Section 300 (2), 447 etc.
22.	Contract Damages (excluding Product Liability)– Strict Liability	No	See **Section 254** of the German Civil Code German law acknowledges the fundamental principle that damages should compensate for loss of profit or gain but the range of the loss, following the general tort-like analysis of the civil law even in the area of contracts, looks more to the damages that can be tied by reason of cause to the breach. Eric C. Schneider, "Consequential Damages in the International Sale of Goods: Analysis of Two Decisions," Section 4
23.	Contract Damages (including Product Liability)– Fault	Yes	See **Section 276** of the German Civil Code: *"The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other*

		GERMAN	ANNOTATIONS
			subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk."
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	No	German law focuses more on the damages that could be foreseen at the time of breach rather than at the time the contract was formed. Eric C. Schneider, "Consequential Damages in the International Sale of Goods: Analysis of Two Decisions," Section 4
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Section 254**: *"Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party."*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Section 254 (2)** of the German Civil Code: *"(1)Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.* *(2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage."* Palandt-Weidenkaff, 71. Aufl. 2012, § 254 Rn. 32
27.	Specific Performance Limited to Real Estate or Unique Goods	No	Specific performance is available whenever *"the thing is defective"*, see **Section 437** of the German Civil Code. **Section 439** of the German Civil Code states, that *"the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied."* See more detailed: Henrik Lando and Caspar Rose, "On the Enforcement of Specific Performance in Civil Law Countries," International Review of Law and Economics (2004) 473-487.

		GERMAN	ANNOTATIONS
28.	Liquidated Damages As Penalty	Yes	See **Section 339** et seq. of the German Civil Code *"Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as penalty, the penalty is payable if he is in default."*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See **Section 249 et seq.** of the German Civil Code *"A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred."*
30.	Anticipatory Breach	Yes	See **Section 323 (4)** of the German Civil Code**:** *"The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met."* See also **Section 281 (2)** of the German Civil Code**:** *"Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages."*
31.	Other Grounds for Termination of the Contract	Yes	See **Section 323 (1)** of the German Civil Code: *"If, in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure."*

COMMERCIAL LAW

		GERMAN	
1.	Negotiable Instruments: Protection Against Fraudulent Endorser	No	For Germany, the two major sources of law are the Geneva Convention Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention Uniform Law for Cheques. Under the Geneva system, a holder acquiring an instrument in good faith and without gross negligence by an uninterrupted series of endorsements can be a good faith purchaser even though the instrument was lost or stolen and one of the signatures was forged.
2.	Letters of Credit: Protection Against Fraudulent Demands	Yes	The courts have been very firm in upholding the *"abstraction"* of the letter of credit from other circumstances affecting the applicant or beneficiary. However, the Uniform Customs and Practice for Documentary Credits (UCP) provides an exception where a bank has received notice of actual fraud on the applicant.
3.	Bills of Lading: Remedy for Carrier if Master Does Not Receive the Goods	Yes	See **Section 409 (1)** of the German Commercial Code: *"A consignment note signed by both parties shall be prima facie evidence of the conclusion of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier."*
4.	Security Interests: Central Registration	No	There is no national system of registration in Germany. Under German law, executing on the collateral requires application to a court. See McGuire Woods, "Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions."
5.	Floating Lien: Creditor Can Appoint Receiver	No	Under German Law, the Creditor has no right to appoint a receiver, this requires court action.

CIVIL PROCEDURE

		GERMAN	
1.	Pre-Trial Deposition To Preserve Evidence	No	In German law there is no such procedure.
2.	Pre-Trial Deposition To Discover or Clarify Evidence	No	Each party may only use the evidence it actually has access to. Under German Law, parties do not have the right to ask for documents they cannot specifically identify and therefore the ability to review a party's entire record with regard to a transaction is not generally available. See Caslav Pejovic, " Civil Law and Common Law," Section IV(C).
3.	General Document Demands	No	However parties do have a right to inspect specific documents, see **Section 810** of the German Civil Code: *"A person who has a legal interest in inspecting a document in the possession of another person may demand from its possessor permission to inspect it if the document was drawn up to his interests or if in the document a legal relationship existing between himself and another is documented or if the document contains negotiations on a legal transaction that were engaged in between him and another person or between one of the two of them and a joint intermediary."*
4.	Parties Appoint Experts	No	See **Section 404 (1)** of the German Code of Civil Procedure: *"The Appointment of the Experts/the determination of their number rests with the trial court."* Parties may consult experts, but the probative value of such a *private* expert is only that of a witness, see Section 402 of the German Code of Civil Procedure.
5.	Court Appoints Experts	Yes	See no 4.

