Choosing New York Law as Governing Law for International Commercial Transactions

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Introduction

The state of New York encourages the choice of New York law as the governing law of international commercial transactions by permitting parties to a transaction where the consideration or obligation is not less than $250,000 to choose New York law "whether or not such contract, agreement or undertaking bears a reasonable relation" to New York state.[1] New York also encourages parties to international commercial transactions to use the courts of New York to adjudicate and resolve their disputes where the dispute arises from a contract, agreement or undertaking governed by New York law and where the consideration or obligation is not less than one million dollars.[2]

For most practitioners concerned with business, commercial and corporate law, the starting point of analysis for making a choice of law for an international commercial transaction is contract law. There are a number of salient differences in the approach to contract and commercial law in New York law (and other common law jurisdictions in general) on the one hand and civil law jurisdictions on the other hand. There are some less well known differences between New York law (and the common law of many other U.S. jurisdictions) and English law (and other exemplars of common law).

In addition, one must consider the impact of international treaties to which New York, as one of the United States of America, is bound and which therefore constitute part of New York law and the areas of commercial law relevant to the transaction. In the field of contract law, the most important of these treaties is the United Nations ("Vienna") Convention on the International Sale of Goods ("CISG"). The CISG actually constitutes the law of New York for international sales transactions where all of the parties have their places of business in one of the many countries that have become parties to the Convention (absent an agreement by the parties to "opt out" of the CISG rules under Article 6 of the Convention).[3]

In addition, in the twenty-first century, it is not enough to compare New York law with the law of other countries. There are a growing number of international formulations and "restatements" of law, particularly in the area of contract law, that have themselves become sources of law and that offer options to international businesses making choices about what law should govern their transactions. Chief among these are the UNIDROIT Principles of International Contract Law, the Principles of European Contract Law, the Draft Common Frame of Reference, and the OHADA Uniform Act on Contract Law.

Part I of this article—the longest—discusses key features of New York contract law and compares and contrasts New York's approach with those of English law, French law, German law, the provisions of the CISG (remembering, of course, that, for many international sales transactions, the CISG is itself the law of New York) and two of the most influential international contract restatements, the UNIDROIT Principles and the European Principles.[4] Part II features brief discussions of some distinctive features of New York commercial law. Part III consists of a short reflection on three points of distinction of New York procedural law that are very relevant to choices of substantive law. Part IV summarizes some of the conclusions of Parts I through III (particularly Part I) and offers some constructive proposals for revision or adjustment of New York law to promote a greater harmony between New York law and other sources of the international law of commercial contracts and to make New York law a more effective instrument for the promotion and support of international trade.

I. Contract Law

Common law and civil law all derive from Roman law (at least as articulated by the great legal scholar, Grotius, and his contemporaries) the basic legal principle that contracts must be fulfilled. But they differ in many important respects, including but not limited to (i) what types of contracts will be enforced, (ii) how contracts are to be construed and interpreted, (iii) whether and under what circumstances third parties can have rights under a contract, (iv) under what circumstances performance under a valid and binding contract can be excused or avoided, (v) when conditions on performance apply, and (vi) what remedies are available when obligations under a contract are breached.

A. What Constitutes an Enforceable Contract

Perhaps the most important practical difference between the civil and common law concerns the rules for determining what contracts are enforceable. Both systems doctrinally require an agreement, generally reflected in an offer and an acceptance. Thus, under Article 1101 of the French Civil Code, "[a] contract is an agreement by which one or more persons bind themselves, as to one or more other persons, to give, to do or not to do something." The consent of the party that binds itself, for French contract law purposes, is the key factor in establishing a contract—so long as, in addition, each party undertaking an obligation has legal capacity to do so, the contract has a "subject matter," and the contract has a valid "cause" or purpose.[5]

The UNIDROIT Principles of International Commercial Contract Law are not far removed from this view by providing under Article 2.1.1, that "[a] contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement." Under Article 2:101 of the Principles of European Contract Law, a contract is concluded if (i) the parties intend to be legally bound and (ii) they reach a sufficient agreement.

The common law has long required that an agreement, to be valid and enforceable, must reflect some exchange of value—which can consist of promises or performances—that constitutes "consideration." In the words of one court, "[w]ithout consideration there is no contract."[6] For a long time, to demonstrate the existence of consideration, it was thought necessary that one party must receive a benefit and the other party must suffer a detriment; today it seems to be acceptable if both parties benefit. It is also accepted that an exchange of promises that impose duties of some sort on each party itself constitutes valid consideration.

The classic example of the difference the consideration requirement can make has to do with gifts. In the civil law system, a promise to make a gift is generally enforceable, at least if it is in writing, even if the promise is gratuitous in nature.[7] Under English law, such a promise would not be enforceable unless made by deed or under seal.[8] Under New York law, by contrast, such a promise would not be enforceable in the absence of a demonstration of reasonable reliance on the promise and detriment by the promisee.[9]

It is important to be clear that the requirement of consideration is not a rule that consideration must be adequate or fair. The idea that the exchange must have been "bargained for," which has been adopted by courts in New York and in England, is largely intended to preclude the need for courts to delve into examinations of the fairness of contractual exchanges.[10]

Now, it may seem that, for the majority of contractual arrangements emerging from business negotiations and exchanges, the requirement of consideration should make little practical difference, since most commercial agreements are precisely the fruit of the give and take that we associate with bargaining and on which the requirement of consideration seems to be founded. After all, it has even been said that, in New York, "[r]ecitals of 'value received' are nearly conclusive evidence of consideration."[11] But in a number of situations, a lack of consideration under a strict application of the doctrine of consideration can make a difference between enforceability and non-enforceability: these include contract amendments, releases, and irrevocable assignments. New York has very helpfully provided statutory relief from the requirement of consideration for contract amendments and releases that are in writing under Section 5-1103 of the New York General Obligations Law. And Section 2-209(1) of the New York Uniform Commercial Code ("NY UCC") specifically exempts modifications to sales contracts from the consideration requirement. New York General Objections Law Section 5-1107 similarly exempts irrevocable assignments that are in writing from the consideration requirement. Finally, Section 5-1105 of the General Obligations Law actually disqualifies any attack on a promise that is in writing and is based on past consideration or prior obligation if the consideration is proved to have been given or performed and would have been valid consideration but for the time when it was given or performed. English law, by contrast, does not have a scheme of statutory relief in instances like this: a 1937 proposal for that purpose was never enacted. It is said that English courts have cut back the requirement of consideration in many of these circumstances by case law, but cases can always be distinguished. Thus, there is good reason to say that New York law confers more security and certainty on this important issue and thus also "levels the playing field" with civil law systems, for which consideration is not a factor.

In the final analysis, the important role that the doctrine of consideration plays in New York law has less to do with legal formalities and more with the way it contributes to what is sometimes called the "objective" orientation or perspective from which New York law approaches issues of contract law in general. Increasingly, in civil law the elements of subject matter and purpose, at least in the area of commercial contracts, seem to be adventitious and secondary in importance, with the main focus being on the "subjective" state of the parties—that is, whether, in the interchange of offer and acceptance, the parties have formed among themselves a mutual understanding or consent that constitutes an agreement. Thus, under French law, proof that an agreement was the result of mistake or fraud or duress would vitiate the consent that is critical to the existence of a contract and lead to the conclusion that no contract existed at all.[12] Under common law, proof of mistake, fraud or duress would make a contract voidable but, for example, in the case of fraud, the defrauded party usually has the option of having the contract rescinded or affirming the contract and suing for damages.[13]

This objective emphasis also evidences itself in another aspect of New York law: what a court may do to "save" a contract that is missing an important or essential term. A contract is missing an essential term if a basic component, such as price, is missing. On the one hand, an agreement by the parties to negotiate an essential term later on is generally not enforceable; a contract will not be enforced if the only way to fill in the gap is to wait for the parties to agree. But courts look for ways to interpret a contract to supply the missing term, especially if the parties have manifested an intent to be bound and there is evidence from commercial practice or usage in the area of business covered by the contract that would enable

a court to supply the missing term. Notice that the one thing a New York court would generally not do is to attempt to detect the intent of the parties by testimony as to the missing term: this will put a court in the position of having to determine the subjective intentions of the parties—something a common law court is generally loathe to do. But the court can and will, on its own initiative, seek to fill the term if it can make reasonable inferences from the objective evidence of the agreement and the customs and practices of the relevant area of business or commerce.

B. How Contracts Are to Be Construed and Interpreted

New York, like some other common law jurisdictions, 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, New York Uniform Commercial Code Section 2-201(1) requires a writing in the case of contracts for the sale of goods in excess of Five Hundred Dollars. French law, while also requiring written evidence for contracts above a certain amount set by regulation, exempts commercial contracts from this requirement. English law, from which New York inherited the so-called "statute of frauds" (which is the origin of these writing requirements), has actually eliminated the requirement of a writing for all contracts except real estate contracts.

Agreements that are strictly oral in nature by necessity have a more subjective component, since there must be much more reliance on memory and mutual subjective understanding to prove the existence of a contract and to interpret it. In maintaining the requirement of at least some written evidence of a contract for enforcing a contract, the "statute of frauds" shifts the balance more in the direction of objective evidence that stands by itself apart from the memory of the parties. It should be noted that the writing that is required here is not necessarily what we would think of as a fully drawn agreement; in many cases a fairly minimum amount of written evidence is sufficient and, in a number of instances, partial or full performance of an obligation eliminates the need for the writing. Of course, it goes without saying that sophisticated international transactions will virtually always be reflected in a detailed written agreement anyway. Thus the importance of the writing requirement is important less for its practical relevance but for the way it tends to support the focus on an "objective" source for determining whether a contract exists and for determining its specific terms and obligations.