6.	Formal "Direct" Presentation of Claimant's Case Generally Required	No	There is generally a great dependence on written testimony in German Civil Procedure. Testimony is usually quite limited and is ordinarily based on questions posed by the Judge. Attorneys often do not question the witness directly but present questions for the Judge to ask. See Caslav Pejovic, " Civil Law and Common Law: Two Different Paths Leading To the Same Goal," Section IV(E).
7.	Cross-Examination by Parties	Generally yes	Cross-Examination by parties is generally possible under German Law, pursuant **Section 397** of the German Code of Civil Procedure. However, it is hardly carried out in practice. It is more common for both parties/their attorneys to examine the witnesses in succession.

CONTRACT LAW UNDER THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS

		CISG	ANNOTATIONS
1.	Consideration	No	**Article 29(1)** of the CISG states that *'[a] contract may be modified or terminated by the mere agreement of the parties'* thereby clearly indicating that there is no place for consideration in the CISG.
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract other than for Contracts of Sales of Real Property or Arising during Contract Negotiations	Yes	See CISG **Article 16:** *(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.* *(2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted* ***in reliance on the offer****.*
3.	Gift Contracts Enforceable	N/A	
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than Sales of Real Property and Certain Consumer Contracts	No	See CISG **Article 11**: *A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	Under CISG **Article 8**, if the intent of the parties was not evident from their statements and conduct, a 'reasonable person' standard would be applied, 'due consideration' being given "*to all relevant circumstances of the case, including the negotiations, any practices which the parties have established for themselves, usages and any subsequent conduct of the parties.*"

		CISG	ANNOTATIONS
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See CISG **Article 8:** *(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.* *(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.* *(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See no 6. There is no parole evidence rule in the CISG.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	No	Such a 'merger'- or 'entire agreement' clause would derogate from **Article 11**, which provides that a sales contract may be proved by any means, including witnesses. The objective to prevent recourse to extrinsic evidence for the purpose of contract interpretation would also appear to derogate from the Convention's canons of interpretation incorporated in CISG **Article 8.**

		CISG	ANNOTATIONS
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See CISG **Article 19:** *(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.* *(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do* ***not materially*** *alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.* *(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See above **Article 19 (2)**.
11.	Good Faith as Implied Term of Contracts Generally	No	The CISG does not have an express provision imposing a duty of good faith in the performance of contracts but does provide that regard must be had for *"promoting the observance of good faith in international trade"* in interpretation of the Convention, see **Article 7.**
12.	Good Faith in Negotiation of Contracts	No	Since the CISG does not even have an express provision imposing a duty of good faith in the performance of the contract, Good Faith in Negotiation of Contracts can not be implied in Article. 7, see no 11.
13.	Excuse of Impossibility	Yes	CISG **Article 79** provides a limited form of 'exemption' in the case of a party's failure to perform because of *"an impediment beyond its control"* for the period of time during which the impediment applies, where the party claiming the exemption could not reasonably be expected to have taken the impediment into account at the time their contract was entered into or to have overcome it.

		CISG	ANNOTATIONS
14.	Excuse of Hardship between private parties	Yes	See no 13.
15.	Excuse of Hardship between public and private parties	Yes	See no 13.
16.	"Highest" Good Faith for Business Partnerships	N/A	
17.	Third Party Beneficiaries Pre-1999	No	The CISG is silent on the admissibility of direct contractual claims by parties not in privity.
18.	Third Party Beneficiaries Post-1999	No	See above.
19.	Perfect Tender Rule (Between Merchants)	No	CISG **Article 49(1)(a)** allows the buyer upon delivery to avoid the contract once goods have been delivered only "*if the failure by the seller to perform any of its obligations under the contract or this Convention amounts to a fundamental bread of contract."* The adoption of the substantial performance standard under the CISG derives from the view that the distances and expenses of transporting of goods in international commerce makes a perfect tender rule less sensible and therefore the substantial performance rule better reflects the likely expectations of parties in international trade.
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	Under CISG **Article 48,** a seller may "*remedy at his expense any failure to perform his obligations if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.*" CISG **Article 49** gives the buyer a measure of self-help in the case of delay in the seller's performance. CISG **Article 47** allows the buyer "*to fix an additional period of time of reasonable length before performance by the seller of its obligations."*
21.	Passage of Title and Passage of Risk Coincide	N/A	The CISG leaves the question of passage of title to be determined by local law.

		CISG	ANNOTATIONS
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	CISG is an essentially 'strict' liability system, since the CISG obligee's right to claim damages is conditioned only on the obligor's non-performance, not his or her fault. See CISG **Article 45(1)(b):** *(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:* *(b) claim damages as provided in articles 74 to 77,* and CISG **Article 61(1)(b):** *(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:* *(b) claim damages as provided in articles 74 to 77.*
23.	Contract Damages (including Product Liability)– Fault	No	The CISG focuses primarily on loss, see no 22 and 24.
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See **Article 74:** *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."*
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	No	The CISG is silent on the possibility of remedies if the reason for the non-performance was the result of the act(s) or omission(s) of the party seeking relief.
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See CISG **Article 77:** *"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."*

		CISG	ANNOTATIONS
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See CISG **Article 28:** *"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."*
28.	Liquidated Damages As Penalty	No	The Convention impliedly excludes damages not related to loss. See **Article 74**, described in no 29 below.
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See CISG **Article 74:** *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."*
30.	Anticipatory Breach	Yes	See CISG **Article 72 (1):** *If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.*
31.	Grounds for Termination of the Contract	Yes	The CISG uses the term "fundamental breach" to constitute the usual precondition for the contract to be avoided. (CISG Art. 49(1)(a); Art. 51; Art. 64(1)(a); Art. 72(1); Art. 73). See CISG **Article 25:** *A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*

CONTRACT LAW UNDER THE UNIDROIT PRINCIPLES

		UNIDROIT	ANNOTATIONS
1.	Consideration	No	See **Article 3.2:** *"A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See **Article 2.4:** *(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.* *(2) However, an offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer.*
3.	Gift Contracts Enforceable	N/A	
4.	Writing Frequently Required for Enforceable Contract (as a Matter of Substantive Law) other than Sales of Real Property and Certain Consumer Contracts	No	See **Article 1.2:** *"Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnessess."* **Article 3.2:** *"A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements."*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	See **Article 4.8** of the UNIDROIT Principles, which direct that *"[w]here the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied."*
6.	Supply Missing Term of Contract on Basis of Commercial Practice	Yes	See **Article 4.8 (2):** In determining what is an appropriate term regard shall be had, among other factors to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness.

		UNIDROIT	ANNOTATIONS
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See no 6.
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	See **Article 2.1.17:** *"A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."*
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Article 2.11:** *(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.* *(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do* ***not materially alter*** *the terms of the offer constitutes an acceptance, unless the offeror without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See no 9.
11.	Good Faith as Implied Term of Contracts Generally	Yes	**Art. 1.7** states that *"[e]ach party must act in accordance with good faith and fair dealing in international trade,"* which includes pre-contractual negotiations.
12.	Good Faith in Negotiation of Contracts	Yes	See **Article 2.1.15:** *(1) A party is free to negotiate and is not liable for failure to reach an agreement.* *(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.* *(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.*

		UNIDROIT	ANNOTATIONS
13.	Excuse of Impossibility	Yes	See **Article 7.1.7:** *(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.* *(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.* *(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.* *(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.*
14.	Excuse of Hardship between private parties	Yes	Hardship, under **Article 6.2.2,** is designated as occurring *"Where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished," provided that (1) the events occur or become known to the disadvantaged party after the contract has been concluded, (2) the events could not have reasonably been taken into account by the disadvantaged parties at the time the contract was concluded, (3) the events are beyond the control of the disadvantaged party and (4) the risk of such events was not assumed by the disadvantaged party."* In the case of such a qualifying occurrence of hardship, Article 6.2.3 allows the disadvantaged party to request renegotiations but does not excuse that party's non-performance.
15.	Excuse of Hardship between public and private parties	Yes	See no 14.
16.	"Highest" Good Faith for Business Partnerships	N/A	