In the case of written agreements, however, New York law takes this objective orientation a step further by prohibiting, in the case of a dispute about the terms of an agreement, oral evidence of prior negotiations, representations and inconsistent understandings. Often known as the "parol evidence" rule, it might be better described as the "anti-extrinsic evidence rule." 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. New York courts give even greater protection against extrinsic evidence regarding the terms of a contract if the parties have agreed to "merge" or "integrate" their agreement, extending the exclusion of oral evidence about so-called "collateral agreements," *i.e.*, agreements entered into at the same time as the agreement under judicial scrutiny. Such provisions are given almost complete deference by New York courts.[14]

The effect, if not the purpose, of the parol evidence rule and the merger rule is to clearly encourage parties to use agreements that fully set out the terms and obligations of the transactions and relationships. New York courts continue by and large to give effect to the "plain meaning" and "four corners" principles: a court's primary role is to give effect to the parties' intent as evidenced by the written contract. If that intent can be discerned from the plain meaning of the written agreement without recourse to any other document or representations (*i.e.*, "within the four corners" of the agreement), the court's interpretive task is to give effect to the terms of the agreement as thus disclosed.[15] Extrinsic evidence can be admitted to establish the meaning of ambiguous terms only if the court determines that the contract cannot be reasonably construed and interpreted based on the aforementioned principles. Notice that if an essential term of a contract is missing and the issue is not simply the meaning of an ambiguous term, two consequences can follow. One, the agreement may fail to qualify as a legal contract because there was no content to the agreement about which there could be meeting of the minds in the first place—the terms of the agreement would be simply too vague for there to have been an offer and acceptance that could be the basis for agreement. Two, the other possibility, at least in the case of contracts for the sale of goods (especially among business parties), is that 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.[16]

It is often said that New York courts are not prone to substitute their judgment for the terms to which contracting parties have agreed and, indeed, this judicial restraint is one of the major reasons why contracts governed by New York law are said to be "certain" and sure to be confirmed according to their terms. As we can see from some

of the features of New York contract law just described, this is not just a matter of general philosophy but the fruit of the focus of New York law on the elements of bargaining and consideration in determining whether a contract exists at all, in the requirement of a writing for many types of contracts (especially those with longer duration or with more economic value at stake), and the strong deference to the written expression of contractual terms (thus limiting the ability of parties, whether deliberately or unwittingly, to try to amend their contracts by oral recollection and putting the court in a position of having to decide whether a written or oral version of the terms of a contract is more persuasive). This is all in marked contrast to the tendency in the civil law tradition to favor shorter and less exhaustive agreements and the willingness to rely on courts to fill in missing terms and to apply and even reshape contractual arrangements.

1. Excursus on the "Battle of the Forms"

A subsection of contract law that manifests some interesting differences between the law of New York and many other U.S. jurisdictions on the one hand and English law and most civil law jurisdictions on the other hand concerns how a contract is constituted and how it is construed in the often quick-fire world of the sale of goods, where contracts are often not negotiated or carefully drafted and where the terms of the contracts are determined by exchanges of offers and acceptances (with buyers and sellers on both sides of the offer-acceptance dichotomy) on standardized forms that include the buyer's or seller's preferred terms and conditions. These differences are especially relevant when acceptance of an offer is indicated not by an executory promise but by a performance—usually delivering goods or accepting goods and/or rendering payment.

The traditional common law approach is exemplified in the "last shot" rule: a seller who delivers a product in response to an offer to buy accompanied by variations from the terms of the offer can set the terms of the contract if the buyer accepts the goods because the variation in the seller's terms means that the seller has legally rejected the offer and substituted its own offer, which the buyer's acceptance of the goods confirms and ratifies. European law is generally consistent with this approach. For example, classical French jurisprudence would insist that there must be "an agreement of the parties on all the conditions of the contract."[17] The German Civil Code follows this principle when it provides, in Article 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 *Bürgerliches Gesetzbuch* ("BGB") 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 case of doubt, not concluded." All of these approaches focus on "consent" 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.

The New York Uniform Commercial Code takes a very different approach by providing 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. This does not mean that the inconsistent terms included in the seller's document necessarily become part of the contract: "The additional terms are to be construed as proposals for additions to the contract."[18] But, as between merchants, "such terms become part of the contract" subject to certain exceptions, the most interesting of which is that "they materially alter it."[19] Thus, even terms that materially alter the contract do not necessarily invalidate the contract, but rather create an issue about the terms of the contract. In such cases, "the terms of the particular contract consist of these terms in which the writing of the parties agree, together with any supplemental terms incorporated under any other provisions of the Act."[20]

Section 2-207(2) of the New York Uniform Commercial Code provides no express guidance as to the criteria for determining whether an additional term materially alters the terms of an offer under Section 2-207(1), although Comment 4 to Section 207 suggests that the test of material alteration is whether the additional term would "result in surprise or hardship if incorporated without express awareness of the other party." It has been suggested that evidence that the offeror never objected to the addition of a term similar to that added by the offeree and accepted by the offeror in previous transactions between the parties establishes a "course of dealing" between them and therefore cannot arise to the requisite "surprise" needed to meet the materiality test.[21] Under NY UCC Section 1-205, "a course of dealing…is fairly to be regarded as establishing a common basis of understanding for interpreting [the] expressions and other conduct" of parties to a particular transaction. Reference to courses of dealing between contracting parties for establishing the terms of a contract seems to be blessed by NY UCC Section 2-207(3), according to which "[c]onduct by both parties" recognizing the existence of a contract can be sufficient to establish a contract, the terms of which agreement will consist of the writings of the parties…together with any supplementary terms incorporated under any other provisions of this Act," including presumably Section 1-205. However, it should be noted that NY UCC Section 2-207(3) usually applies when the parties have failed to establish a contract under Sections 207(1) and (2) and that

the terms proposed to be added by the offeree under Section 207(2) may not avail if the contract is established by conduct of the parties under Section 207(3) rather than by the exchange of express contractual terms under Sections 207(1) and (2).[22]

England has not passed any legislation similar to NY UCC Section 2-207. Lord Denning, in the much-discussed case of *Butler Machine Tool Co Ltd v. Ex-cell-O Corporation (England) Ltd.*,[23] proposed that "[t]he better way is to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points." But it is unclear how widely this approach has been accepted in England. The rule of Uniform Commercial Code Section 2-207 makes more sense in a jurisprudential environment where the focus on the subjective intentions and meaning of the parties is less important than the outer or objective inferences that can be drawn from the conduct of the parties and where courts focus more on what a "reasonable person" might think the parties intended or meant. Ironically, by requiring that the terms to which the parties have agreed be supplemented by terms incorporated under other provisions of the Act, Section 2-207 seems to create an opportunity for New York courts to become involved in contract supplementation more familiar to civil law practice than to common law practice.

2. Excursus on "Plain Meaning"

It should be pointed out that adoption of the plain meaning rule does not mean that courts in either New York or England are bound to a purely literalist construction of contracts based on the dictionary meaning of the words. Lord Hoffman, in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,[24] set forth a so-called "modern" approach to contract construction that emphasizes not so much the meaning of words in dictionaries and grammars but rather what "the parties using those words against the relevant background would reasonably have been understood to mean." New York courts have emphasized the importance of the "purpose of the contract" and interpreting the terms of a contract consistently therewith.[25]

3. Excursus on "Entire Agreement" Clauses

Under New York law, the parol evidence rule does not by itself preclude evidence of collateral agreements or understandings. To preclude evidence of such other agreements and understandings, a contract must contain a provision that recites that it represents the sole and complete ("entire") expression of the parties' understanding, thus "integrating" or "merging" any other agreement or understandings into the contract.[26] The same option is available for purposes of contracts for the sale of goods, under Uniform Commercial Code Section 2-202. English law generally follows the same concept.[27] 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 UNIDROIT Principles of International Commercial Contacts at Section 2.1.17 and by the Principles of European Contract Law at Section 2.05.

Notwithstanding the general acceptance of entire agreement clauses by New York law as well as English law, it appears that English courts are inclined to read these provisions more strictly, especially when issues of misrepresentations have been raised. The issue is whether such undertakings preclude evidence of pre-contractual representations. Thus, in *Thomas Witter Ltd v. TBP Industries Ltd*,[28] and *EA Grimstead & Son Ltd v. McGarrigan*,[29] the court held than an "entire agreement" clause did not exclude remedies for alleged pre-contractual understandings where the agreement incorporated in the contract contained an acknowledgement that the plaintiff party had not been induced to enter the contract by any representation or warranty other than the statements contained in the warranty schedule.[30] It has been suggested that, in England, taking into account the provisions of the Unfair Contract Terms Act 1977, any such non-reliance clause must distinguish between innocent and negligent misrepresentation, on the one hand, and fraudulent misrepresentation, on the other.[31] New York courts are more likely to bar fraudulent as well as non-fraudulent misrepresentation claims where the contract has a specific statement of nonreliance with regard to representations on which, under the clause, the parties have agreed they have not relied. The authority for this broader enforcement was set forth by the New York Court of Appeals in *Danann Realty v. Harris*,[32] and applied in *Grumman Allied Industries Inc., v. Rohr Industries*.[33]

C. The Role and Application of Good Faith Under New York Contract Law

New York law (and to a certain extent a number of other U.S. jurisdictions—though not all) stands in an interesting "middle" position between the civil law on the one hand and English law on the other hand when it comes to the doctrine of "good faith" in the law of contracts. Perhaps the most noted example of the legal requirement of good faith is to be found in Section 242 of the German Civil Code, which provides that all contractual obligations must be performed with "faith and trust" ("*Treu und Glauben*"). Article 1143(3) of the French Civil Code similarly provides that contracts must be carried out in "good faith" ("*bonne foi*"). Several articles of the Italian Code also impose a "good faith" requirement: Article 1375 requires that a "contract must be performed in good faith"; Article 1366 provides that a "contract must be interpreted in good faith"; and Article 1337 imposes obligations of "good faith and fair dealing" in debtor-creditor relations. The principle of good faith has become enshrined in efforts to harmonize European and international laws of contract. Thus, Article 1.106 of the Principle

of European Contract Law imposes an obligation of "good faith and fair dealing." The UNIDROIT Principles of International Contract Law impose a similar obligation. The Convention on Controls for the International Sale of Goods does not have an express provision imposing a duty of good faith in the performance of contracts, but it does provide that regard must be had for "promoting the observance of good faith in international trade" in the interpretation of the Convention.

New York courts were the first courts in the United States to introduce the implied covenant of good faith into contract law jurisprudence. In *New York Central Iron Works Co. v. United States Radiator Co.*,[34] a case involving a long-term requirements contract, the Court of Appeals declared that "[t]he obligation of good faith and fair dealing towards each other is an implied concept of this character." Another landmark case was *Wood v. Lucy*,[35] in which Justice Benjamin Cardozo, then sitting on the New York Court of Appeals, opined that the contract at issue was "instinct with an obligation, imperfectly expressed" of good faith performance. The duty of good faith was further strengthened under New York contract and commercial law when New York, in 1962, adopted the Uniform Commercial Code. Section 1-203 of the Uniform Commercial Code provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 2-103 of the Uniform Commercial Code defines good faith for purposes of the sale of good as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

New York continues to adhere to this principle.[36] For New York law, the duty to act in good faith under a contract is not generally separable from a duty to perform one's duties under the contract itself. Thus, a breach of a covenant of good faith is generally not seen as giving rise to an independent cause of action.[37] It is supposed to aid the interpretation and performance of the terms of the contract itself "by protecting the promise against breach of the reasonable expectations derived from an agreement of the parties."

In the early New York cases, such as *New York Central Iron Works*, the implied covenant was introduced to construe contracts in a manner that was commercially reasonable and fair without compromising New York law's adherence to the plain meaning and parol evidence rules.[38] As recently as 1995, the Court of Appeals suggested that, within the parameters of protecting the reasonable expectations of the parties, courts can read or imply into a contract "a promise that a reasonable person in the place of the promisee would justifiably believe was included within the contract."[39] But in an age where more and more contracts between commercial parties are written with the assistance of counsel, the need and inclination of New York courts to use the covenant for the purpose of essentially supplementing or revising contracts can be said to have waned. A few years before *Dalton*, the Court of Appeals had noted that "[f]reedom of contract prevails in an arms-length transaction between sophisticated parties and, in the absence of countervailing public policy concerns, these parties will not be relieved of the consequences of their bargain."[40] In *Reiss v. Financial Performance Corp.*,[41] the Court of Appeals declined to imply a contractual term to a contract for the purchase of stock warrants to deal with the contingency of a reverse stock split after the terms of the purchase were set. To the Court, the possibility of a stock split was reasonably foreseeable and the parties had to be assumed to have advisedly declined to address modifying the purchase price in the event of any such split. While this decision seems to run contrary to an earlier decision of the U.S. Court of Appeals for the Second Circuit in *Bank of China v. Chan*,[42] which suggested a more generous approach to implying terms not expressly addressed, the *Reiss* case seems to underscore the policy of New York law not to allow the covenant of good faith and fair dealing to become an excuse for commercially sophisticated parties not to carefully consider and address all foreseeable issues that could arise under the terms of their transactions.[43]

Thus, in many ways, the covenant of good faith, as between sophisticated commercial parties, tends to serve primarily as a "negative protection," *i.e.*, allowing the court to imply prohibitions on conduct that would undermine the performance of obligations of an agreement or deprive a party of the benefit of its bargain. "The covenant applies only where an implied promise is so interwoven with the contract as to be necessary for the effectuation of the purpose of the contract. For a violation of the covenant to occur, the defendant's action must directly violate an obligation which may be presumed to have been intended by the parties."[44] In such cases, at least one New York court has suggested that a separate claim for violation of the covenant of good faith might exist, even if there is no viable breach of contract claim, if a defendant has used its rights under the contract for its own gain or to deprive the plaintiff of benefits under the contract or to realize gains that the contract implicitly denied to the defendant.[45]

The reluctance of New York courts to apply the covenant of good faith and fair dealing to impose additional positive obligations on parties or to address contingencies the parties declined to address themselves contrasts with the more expansive view of the duty of good faith taken by civil law courts. For example, Section 242 of the German Civil Code, which imposes a duty of "trust and faith" ("*Treu und Glauben*") on contracting parties, was used very broadly by the German courts in the aftermath of the inflation after the First World War to relieve parties from the perceived loss of financial position that resulted from the massive devaluation of the German currency. Similar adjustments were made in cases arising after the conclusion of World War II. Implementation of this

provision in recent decades has been less dramatic but is still much more expansive than the New York approach. German courts are seen as having a broader ability to fill in gaps and to supply contractual provisions that will enable the transactions contemplated to be completed. According to a recent review of comparative perspectives on the notion of contractual good faith, Section 242 "notably permits the completion, limitation and concretization of existing agreements."[46]

French law has long been known for its insistence on the principle that contracts must be followed. The role of the principle of good faith has been said to be "moderating" and "a valve of commutative justice or of 'contractual solidarity.'"[47] The duty of good faith under French contract law is said to be "classically defined as the expression of the duty of loyalty by each co-contractor so as not to offend the confidence that gave rise to the contract [so that]…[t]he parties must act towards one another with loyalty, without fraud or malice." Expressed this way, the duty of good faith has led some legal scholars to conclude that the principle of good faith gives rise to a positive obligation of cooperation, and, at least in cases of "flagrant abuse," to imply obligations of information or security, in order to provide suitable remedies.

English law has, at least to date, steadfastly declined 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."[48] 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.[49] The discomfort about "abstract principles" seems, to this author, itself to be somewhat theoretical, as even the notions of consideration and agreement with which English courts are comfortable are themselves general principles that gather their meaning and application from particular cases. In the case of New York, it is clear that the principle of good faith has been handled very cautiously and with great discretion. It is not, except in some highly unusual situations, the basis of a cause of action or a claim separate from a claim of breach, and it has been used very sparingly to supply terms in existing contracts, especially in the case of written agreements between sophisticated commercial parties. At the same time, it places a certain "floor" as to the range of activities that parties to contracts may take in reference to the obligations they have undertaken. It recognizes that, while negotiations in certain contexts may indeed be adversarial at least in inception, many contracts, beyond those for discrete purchases of goods, entail longer relationships and therefore require a degree of mutual respect and cooperation that needs to be taken into account in determining the constraints that a party may need to place on its actions in order to perform its contractual obligations.

The principle of good faith has led to developments in two important areas of European law that New York law has been more hesitant to adopt: pre-contractual liability and adaptation of contracts for hardship or dramatic changes in economic circumstances.

1. Pre-Contractual Liability

A corollary of the rule that contracts must be observed would seem to be that no such duty arises until agreement has been reached. French law and German law have been more willing to find that certain remedies can be available for conduct that constitutes bad faith in pre-contractual negotiations. English law, by contrast, has been very reluctant to find any such liability. New York law admits the possibility of such liability in certain cases where parties have contractually bound themselves to conduct negotiations, but cabins any such liability very closely.

The concept of good faith and fair dealing in business negotiations received perhaps its best known formulation in the writings of the German nineteenth century legal scholar, Rudolph von Jhering. He argued that parties to pre-contractual negotiations have a duty of good faith, fair dealing, care and loyalty.[50] It has been suggested that this is consistent with the civil law's focus on the relationship between the parties (*i.e.*, their consent to be bound in duties to each other), as distinguished from the common law's stress on the bargain between them. Under French law, remedies for violation of duties inherent in pre-contractual negotiations arise under tort law, not contract law itself. Bases for liability can include "unjustified and abusive rupture of negotiations" as well as negotiation without serious intent to contract, failure to cooperate, misuse of information provided in confidence, entry into negotiations in order to prevent someone from entering into an agreement with another party, and failure to disclose essential and material facts. The chief factors that seem to increase the chance of a finding of liability are (i) the advanced stage of negotiations, (ii) the amount of work already undertaken, and (iii) the suddenness of the breaking off of negotiations.

Under German law, duties and liabilities with regard to pre-contractual liabilities are inferred from Section 242 of the Civil Code, so that the principle of good faith and fair dealing applies in the pre-contractual as well as the contractual stages. English law, by contrast, assumes that the relationship between the parties during negotiations, far from being one of mutual cooperation and loyalty, is intrinsically adversarial. Granted the assumed adversarial nature of the negotiation context, under English law, a party has the right to withdraw from negotiations at any time up to the point where a contract or agree-

ment has been reached. One exception to this approach is when there is an express agreement to renegotiate an agreement.[51]

The New York Court of Appeals, in *American Broadcasting Companies, Inc. v. Wolf*,[52] opened the door to possible pre-contractual liability for failure to negotiate in good faith in a case involving a contract between the famous sportscaster Warner Wolf and the American Broadcasting Company ("ABC"). The agreement between Wolf and ABC required that he "enter into good faith negotiations…for the extension of his agreement on mutually agreeable terms," and the Court of Appeals ordered Wolf to comply. But New York courts have been very careful not to extend this case beyond its facts. There can be an obligation only to negotiate in good faith when the parties use definite language indicating a present intent to be bound and "the subject of negotiations must be both specific and backed by ascertainable indications of intent regarding the anticipated outcome of the process."[53] Significantly, New York courts give great deference to stated intentions by the parties that they intended to execute their agreement in a written form. Thus, in *R.G. Group, Inc. v. Horn & Hardart Co.*,[54] the court stated that "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent." An effort to try to find contractual liability in the absence of a concluded contract based on promissory reliance or estoppel was firmly rejected by the Federal Court of Appeals for the Second Circuit, per Judge Learned Hand, in *Baird v. Gamble Brothers*.[55] There, the court, applying New York law, declined to find a subcontractor accountable to the general contractor because the general contractor obtained a contract in reliance on the subcontractor's bid, which the subcontractor withdrew before the general contractor's offer was accepted by the contractor. Thus, while New York law may be slightly 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.

2. Notions of Impossibility, Impracticability and Hardship

One of the most salient issues of contract law—especially in the case of contracts that take a long time to perform—is whether circumstances could so dramatically change the obligations of the parties to each other so as to cause any of them to have a legal basis for suspending or terminating performance under the contract. In civil law systems, the adjudication of cases rests on concepts of *force majeure* and hardship, while in common law systems, the relevant concepts are impossibility of performance, frustration of contractual purpose, and commercial impracticality. In general, the concepts of *force majeure*, impossibility and frustration stand on one side of the more restrictive continuum while the concepts of commercial impracticality and hardship stand on the more expansive side.

Section 1148 of the French Civil Code enshrines the concept of *force majeure*. To grant relief from the duty to perform one's contract, one most show that performance has been rendered dischargeable by reason of some event that was unforeseeable, irresistible and external. An explanatory note to Section 1148 explains that the concept of *force majeure* "applies to events that make performance impossible, but not to those that make performance only more difficult."[56]

The Court of Appeals for the Second Circuit has explained the distinction between impossibility and frustration of purpose: "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…Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for its performance."[57] In the case of frustration, "[b]oth parties can perform but, as a result of the unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." In either case, the fact that performance has become more burdensome, difficult or expensive does not absolve a party from performing its obligations. As with cases of impossibility, discharge on the basis of frustration is "generally limited to instances where a virtually cataclysmic, wholly unforeseeable event has rendered the contract valueless to one party."[58]

Section 2-615(a) of the New York Uniform Commercial Code excuses delay in delivery or even non-delivery "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic regulation or order whether or not it later proves to be invalid." As the Official Comment notes, "[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance." English law and New York law seem here not to differ greatly: "Frustration is exceptional, and cannot be invoked lightly. If frustration is extended to cover the case where the fixed price becomes "so unfair to the contractor that he ought not to be held to his original price," then "there would be an untold range of contractual obligations rendered uncertain, and possibly unforseeable."[59]

Providing on the continuum to the most flexible of these concepts, "[h]ardship refers to performance being rendered more difficult, but not impossible, by an unforseeable change in circumstances beyond the parties' control."[60] Hardship makes its appearance in French law under the concept of *imprevision*, but French law does not

grant a remedy for hardship between private parties, but only to parties to contracts with government agencies. The Algerian and Egyptian Civil Codes have adopted provisions that, in cases of hardship, allow judges not to rescind a contract between private parties but to adjust the obligations of the parties. In 2002, Germany enacted a substantial revision of the relevant sections of its Civil Code regarding obligations, including a new Section 313, 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 a 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."