		UNIDROIT	ANNOTATIONS
17.	Third Party Beneficiaries Pre-1999	Yes	See **Article 5.2.1:** *(1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").* *(2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.*
18.	Third Party Beneficiaries Post-1999	Yes	See above.
19.	Perfect Tender Rule (Between Merchants)	N/A	
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See **Article 7.1:** *(1) In a case of a non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.* *(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.* *(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.* *(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.*

		UNIDROIT	ANNOTATIONS
21.	Passage of Title and Passage of Risk Coincide	N/A	The UNIDROIT leaves the question of passage of title to be determined by local law.
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	See **Article 7.4.1:** *Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.*
23.	Contract Damages (including Product Liability)– Fault	Yes	The UNIDROIT Principles, focus on 'harm' in a way that still suggests a strong role for fault. See generally John Y. Gotanda, "Damages in Lieu of Performance Because of Breach of Contract," Section III(2)
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	The UNIDROIT Principles in **Article 7.4.4** provide for damages that "reasonably" could have been foreseen at the time of the conclusion of the contract as being likely to result from non-performance.
25.	Damages under Contract Law of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Article 7.4.7:** *Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Article 7.4.8:** *(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.* *(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.*
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See **Article 7.2.2:** *Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless* *(a) performance is impossible in law or in fact;* *(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;* *(c) the party entitled to performance may reasonably obtain performance*

		UNIDROIT	ANNOTATIONS
			from another source; *(d) performance is of an exclusively personal character; or* *(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.*
28.	Liquidated Damages As Penalty	Yes	See **Article 7.4.13:** *(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such nonperformance, the aggrieved party is entitled to that sum irrespective of its actual harm.* *(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	See **Article 7.4.3:** *(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.* *(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.* *(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.*
30.	Anticipatory Breach	Yes	See **Article 7.3.3:** *Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.*
31.	Grounds for Termination of the Contract	Yes	See **Article 7.3.1:** *(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental performance.* *(2) In determining whether a failure to perform an obligation amounts to a fundamental nonperformance regard shall be had, in particular, to whether* *(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;*

		UNIDROIT	ANNOTATIONS
			(b) strict compliance with the obligation which has not been performed is of essence under the contract; *(c) the non-performance is intentional or reckless;* *(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;* *(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.*

CONTRACT LAW UNDER THE PRINCIPLES OF EUROPEAN CONTRACT LAW

		PECL	ANNOTATIONS
1.	Consideration	No	In **Article 2:101 (1)** PECL explicitly say: "a contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement *without any further requirement."*
2.	Promissory Estoppel (Reliance) as Independent Cause of Action in Contract	Yes	See **Article 2:202:** *(1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205(2) or (3).* *(…)* *(3) However, a revocation of an offer is ineffective if:* *(a) the offer indicates that it is irrevocable; or* *(b) it states a fixed time for its acceptance; or* *(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted* ***in reliance on the offer.***
3.	Gift Contracts Enforceable	Yes	Under the PECL, a promise to make a gift is generally enforceable, even if the promise is gratuitous in nature. See Vranken, European Civil Law, Section 532. **Article 2:107:** *A promise which is intended to be legally binding without acceptance is binding.*
4.	Writing Required for Enforceable Contract (as a Matter of Substantial Law)	No	See **Article 2:101 (2):** *A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.*
5.	Extrinsic Evidence To Establish Missing or Additional Terms of Written Contract	Yes	See **Article 5:101 (1):** *A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.*
6.	Supply Missing Term of Contract on Basis	Yes	See **Article 5:102:**