The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law are considered by some to have adopted rules that come close to reflecting the German perspective. Section 6.2.1 reiterates the basic principle that contracts must be performed subject to its provision on hardship. 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 (i) the events occur or become known to the disadvantaged party after the contract has been concluded, (ii) the events could not have reasonably been taken into account by the disadvantaged parties at the time the contract was concluded, (iii) the events are beyond the control of the disadvantaged party and (iv) 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. Upon failure to reach agreement, either party may resort to a court and, if the court finds that hardship has been established, it may, "if reasonable," terminate the contract on a date and on terms to be fixed or adapt the contract with a view "to restoring its equilibrium." Article 6.111 of the European Principles follows the UNIDROIT Principles, except that it also provides that "the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing." Article 79 of the CISG provides a more limited form of "exemption" in the case of a party's failure to perform because of "an impediment beyond its control"; the exemption is available only for the period during which the impediment lasts and the party claiming the exemption must give the other party notice within a "reasonable time" after the impediment came to (or should have come to) the affected party's knowledge.

3. "*Force Majeure*" and Material Adverse Change Clauses

New York as well as English courts generally pride themselves on honoring the terms of the agreement the parties have agreed to, without substituting their own business judgment for that of the parties. General discomfort with granting relief based on change of circumstances and hardship can cause them to construe provisions that call for the renegotiation of contract terms in the event of an event of *force majeure* or material adverse change more narrowly than civil law courts, in part perhaps because of the general common law discomfort with enforcing "agreements to agree."[61]

In *IBP, Inc. Shareholders Litigation v. Tyson Foods, Inc.*,[62] the Delaware Court of Chancery applied New York law to adjudicate the effort of Tyson Foods to withdraw from its agreement to acquire IBP, Inc., based on a change of IBP's projected earnings after the "9/11" attacks. The Delaware Chancellor held that a New York court would incline toward a view that a buyer ought to have to make a strong showing to invoke a "material adverse change" exception to its obligation to close a very heavily negotiated merger agreement covering many details with great specificity and detail. Interestingly, the Chancellor acknowledged that the "Material Adverse Change" or "MAC" clause was very broadly drafted, most likely in an effort not to undercut the MAC clause by allowing it to be limited, under the doctrine of "*eiusdem generis*," to a list of specific circumstances. Still, the court concluded that the MAC clause "is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings of the target in a durationally significant manner" and found that the change of earnings invoked by Tyson did not meet that test.[63] Other New York cases tend to support the preference for enforcing *force majeure* clauses only to specific types of occurrences expressly mentioned in the clause.[64]

Strict as New York law may seem to be, English law may be ever more restrictive. Thus, the UK Take Over Panel, in the *WIP/Tempus* case, declined to accept WPP's invocation of the MAC clause in its agreement to acquire Tempus, stating that a "material" change of circumstance "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 contracts.*" (Emphasis added.) This seems to be a very strict test indeed, which renders MAC clauses almost meaningless if the circumstances in which it is invoked falls short of frustration of purpose.[65]

D. The Principle Under New York Law of Fiduciary Loyalty Among Business Partners

A discussion of New York law on the issue of good faith cannot be complete without considering the 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." Justice Cardozo elevated the relationship of those in business partnerships to "those bound by fiduciary ties," as if each partner were a trustee to the other. For trustees, Cardozo noted "the standard of behavior" is "[n]ot honesty alone but the punctilio of an honor the most sensitive."[66] Joint ventures and partnerships (whether formally structured as partnerships, corporations or limited liability companies) are all governed by agreements or contracts—and therefore the agreements that business partners make among themselves, and the standard for their implementation and interpretation, should be as much taken into account when weighing the merits of New York contract law as agreements to buy and sell goods and other relatively short-term transactions.

The law of England knows the duty of business partners to each other as *uberrimae fidei*; French and German law do not speak in this exact terminology but interpret the principle of good faith very fully to what French legal scholars increasingly recognize as "agreements of cooperation." Interestingly, many states of the United States have adopted a non-fiduciary, so-called "contractarian" approach to the mutual duties of business partners by adopting the Revised Uniform Partnership Act of 1994 ("RUPA"), which "[m]oves away for a reliance on this broad fiduciary duty to regulate partner conduct" and instead "limit[s] fiduciary duty to a duty of loyalty, which is further limited… to specific conduct instead of being a general concept tailored by courts to cover a broad array of impermissible conduct."[67] Significantly, unlike almost forty other states of the United States, New York has not adopted RUPA. Thus, the same judge whose dissenting appellate decision opinion in the *Reiss* case[68] (later adopted by the New York Court of Appeals) declined to adjust the terms of the warrant purchase agreement despite appeals to the principle of good faith firmly upheld the standards of utmost good faith and fiduciary loyalty in *Rickbell Information Services, Inc. et al. v. Jupiter Partners et al.*[69] There, Judge Saxe determined that fiduciary obligations could arise between parties to a joint venture even in the absence of an express agreement between them and that these obligations can impose limits on the parties' otherwise unfettered exercise of their contract rights.

In a perhaps further ironic turn, a Singapore legal scholar, in an article now posted on the website of the Singapore Academy of Law, suggests that the decision in *Rickbell* shows that New York courts cannot be counted on to strictly interpret and enforce contracts on their own terms.[70] There is a double confusion here. The fact that New York law holds business partners to a very high standard of mutual conduct does not mean that New York law has imposed the same high standard on what Justice Cardozo termed the "workaday world for those acting at arm's length," as the well documented aversion of New York courts to upset private contractual arrangements demonstrated in the *Reiss* case clearly attests.

E. Third-Party Beneficiaries

A corollary of the common law doctrine of consideration is the doctrine of contractual privity—the rule that says the benefits and detriments of a contract can only adhere to persons who are parties to that contract. As a consequence, common law (before changes made in New York and other states in the nineteenth century and changes in English law introduced in 1999), as a general proposition, did not permit persons who were not parties to a contract to enforce any rights or benefits conferred on them by the contract that required the performance of obligation in their regard. There were, of course, exceptions to this rule, in areas like trust law and insurance law, but at least in England the exclusion of third-party remedies was still strong until relatively recently. As discussed earlier, consideration is not a factor in constituting a valid contract under civil law and, at least under German law, third parties could more easily claim benefits and rights in respect of a contract to which they were not a party. BGB Section 328, for example, 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.[71] The French Civil Code does not contain provisions regarding third-party rights. On the other hand, as with most civil law systems, French law does not draw a rigid distinction between tort law and contract law in the style of the common law, and therefore tort remedies are more easily available with regard to contractual matters.

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"; Section 2 provides that the provision just mentioned "does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party."

New York law has been far less hostile to third-party beneficiaries. As far back as 1918, the New York Court of Appeals recognized that the doctrine of privity should be set aside in the case of contracts made for the benefit of a third party.[72] In 1985, the Court of Appeals adopted

the principles put forth in Section 302 of the Restatement (Second) of Contracts regarding third party beneficiaries. Under this test, a third-party beneficiary has the burden of demonstrating that (i) a valid and binding contract exists, (ii) it was an intended beneficiary of the contract, and (iii) the benefit to it is sufficiently immediate to indicate that the contracting parties intended to compensate the third party if it lost its benefit.[73] Under New York law, a third-party beneficiary takes no greater rights to enforce a contract than the actual parties would, "'its rights are subject to the same defenses as the rights of the promisee,'" and it is bound by the same limitations on liability that are provided for in the contract.[74] Anecdotally, this author understands that advisors often feel more comfortable with the longer tradition of respect for third-party beneficiary rights under New York law, where the courts are not bound by a statutory scheme in the mode of the 1999 English Act. Thus, for example, it is considered much easier and reliable to provide for the rights of purchasers in the structuring of American Depositary Receipts under New York law than it is under English law.

F. Performance Issues: Perfect Tender, Substantial Performance, *"Nachfrist"*

Under the law of New York (NY UCC Section 2-601(a)), subject to certain exceptions, "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." Section 35 of the English Sale of Goods Act 1994 is to the same effect. Article CISG 52 does allow a buyer to reject goods "if the seller delivers the goods before the date fixed" or "if the seller delivers a quantity of goods greater than that provided for in the contract." But, upon delivery, CISG Article 49(1)(a) allows the buyer 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."

Article 25 of the CISG defines a breach of contract as "fundamental" only 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…" CISG Advisory Council Opinion No. 5 advises that the following factors should be taken into account in determining whether a breach is "fundamental": (i) the terms of the contract; (ii) the purpose for which the goods are bought; and (iii) the possibility of repair or replacement. Article 7.3.1 of the UNIDROIT Rules adopts the same rules not just for contracts for the sale of goods but on a broader basis for when the failure of a party to perform an obligation under a contract amounts to a "fundamental non-performance," and sets forth a broader set of circumstances where non-performance can be "fundamental," including where the non-performance is "intentional or reckless" or where strict compliance is "of the essence" under the contract.

The CISG offsets the loss of the "perfect tender" rule for the buyer under Article 50 by allowing the buyer, under Article 50, "[if] the goods do not confirm with the contract and whether or not the price has already been paid…[to] reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at the same time." This is a remedy not available under New York law or English law. Under the CISG, the buyer has all the other remedies for damages provided by Articles 74-77 as well. The CISG makes it very important for the buyer to inspect goods received quickly and not to tarry in pursuing remedies. Article 38(1) requires the buyer to examine the goods within as short a period as is practicable under the circumstances and Article 39 requires that the buyer give notice to the seller of any non-conformity "within a reasonable time after he has discovered it or ought to have discovered it." Section 2-607(3)(a) of the New York Uniform Commercial Code is arguably less stringent when it provides that "[w]here a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from remedy."

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." However, CISG Article 49, borrowing the German concept of "*Nachfrist*," 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." If the seller fails to perform within the time set by the buyer, under CISG Article 49(1)(b), "the buyer may declare the contract avoided…if the seller does not deliver the goods within the additional period of time fixed by the buyer."

G. Passage of Title and Risk (Sale of Goods)

In a somewhat unusual confluence, English law as well as French law provide that, in the absence of agreement to the contrary, title to specific goods under a contract of sale passes upon the conclusion of the contract of sale.[75] New York's UCC Section 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." The CISG leaves the question of passage of title to be determined by local law.

It should be noted that passage of risk of loss does not necessarily follow passage of title. Thus, under English law, while title often passes on conclusion of the contract, passage of risk follows when the goods are transferred to the buyer.[76] On the other hand, under French law, where

title also passes on conclusion of the contract, passage of risk follows as soon as the buyer acquires title to the goods. Under NY UCC 2-509, in the case of a sale where shipment is required but not to a particular destination, risk of loss passes to the buyer when the goods are delivered to the carrier—as long as they are conforming. Where delivery must be made to a particular destination, risk passes when the goods are tendered at the specific place indicated. With regard to goods that are not delivered but stored, title passes when a negotiable bill of lading is delivered to the buyer. The provisions of CISG Article 67 on issues of passage of title are very similar to those of the NY UCC.[77]

Section 2-509(4) of the New York Uniform Commercial Code provides that the provisions of Section 2-509 dealing with the risk of loss in contracts for the sale of goods are "subject to contrary agreement of the parties."

The "International Commercial Terms" published by the International Chamber of Commerce, or so-called "Incoterms," provide a convenient menu of options denominated in three letter trade terms for allocating the costs and risks of transporting and delivering goods under contracts for the sale of goods and are equally useful whether the CISG or Article 2 of the New York Uniform Commercial Code applies to a particular transaction.[78] Significantly, Incoterms do not endeavor to regulate when title passes, but rather regulate only when risk of loss passes.

H. Remedies

In addition to the contrasting approaches the civil law and the common law traditions take to hardship and fundamental changes of circumstances, the civil law and the common law differ substantially, at least in theory, in several other matters related to remedies, including the basic criteria for determining liability for loss, the role of foreseeability in determining damages, the availability of specific performance and the availability of liquidated damages.

By way of introduction, under common law concepts, contracting parties are strictly liable for breach of contractual obligations whereas, under civil law, liability is generally based on fault.[79] Under New York law, "[w]hen a contract is breached, the non-breaching party may assert a claim to recover damages for the loss it suffered as a result of the breach."[80] Fault is simply not a relevant issue. English law is of the same view: "Non-performance and defective performance are not seen as 'wrongs' in the same sense that a tort is a wrong."[81]

For civil law, the issue of liability turns on whether the breach arose from the fault of the breaching party. Thus, Article 1147 of the French Civil Code provides that: "[t]he debtor is held…to the payment of damages, whether because of the non-performance of the obligation or because of the delay in performance, whenever he fails to show that the non-performance is due to a foreign cause, and further that there was no bad faith on his part at all." The introduction of the issue of good faith into the determination of liability essentially allows the breaching party to lessen or even avoid liability if it can be shown that he did everything reasonable to attempt to perform the breaching party's obligations. Article 254 of the German Civil Code establishes a general principle of contributory negligence in contract law as well as in tort law. French case law also allows set-off for the responsibility of the non-breaching party; on the other hand French law does not impose a duty to mitigate losses on the injured party.[82] Notwithstanding the prevailing fault-based regime of French law, it does, unlike common law, allow parties to provide for *obligations de resultat*, where liability can arise on a single demonstration that a promise was not performed.[83]

1. Consequential Damages

Under New York and English law, the major categories of contract damages are (i) general or compensatory, (ii) reliance damages, and (iii) consequential or indirect damages. Punitive damages are not allowed unless a claim can be made out in tort.

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 causally tied to the breach and, as for foreseeability, focuses more on the damages that could be foreseen at the time of breach rather than at the time the contract was formed.[84]

The notion of foreseeability, which became so prominent for the common law in the aftermath of the seminal English case of *Hadley v. Baxendale*,[85] may have actually been borrowed from Articles 1150-1151 of the French Civil Code. But under French law, in the case of deliberate non-performance, the focus narrows to the damage caused by the breach, even if the damage was not foreseeable.[86] 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 into but also loss that follows from breach due to special circumstances known to the parties at the time the contract was formed. The 2008 decision of the House of Lords in *The Achilleas*[87] appeared to require proof that the defendant expressly assumed the risk of loss that could be expected to arise in the ordinary course from a breach of the contract—a requirement that would not only significantly change English law but cause English law to differ from New York law. However, the 2010 decision of the High Court in *Sylvia Shipping*[88] appears to have limited *The Achilleas* case to its facts and declined to apply the assumption of responsibility test that *The Achilleas* seemed to introduce.[89]

Under New York law, under the *Hadley v. Baxendale* rule, general damages compensate the non-breaching party for economic loss because of the non-performance of a contractual obligation, but "special damages" compensate the non-breaching party for losses that could arise under special circumstances the parties contemplated at the time the contract was entered into. The analysis looks to whether there has been any conscious assumption to pay the claimed special damages and whether, by words or deeds, the defendant reasonably led the plaintiff to believe the defendant had assumed such liability.[90]

It should be noted that both the UNIDROIT Principles of International Commercial Contracts in Article 7.4.4 and the Principles of European Contract Law in Article 9.503 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. If by "reasonably" there is intended an objective test, "special damages" seem to be excluded. As with "entire agreement" clauses and MAC clauses, parties can limit their exposure to consequential special damages by careful drafting. New York law generally enforces such clauses if they are not "unconscionable" and NY UCC Section 2-719(3) applies the same principle to contracts for the sale of goods.[91] As with MAC clauses, specificity in the drafting of such clauses makes them more likely to be enforced. Thus, while the "demarcation between direct and consequential damages is a question of fact usually left for resolution at trial," in *Roneker v. Kenworth Truck Co.*[92] the court determined that the waivers in the contract at issue included a detailed listing of the consequential damages to be excluded that permitted the court to determine "as a matter of law" whether the trucker's damages were direct or consequential.[93] Drafting waivers under English law requires awareness that English courts have held that "consequential loss" is a synonym for "indirect loss" and therefore that a general waiver of "consequential losses" might not preclude damages that arise from, "special circumstances" under the second branch of the *Hadley v. Baxendale* test. Thus, if the parties intend to exclude "lost production, profits, business, revenue or the like," it is best that these be expressly referred to in the waiver clause.[94]

2. Specific Performance

Under New York law, "the proper measure of damages for money withheld is lost interest" and the plaintiff cannot claim consequential damages. European law recognizes the right of a creditor to require the performance of a contractual obligation by payment of money.[95] Under civil law, a party generally has a right to seek specific performance of a non-monetary obligation. Thus, Article 1184(2) of the French Civil Code provides that "[t]he party towards whom the undertaking has not been fulfilled has the chance whether to compel the other to fulfill the agreement when it is possible, or to request its avoidance with damages." While the common law makes specific performance an essentially discretionary remedy available in equity, specific performance is not available when a remedy at law (basically monetary damages) will suffice.[96] So far, English law has resisted a tendency to give the remedy of specific performance a broader application.[97] In reality, parties to contract disputes in the civil law jurisdictions resort to specific performance as a desired remedy in far fewer instances than the general doctrine might lead one to suppose. Specific performance is not available if it would be unreasonable, involves services or work of a personal character or depends on a personal relationship.[98] It has been found to be rarely applied, based on a detailed study of the use of the remedy in Denmark, Germany and France, in part due to a reluctance to incur the administrative costs of enforcement.[99]

3. Liquidated Damages

Civil law and common law countries also have different doctrinal points of departures regarding the enforceability of liquidated damage clauses. The French Civil Code was noteworthy for allowing penalty clauses—clauses that exact a very high cost for non-performance as a means of determining breach. This permissive attitude towards penalty clauses was consistent with the theory of the civil law, which sees contracts and torts as part of one overarching law of obligations, where the concept of fault applies to breach of contract as well as to tort injury. In the common law, penalty clauses have been seen as a form of punitive damages, which are generally not allowable as a remedy in contract because of the strict liability of contractual breach and the general irrelevance of issues of fault.

But the two systems have moved closer toward each other. New York courts generally recognize and give effect to liquidated damage clauses when the damages represent reasonable estimates of the cost of breach, especially under circumstances where establishing the cost of breach may not be easy. They are enforceable as long as they are neither unconscionable nor contrary to public policy, but penalties for violations of contractual obligations are still not enforceable.[100] English law is of the same view, save for the fact that the courts are very reluctant to interfere with liquidated damage clauses as between sophisticated commercial parties.[101] On the civil law side, there has been a tendency to mitigate penalty clauses in some courts. The Council of Europe issued a "Resolution on Penalty Clauses" in 1971 with the aim of recommending a uniform application of penalty clauses under which "the penalty amount may be reduced by the courts if they are manifestly excessive, or if part of the main contractual obligation has been performed." Many countries have passed legislation consistent with the Resolution, including France and Germany.[102]

4. Early Termination of Contract

Perhaps the most fundamental remedy for breach to which a party to a contract can resort is unilateral termi-

nation of the contract and suspension of its obligations under the contract. All of the legal systems discussed here, as well as the international instruments, recognize the availability of this remedy if the defaulting party's breach is "substantial" or goes to the heart of the contract. The aggrieved party is given a choice between terminating the contract and seeking damages on one hand, or continuing with the contract on the other.[103] Section 1147 of the French Civil Code provides that non-performances of a contract "for no external reasons" is grounds for termination. Article 7.3.1 of the UNIDROIT Principles puts forth the most comprehensive list of circumstances where termination is justified: (i) the non-performance substantially deprives the aggrieved party of what it is entitled to expect unless the defaulting party did not foresee and could not reasonably have foreseen that result; (ii) strict performance of the obligation in question is "of issue" under the contract; (iii) the non-performance is intentional or reckless; and (iv) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance. Section 323 (1) of the German Civil Code requires that, in the case of a reciprocal contract, the aggrieved party may revoke the contract "if he has specified, without result, an additional period for performance or cure."