		PECL	ANNOTATIONS
	of Commercial Practice		*In interpreting the contract, regard shall be had, in particular, to:* *(a) the circumstances in which it was concluded, including the preliminary negotiations;* *(b) the conduct of the parties, even subsequent to the conclusion of the contract;* *(c) the nature and purpose of the contract;* *(d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;* *(e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received ;* *(f) usages; and* *(g) good faith and fair dealing*
7.	Extrinsic Evidence of Collateral Agreements to Construe Written Contract Lacking Merger Clause	Yes	See **Article 2:105 (3)**: *The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.*
8.	Parties Permitted to Exclude Extrinsic Evidence of Collateral Agreements in Construction of Written Contract	Yes	While the parol evidence and 'merger' clauses were generally unique to the common law, the concept of precluding oral evidence in the case of agreements that contain an 'entire agreement' clause has been accepted by the Principles of European Contract Law at **Article 2.105 (1)**: *If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.*
9.	"Battle of Forms" for Contracts for Sale of Goods: "Mirror Image" as to material terms	Yes	See **Article 2:208 (1):** *A reply by the offeree which states or implies additional or different terms that would materially alter the terms of the offer is a rejection and a new offer.*
10.	"Battle of Forms" for Contract for Sale of Goods – "Mirror Image" as to non-material terms	No	See **Article 2:208 (2):** *A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.*

		PECL	ANNOTATIONS
11.	Good Faith as Implied Term of Contracts Generally	Yes	**Article 1.106** of the Principle of European Contract Law imposes an obligation of *"good faith and fair dealing."*
12.	Good Faith in Negotiation of Contracts	Yes	See **Article 2:301:** *(1) A party is free to negotiate and is not liable for failure to reach an agreement.* *(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.* *(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.*
13.	Excuse of Impossibility	Yes	See **Article 8:108 (1):** *A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.*
14.	Excuse of Hardship between private parties	Yes	The drafters of the European principles have developed a broad range of circumstances by providing that *"where the concurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party has received has diminished,"* the aggrieved party may request renegotiation of the transaction and, if the negotiations fail, judicial relief, which may include termination of the contract or its reform. See **Article 6:111.**
15.	Excuse of Hardship between public and private parties	Yes	See no 14.
16.	"Highest" Good Faith for Business Partnerships	N/A	
17.	Third Party Beneficiaries Pre-1999	N/A	

		PECL	ANNOTATIONS
18.	Third Party Beneficiaries Post-1999	Yes	See **Article 6:110 (1):** *A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.*
19.	Perfect Tender Rule (Between Merchants)	N/A	
20.	Unilateral Grant of Extra Time to Complete Performance, Subject to Contract Avoidance	Yes	See **Article 8:106:** *(1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.* *(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9.* *(3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.*
21.	Passage of Title and Passage of Risk Coincide	N/A	
22.	Contract Damages (excluding Product Liability)– Strict Liability	Yes	See **Article 1:301(4):** *'Non-performance' denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract.*

		PECL	ANNOTATIONS
23.	Contract Damages (including Product Liability)– Fault	No	See **Article 4:117 (1):** *A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage.*
24.	Damages for Loss Foreseeable at Time of Contract Was Signed	Yes	See **Article 9:503:** *The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.*
25.	Damages of Breaching Party Offset by Non-Breaching Party's Contribution to Breach ("Comparative Negligence")	Yes	See **Article 9:504:** *The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.*
26.	Requirement of Mitigation or "Cover" by Non-Breaching Party	Yes	See **Article 9:505:** *(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.* *(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.*
27.	Specific Performance Limited to Real Estate or Unique Goods	No	See **Article 9:102**: *(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.* *(2) Specific performance cannot, however, be obtained where: (a) performance would be unlawful or impossible; or (b) performance would cause the debtor unreasonable effort or expense; or (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or (d) the aggrieved party may reasonably obtain performance from another source.*

		PECL	ANNOTATIONS
			(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.
28.	Liquidated Damages As Penalty	Yes	See **Article 9:509:** *(1) Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss.* *(2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.*
29.	Liquidating Damages as Approximation of Damages ("Reasonable")	Yes	**Article 9.503** provides for damages that "*reasonably*" could have been foreseen at the time of the conclusion of the contract as being likely to result from non-performance. See no 28.
30.	Anticipatory Breach	Yes	See **Article 9:304:** *Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it the other party may terminate the contract.*
31.	Grounds for Termination of the Contract	Yes	The notes to PECL Article 8.103 state."*[the rule that] the aggrieved party can terminate the contract or claim that a defective performance be replaced by a conforming tender only if the non-performance is substantial."* See **Article 8.103:** *A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.*