The fourth UNIDROIT criterion for establishing the "fundamental" or "material" nature of a breach justifying the remedy of termination, which looks to the likelihood of future performance, raises the issue of when the remedy of termination is available for anticipatory breach of contract. Under New York law, "where one party clearly and unequivocally repudiates his contractual obligations…prior to the time performance is required, the non-repudiating party may deem the contract breached and immediately sue for damages."[104] The same essential rule for "repudiatory breach" holds under English law[105] and under German law.[106] French law appears to be less open to the remedy of termination for anticipatory or repudiatory breach: Section 1186 of the Civil Code provides that when the performance of an obligation is due only on a certain event (i.e., a specific date), its performance cannot be claimed before the contract.

II. Commercial Law Topics

A. Negotiable Instruments

The law of negotiable instruments has two major sources. For the common law, the primary source is the English Bills of Exchange Act, which formed the background against which Articles 3 and 4 of the UCC were drafted. For the civil law, 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. Perhaps the most striking difference between the two systems has to do with the effect of a fraudulent endorsement on a bill for the subsequent negotiation of the bill. 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. But under the New York Uniform Commercial Code and similar common law provisions, at least in regard to instruments made out to a payee, a thief can never be a holder (and therefore not a holder in due course) 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.[107]

The Geneva approach, it has been said, better reflects the interest of the law merchant in the free circulation and negotiability of instruments, while the New York and common law approach is more attentive to property law concerns. At least one commentator believes that the approach of the UCC is an instance where "better policies necessitated the law to prefer the protection of property, unless the dispossessed owner has been at some fault or in a position to avoid loss."[108]

B. Letters of Credit

Letters of credit are governed in New York by NY UCC Article 5. Perhaps the most fundamental characteristic of a letter of credit is that the issuing bank cannot withhold payment on the basis of breach by a party to the underlying transaction that gave rise to the issuance of the letter in the first place. This substantially diminishes the risks to issuing banks and makes banks more willing to support these payment mechanisms, on which so much of international trade depends. No set-offs or counterclaims are generally allowed and the bank cannot be impleaded in any action between the applicant for the letter and the beneficiary of the letter related to the underlying obligations as between the letter's applicant and its beneficiary.[109]

In general, some civil law jurisdictions, particularly in Latin America, are said to have difficulty in completely isolating the documentary commitment from the underlying transaction. The courts of England and New York have been very firm in upholding the "abstraction" of the letter of credit from other circumstances affecting the applicant or beneficiary. However, New York, following the lead of the Supreme Court of New York County in *Sztejn v. J. Henry Schroder Banking Corp et al.*,[110] has made an exception where a bank has received notice of actual fraud on the applicant by the beneficiary. 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. Although recognizing an exception to the independent status of a letter of credit in principle, English courts have been very reluctant to give relief, while New York courts have continued to be more willing to issue temporary injunctions in cases where credible allegations of fraud have been raised. New York's UCC Section 5-109 provides guidance for certain situations under which an issuing bank should honor a demand for payment despite allegations of fraud, gives the bank discretion in other cases, and permits New York courts to issue injunctions stopping payment upon compliance with a detailed list of requirements.

C. Bills of Lading

In New York, bills of lading are governed by NY UCC Article 7. A salient issue with regard to bills of lading has been whether a carrier is responsible for misrepresentations by the ship's master. Under the leading (although very counter-intuitive) English case of *Grant v. Norway*,[111] a shipping company could not be held responsible for the master's misrepresentation about goods the master never received. The New York Court of Appeals, in *Bank of Batavia v. New York, Lake Erie & Western Railroad*,[112] became one of the first courts in the United States to dissent from the English view and find that a carrier was not estopped from liability on the bill when the carrier's freight agent issued a bill of lading without having received the goods. The Comments to UCC Section 7-507 provide that the carrier who issues a bill of lading is liable for the bill when the carrier's agent has received no goods.[113] 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.[114]

D. Providing for Security Interests

Article 9 of the New York UCC provides a framework for secured lending. It contains provisions for creating and perfecting a security interest in personal property and enforcing it. New York's UCC Article 9 provides for liquid collateral, which means that a creditor may acquire a security interest in categories of property (including not only many categories of personal property but also some categories of real property). The lien can be "floating"—*i.e.*, apply to property that may exist in the future as well as property that exists at the time the security interest is established—a very important feature that facilitates security interests in accounts receivable and inventory that necessarily change over time. New York's 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. By providing for centralized registration of security interests, New York's UCC Article 9 also provides a more efficient and reliable system for prioritizing interests. Finally, NY UCC Article 9 provides for various forms of self-help in the event a security interest holder needs to execute against the collateral.[115]

The system of security interests is generally more limited under French law. French law does not recognize the concept of a "floating lien" as a way of acquiring a security interest in inventory. A security interest in accounts receivable would be limited to existing accounts. Under special legislation passed in 1981 ("*Loi Dailly*"), a lien may be placed on future accounts receivable but only if the debtor periodically provides information about them. The effect of the lien is that the secured lender actually takes title to the accounts receivable and can give notice to the obligors on the accounts to pay the secured lender directly. But there is considerable doubt as to whether creditors who are not French or European banks can avail themselves of the benefits of the *Loi Dailly*. German law technically recognizes floating liens, but requires that collateral be described with a degree of specificity that would be strange to New York requirements. In the case of inventory, security interests may be taken out only in inventory described and located at a specific place. There is no national system of registration in either France or Germany. Under both German and French law, executing on the collateral requires application to a court; in France, an insolvency administrator must be appointed, although it is easier to attain an order of attachment (*saisie-conservatoire*) against a borrower's assets or even an order of payment (*injunction de payer*).[116]

The English system of security interests bears more resemblance to the New York system. English law recognizes floating liens. However, English law makes a distinction between "fixed charges" and "floating charges." A fixed charge carries a higher priority against other claimants. But to enjoy this benefit, the secured lender must have a high degree of control over the collateral, which make this approach to security interests unattractive to borrowers. Floating charges leave the borrower in effective control of the assets, with the lien only becoming "fixed" upon an actual default. Floating charges are in turn divided into "equitable" and "legal" charges. But while England has a central registration system, "legal" charges over receivables—which have a higher degree of priority—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, even if not as absolutely necessary as in France or Germany. English law does give the holder of a lien over substantially all of a Borrower's assets and a form of self-help through 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. The administrative receiver may apply to a court to sell an asset subject to a proper lien if the administrative receiver can show that superior recovery could be had.[117]

Of course, the ability of parties to stipulate what law would apply in a secured loan is limited by local laws protecting the debtor or the assets that will constitute collateral. But the benefits of NY UCC Article 9 can be achieved by creative planning, including organizing collateral in a way that would give it a situs in New York or making the debtor take on a form of legal personality or presence in New York that may give New York courts jurisdiction over it.

III. Considering the Interaction of Contract Law and Civil Procedure

The 2011 Report of the New York State Bar Association's Task Force on New York Law and International Matters focuses on issues that have been raised about the alleged length, complexity and cost of litigation in New York, as distinguished from other common law centers such as London and Singapore or civil law centers such as Paris or Frankfurt. The Task Force Report also explains the many ways in which parties can adjust or ameliorate these concerns by agreements to waive jury trials, shorten or limit pre-trial discovery, adjust the allocation of legal costs among the parties and so forth.

However, there is a larger issue, which has to do with the effectiveness of proceedings conducted under a given form of civil procedure to afford effective and equitable remedies and relief. This is critical because the evaluation of the procedural rules available in the jurisdiction where disputes would be resolved cannot be totally separated from the area of substantive law likely to govern any dispute likely to arise. Those who counsel clients about choosing governing laws and dispute resolution should consider whether the legal principles that may be most meaningful for the client can be effectively applied within the confines of the procedural rules that the forum of choice will employ.

A. Oral Contracts

Most jurisdictions other than New York do not require a writing to make a contract enforceable. However, an oral contract, by its very nature, has to be proved by evidence and, when there is no writing to confirm the obligations in question, testimony has to be given to prove the contract. In common law jurisdictions, oral testimony by witnesses is usually a key component in the proof because affidavits do not present opportunities for cross-examination and for the exploration of questions that the litigating parties or the judges themselves may think important to resolve the matter. In civil law jurisdictions, there is generally much greater dependence on written testimony: Having a witnesses testifying in support of a claim on direct examination—that is, giving the witness the opportunity to tell the story behind the claim to the judge in person—is generally not possible, since testimony is usually quite limited and is ordinarily based on questions posed by the judge. Attorneys often do not question the witness directly but rather present questions for the judge to ask.[118] Thus, a forum that entertains oral testimony almost necessarily has to be the better forum in which to prove an oral contract.

B. Fraudulent Conduct

As we have seen, New York law implies an obligation of good faith in matters of contract—applied perhaps in a somewhat more constrained way than in many civil law jurisdictions. And, as we have also seen, in several areas of commercial law, New York law tends to be more protective of parties that have been the victim of fraud than the law of civil law jurisdictions. Parties engaging in fraud, almost by definition, try to conceal facts or conditions they do not want others to see; they are certainly not going to volunteer them. Under the procedural rules of most civil law jurisdictions, 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.[119] By contrast, 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. In situations that may involve significant sums of money and major commitments of resources and personnel, especially among parties who do not know each other and whose honesty and integrity have not been really tested, it stands to reason that there is a greater risk that fraudulent representations may be made, material facts not disclosed, or obligations not undertaken in good faith. Having the ability to obtain relief if any of these circumstances were to occur can be critical: thus, the possible need to prove fraud and to obtain relief from it has to be weighed against the supposed economies in cost and time associated with civil law forums and also common law jurisdictions such as England that do not usually permit pre-trial depositions.

C. Commercial Practice in Technical Specialties

Finally, one must consider the importance of expert testimony in the event it should be necessary to seek judicial remedies for breach of contractual obligations. Many areas of commerce involve highly specialized issues of technology, finance and commercial practice, about which even the most qualified jurist would need expert advice. Under the rule of civil procedure of most civil law countries, the court selects experts to advise it, sometimes after taking into account recommendations from the parties. This, of course, puts the expert chosen by the court—especially in cases that primarily turn on knowledge of practice and custom in highly technical areas of business or production—almost in the position of the court itself. Under New York law, the court does not generally choose a single expert, but rather the parties choose their own experts, with the court having the opportunity to hear the testimony and perspective of each side's expert. While it is easy to lampoon so-called "battles of the experts," in

many areas of commerce there can be substantial differences of professional opinion on technical issues that may be material to the disposition of a case. Depending on the nature of the science involved in a particular transaction, parties to joint ventures that are especially dependent on intellectual property may want to preserve their right to make a full presentation of their side on technical issues rather than risk that the entire case turns on a court's choice of an expert.[120]

IV. Summary and Proposals

Our survey has highlighted legal principles and rules within the domain of contract and commercial law, identified the approach of New York law to them, and compared and contrasted the New York approach with the laws of England, France, Germany, the CISG, and the UNIDROIT and European Principles of International Commercial Contract law.

This article has emphasized the so-called "objective" focus of New York law in the construction and enforcement of contractual obligations, highlighting the important place of the requirement of consideration and the parol evidence rule. New York law (and, to a large extent, English law) have adhered to these principles despite the weight of disfavor they receive in civil law systems and in the international restatements. The Task Force Report emphasizes the respect that New York courts give to the contractual arrangements of private parties and their reluctance to substitute their judgment for the choices made by such parties. It can be argued that the claim of New York to have such a high level of respect for the contractual autonomy of parties to commercial and corporate transactions derives from and is supported by the New York practice embodying contractual undertakings in detailed and comprehensive agreements, which may be of considerably greater length and detail than their civil law counterparts. Whether the noninterventionist predilections of New York courts is the cause of this custom of highly articulated contracts or whether private legal practice in commercial matters has encouraged this policy of New York law, the requirements of consideration and the parol evidence rule encourage commercial parties carefully to think through and address the issues that are most likely to arise in their relationship—rather than rely on the courts to solve their problems for them. *At the same time, I think it is at least worth considering whether, in the long-run, the stringency of the discipline that New York courts seem to expect of commercial parties should be more carefully calibrated to deal with the cross-cultural and cross-linguistic context of international commerce, at least in instances that I discuss below.*

A. Eliminating or Reducing the Applicability of the Statute of Frauds

New York, as we have seen, continues to require that certain obligations be embedded in writing in order to be enforceable, while England—the "mother" of the statute of frauds—has virtually eliminated this requirement, and most civil law jurisdictions, the CISG and the international restatements never adopted it. There are two provisions that deserve special comment: the requirement of a writing under the New York Uniform Commercial Code for transactions of more than Five Hundred Dollars and the requirement of a writing under the New York General Obligations Law for transactions that are not to be performed within one year. The Five-Hundred-Dollar limit appears to date back to 1962, when the New York first adopted the Uniform Commercial Code; the National Commissioners on Uniform State Laws have encouraged states to raise this limit to Five Thousand Dollars. This seems clearly advisable, at least in the case of contracts between merchants. The "more than one year" rule is not always easy to apply and, for an international lawyer not steeped in New York law and even for New York lawyers, it can be another trap for the unwary. It is not clear what purpose it really serves in today's context. *Eliminating—or at least reducing—the instances where a writing is a condition of a contract's enforceability (and at least raising the monetary limit for contracts for the sale of goods) would also introduce greater consistency between domestic New York law and the CISG and thus reduce mistakes about when the New York domestic rule or the CISG rule applies.*

B. Using Commercial Practice in the Construction of Contracts

As for construction of contracts, in the case of written contracts, as already noted, New York courts are loathe to admit extrinsic evidence about additional terms or even collateral terms when it appears the contract's essential terms can all be gleaned from "the four corners of the written agreement." But, 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 New York Uniform Commercial Code, toward supplying the missing term from evidence of the party's conduct and general commercial practice in the relevant field of trade or business.[121] The tendency to use objective evidence to supply "missing terms" is consistent with the objective emphasis of New York contract law. *This tendency is also consistent with Articles 8 and 9 of the CISG and should be encouraged, among other reasons, to eliminate needless divergence between the New York law of domestic sales transaction and the New York's default law for most international transactions*. It is also consistent with the principles enshrined in the UNIDROIT and European Principles. As to "entire agreement" clauses, it is noteworthy that the UNIDROIT and European Principles, despite the strong civil law influence evident in both documents, have adopted the concept of excluding extrinsic evidence in the determination of contract terms where agreements contain "entire agreement" or merger clauses.

C. Return to a Modified Mirror Image Rule?

One of the innovations of Article 2 of the UCC was to reverse the "mirror image" rule, under which an acceptance of a 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. The purpose of the UCC in reversing the traditional rule was said to be to "save contracts" and facilitate the flow of commerce. Be that as it may, the statute is recognized in many quarters as having been drafted in a confusing manner and, ironically, going against the general drift of New York law of encouraging parties to take responsibility for creating their contractual arrangements by not placing courts in the position of having to determine the material terms on which the parties could not agree. It is noteworthy that not only civil law jurisdictions continue to follow the "mirror image" rule as to essential or substantive terms but the international restatements do as well. Most importantly, Article 19 of the CISG maintains the "mirror-image" rule as to material terms of an offer. Thus, in the recent case of *Hanwha Corporation v. Cedar Petrochemicals, Inc.*,[122] where the litigants were businesses in New York and Korea, the CISG applied, with the result that no contract was formed because the parties could not agree on the substantive law that would replace the CISG! *Therefore, to avoid traps for the unwary (especially for New York parties to international transactions that are not the subject of fully negotiated executory contracts), adoption of the "mirror image" as to material terms, at least as between international merchants, seems advisable.*

D. Applying the Principle of Good Faith

The recognition by New York law of the implied obligation of "good faith" in the performance (if not the negotiation) of contracts places New York in a position closer to the civil law tradition than to the English common law version as well as the articulation of international contract law adopted by the international restatements. As we have noted, New York courts have applied the obligation in a very restrained fashion and New York law does not appear, at this time, to embrace the broad mandate of the UNIDROIT Principles that "[e]ach party must act in accordance with good faith and fair dealing in international trade," especially in pre-contractual negotiations. No doubt, New York's restrained approach enables it to continue to put itself forward as a jurisdiction that encourages parties to structure their own transactions and to determine for themselves the rules and conditions to which they want to be subject in carrying them out. Likewise, this restraint supports the position that New York courts are loathe to substitute their business judgment for the decisions private parties make about weighing and balancing the risks and rewards of their transactions—a position that, at least according to some recent research, helps to make New York law, among jurisdictions in the United States, a far more popular choice of law than the law of California, whose courts appear to apply common law contract rules in a manner more reminiscent of the German tradition and some features of the international restatements.[123]

But caution should be taken here because the studies and surveys that appear to favor New York's generally "formalist" and "non-contextualist" approach appear primarily to test the preferences of U.S. domestic private parties. Should it not be wondered if the sole value international businesses, merchants and traders look for in choosing a governing law—especially in the case of international businesses that may not have the resources to retain the most sophisticated cross-border counsel and advisors—is a completely formalist approach to contract construction, especially if a purely formalist approach can lead to a disproportionate allocation of risks that the parties may well not have contemplated? Does it always help New York law when a very learned commentator can say that "New York's tenderness for freedom of contract expresses itself, at times, in a seemingly atavistic pleasure in imposing the consequences of bad bargains?"[124]

In this context, let us revisit the *Reiss* case discussed above. There, the party exercising its warrants gained what the Court of Appeals admitted was a "windfall" when it became entitled to acquire the shares of stock after a five-to-one reverse stock split for the same price it had contracted to purchase the shares before the split. The court reasoned that the agreement had been entered into by experienced business parties and that the parties must have addressed the issue, notwithstanding the complete silence of the purchase agreement on the issue, because the company had issued warrants to other parties under agreements that did address the effect of a reverse split on an exercise of warrants. The court declined the company's invitation to imply a term or otherwise reform the contract on the basis that the contract was in writing, that the agreement was complete (at least in the sense that, in the court's opinion, no essential terms were missing), that there were no ambiguities as far as the writing was concerned, and therefore, under the parol evidence rule, the court was not permitted to find or add terms for the unaddressed contingency.

On the basis of these principles, the decision is very consistent with what one might expect of New York law. On the other hand, one wonders, as a general matter of policy, whether the parol evidence rule should operate to exclude consideration of gaps where, "within the four corners of the agreement," it is hard to say whether the failure to address a key issue was deliberate or not. Because the *Reiss* case did not involve businesses from different countries and also because sales of securities are excluded from the province of the CISG, the CISG did not apply. But in an analogous case among international par-

ties where the CISG would apply, the parol evidence rule would not apply and, 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." It is not too far a distance between CISG Article 8 and Article 4.8 of the UNIDROIT Principles, which directs 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."

Interestingly, the principle behind UNIDROIT Principle 4.8 was essentially adopted in *Reiss* by the majority opinion of the Appellate Division on the initial appeal by the warrant holders from the decision of the New York Supreme Court, which adjusted the terms of the warrants by holding that the failure of the warrants to address the contingencies of a split or a reverse split constituted an omission of an essential term of the warrant transaction. "[F]ormalistic literalism serves no function but to contravene the essence of proper contract interpretation, which, of course, is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract."[125] *This reasoning seems more consistent with the application of the principle of good faith and commercial reasonableness that we see in what appears to be a developing consensus of international commercial jurisprudence and it is one to which New York courts might well consider giving a more robust application.* (See Part IV(H) below for more details.)

E. Hardship and Commercial Impracticality; the Issue of Foreseeability

A related area that may be very relevant to a decision to choose New York law for an international transaction is how New York law deals with contracts whose economic balance has been fundamentally altered by major changes in economic, political or meteorological circumstances, especially macro-economic factors for which it may be very difficult for private parties to foresee or anticipate. Aside from the ameliorative rule of NY UCC 2-615 in cases involving the sale of goods, 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.

As noted above, CISG Article 79, which represents New York contract law for a very substantial portion of international sales transactions involving New York parties, 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. The drafters of the UNIDROIT and European principles have developed what appears to be a careful and cabined rule for a broader range of circumstances by providing, as provided in Article 6.1.1.1 of the European Principles, 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. *It may be advisable to consider whether such a provision dealing with hardship and commercial impracticability would make a prudent addition to New York's common law or even the General Obligations Law.*

The crux of hardship cases, as even the language of the UNIDROIT and European Principles demonstrate, is the definition of foreseeability. It has been recently observed, in reference to NY UCC Section 2-615, that "… despite the implication that the test should be whether the event was unforeseen by the parties at the time of contracting, courts have frequently required that the event be unforeseeable or outside of the realm of logical possibility."[126] *Thus, as valuable as adding provisions to New York law dealing with hardship or commercial impractability on a wider scale than UCC Section 2-615 may be, even more valuable would be judicial or statutory guidance as to what contingencies may be considered reasonable to think the parties should have contemplated themselves and those that are not.* Certain circumstances may be simply too unlikely or, even if predictable, too difficult to measure or to meaningfully analyze, or the efforts to account for them too speculative and burdensome to penalize the parties for not having resolved them contractually.

F. Limiting Perfect Tender Rule

One of the major divergences between New York law on the one hand and the CISG and the laws of many other jurisdictions on the other hand concerns the right of a buyer to reject goods that do not completely conform to the requirements of the contract, even if they substantially conform thereto. In a number of cases, the New York UCC limits the application of the rule—perhaps most importantly by excluding its application to installment sales but also by making rejection of the product subject to the UCC's requirement of good faith as well as to trade usage and prior or current courses of dealing.[127] 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 substan-

tial performance rule better reflects the likely expectations of parties in international trade. Putting New York law in conformity with the CISG on this topic eliminates another possible area of confusion and mistake, especially when parties may not be sure whether the NY UCC or the CISG applies or, worse—as one suspects is still often the case—not even aware that there is an issue and a difference here. *Consideration, therefore, should be given as to whether NY UCC Section 2-601 should be modified so that the perfect tender rule, under New York law, would not apply to international merchants (leaving it in place for consumers and domestic merchants).*

G. Integrating New York Law Standards for Commercial Transactions and Business Collaboration

We have considered that New York applies the principle of good faith in a relatively sparing way, at least among sophisticated commercial parties, but imposes a very strict duty of fiduciary among business partners. The distinction between "contracts of exchange" and "contracts of co-operation" is well-known in contemporary French jurisprudence and seemingly reflected in New York law's restrained application of the "good faith" standard for commercial trade and it is much more generous application of the "fiduciary duty" standard for business collaboration seems to reflect this distinction very sharply. But one may well ask, especially in the context of international commercial transactions and relationships, whether this distinction should not be tempered. Contractual relations span a spectrum of commitments of time, financial resources, proprietary technology and human energy. There are many types of contract relationships that do not invoke the long-term commitments of a joint venture or business partnership but involve more resources and more mutual dependence than the purchase and sale of fungible products of manufacture, agriculture or mining. *New York courts could use the New York legal principles of good faith and business loyalty to effect a compelling "bridge" between the hyper-literalist philosophy of some common law contract jurisprudence and the overly malleable and unpredictable contextual tendencies of at least some branches of the civil law tradition.*

Much litigation around the issue of "good faith" turns on the question of what terms are essential to a contract, without which the contract, even if valid, cannot be said to be complete, and whether the courts should supply or imply any such missing terms. It could be helpful if New York courts—or perhaps even the New York legislature—were to identify the terms that, for New York law purposes, are essential for a range of basic forms of commercial contracts. The typical trio of price, term and product may be sufficient for most contracts for the sale of goods but the sale of goods should not necessarily be the sole model or paradigm for the great variety of contracts that are necessary for commerce—domestic or international—especially those for which the stakes in the allocation of risk of loss are especially high. "Entire agreement" or "merger" clauses could still bar any implication of missing terms, but otherwise, in the absence of an express provision allocating the relevant risks, New York courts would be permitted to supply a missing term in order to prevent extreme or even absurd outcomes. Whatever the merits of the Court of Appeals' decision in *Reiss*, on its particular facts, its seems to me that Judge Friedman's method, in his decision for the Appellate Division, of inferring additional "essential terms" relevant to the type of contract at issue, represents, for the long run, a more nuanced, insightful and creative way of developing New York law on these issues. This could provide the courts a way to give precise and significant meaning to the implied covenant of good faith without compromising the dedication of New York jurisprudence to the enforcement of contracts in accordance with their express terms.

H. Dealing with Passage of Risk; Damages

New York's correlation of delivery and passage of risk seems sensible, consistent with the CISG and also more or less consistent with the part of the civil law tradition based in German law, while, in this area, the English and French rules seem more difficult to apply and even counter-intuitive. The general approach of New York law to damages also seems consistent with the approach of the CISG, which focuses, like New York law, primarily on loss and less on fault. In this, the international restatements, particularly the UNIDROIT Principles, focus on "harm" in a way that still suggests a strong role for fault, which at the one and the same time, makes expectations of relief less certain (because willfulness or negligence may have to be established) and also liable to a broader scope of claims (even for emotional damages under the UNIDROIT Principles).[128] *In dealing with contract provisions excluding or limiting consequential damages, as with entire agreement clauses and hardship provisions, drafting must be especially careful and complete*. Notwithstanding the general deference by New York courts to the "private ordering" for which parties provide in their agreements, it appears New York courts (as common law courts in general) tend to interpret provisions that limit remedies under New York law (such as consequential damage exclusions) or that provide relief where New York law might not ordinarily provide it (such as allowing for hardship or providing a remedy of specific performance) or that limit liability (such as "entire agreement" clauses seeking to exclude relief for misrepresentation) by applying a very strict standard of specificity and comprehensiveness in such areas where common law courts are generally loathe to tread. Providing a detailed map for navigating the rights and obligations of contracting parties in such uncharted legal waters is clearly the best way to win the adherence and support of New York courts.

Endnotes

1. NY General Obligations Law Section 5-1401 ("NY GOL").
2. *Id*. §5-1402. *See* Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, Section II(A)(1)(e) (25 June 2011).
3. Pursuant to the Declaration made by the United States at the time it deposited its ratification of the CISG, the Convention is applied in the United States to contracts of sale under which all contracting parties have their businesses in countries that have ratified the Convention but not to contracts where the law of a U.S. jurisdiction would apply by application of principles of conflicts of laws. See Appendix B hereto: *Sample Governing Law and Choice of Form Clauses*, Part I, n. 3.
4. More space could allow for consideration of other national laws. But English law has been the "fount of law" for most common law jurisdictions, and French law and German law have had a pervasive influence on the law of most civil law jurisdictions—whether in Europe, Latin America or Asia. Nor should one overlook the important influence of the CISG on the shape of national laws, perhaps most notably in the case of China.
5. See French Civil Code, Article 1108.
6. Glen Banks, NEW YORK CONTRACT LAW §2:27 (2006), *citing Express Industries v. Elsevier Sciences, Ltd.*, 927 F. Supp. 2d 688, 703 (S.D.N.Y. 1996).
7. See Vranken, EUROPEAN CIVIL LAW §532.
8. John Cartwright, CONTRACT LAW: AN INTRODUCTION TO THE ENGLISH LAW OF CONTRACT FOR THE CIVIL LAWYER 114-116 (2007).
9. *See* G. Banks, note 6 *supra*, §4:26.
10. *Id*. §§2.29 and 6.27. Note that the important role that the principle of good faith plays in the German tradition and, to an important extent, also in the French tradition, even in pre-contractual negotiations, makes it somewhat more likely that civilian courts will become involved in assessing and adjusting the terms of contracts than New York or English courts would be inclined to do. *See generally* Richard Zimmerman and Simon Whitaker, GOOD FAITH IN EUROPEAN CONTRACT LAW.
11. Miller, *Bargaining on the Red-Eye: New Light on Contract Theory* at 55, *available at* http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=1129805.
12. *See generally* Martin Vranken, FUNDAMENTALS OF EUROPEAN CIVIL LAW, §§508-525; and Jan Dalhuisen, 2 TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW §1.4.2 (4th ed.).
13. G. Banks, note 6 *supra*, §12:4.
14. *See* Miller, note 11 *supra*, at 40.
15. G. Banks, note 6 *supra*, §§9:3-9:4.
16. *Id*. §§2:19-2:21.
17. Vergne, *The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, *available at* http://www.cisg.law.pace.edu/cisg/biblio/vergne.html *citing* Cass. Civ. lère, 17 juillet 1967, Bull. Civ. III, 29.
18. NY UCC §2-207(2).
19. *Id*. §2-207(2)(b).
20. *Id*. §2-207(3).
21. *Isn't 60 Some Years of Litigation Enough?*, 48 THE UNIFORM COMMERCIAL LAW LETTER 7 (March 2014).
22. *See Coastal & Native Plant Specialties, Inc. v. Engineered Textile Products, Inc. v. Occidental Chemical Corporation*, 139 F. Supp. 2d 1326 (N.D. Fla. 2001) (applying New York law).
23. [1979] 1 WLR 401 (CA). The case is discussed in J. Cartwright, note 8 *supra*, at 96.
24. [1985] AC 191, 201, discussed in J. Cartwright, note 8 *supra*, at 186-188.
25. G. Banks, note 6 *supra*, §9:5 *citing Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 N.Y.2d 1, 6 (1976): "Where the document makes clear the parties' overall intentions, the construction that would effectuate the plain purpose and object of the agreement should be given to the particular language at issue." *See also id*., §9:6, *citing Kass v. Kass,* 91 N.Y.2d 554, 567 (1998). "In interpreting contract terms," the New York Court of Appeals has stated, "the court considers the matter from the perspective of the ordinary business person making an ordinary business contract," *Michaels v. City of Buffalo*, 85 N.Y.2d 754, 757 (1995), "keyed to the level of business sophistication and acumen of the particular parties." *Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336 (1983). *See* G. Banks, note 6 *supra*, §§9:6-9:7.
26. G. Banks, note 6 *supra*, §8:18.
27. J. Cartwright, note 8 *supra*, at 184.
28. [1996] 2 All ER 573.
29. [1999] WL 852482.
30. Jones Day, *Some Differences in Law and Practice Between U.K. and U.S. Stock Purchase Agreements*, 16 April 2007.
31. Kamya and Thompson (Steptoe & Johnson LLP), *Entire Agreement Clauses—Are You Adequately Protected?* (October 2010).
32. 184 N.Y.2d 599 (1959).
33. 748 F.2d 729 (2d Cir. 1984).
34. 174 N.Y. 331 (1903).
35. 222 N.Y. 88 (1917).
36. *See, e.g., Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (N.Y. 1995) (covenant of good faith and fair dealing in the course of contractual performance is implicit in all contracts).
37. G. Banks, note 6 *supra* §11:16. *See also* Official Comment to NY UCC 2-103.
38. *See* Harold Dubroff, *Implied Covenant of Good Faith in Contract*, *available at* http://www.stjohns.edu/ academics/graduate/law/journals/lawreview/issues/80_2/Dubroff.stj.
39. G. Banks, note 6 *supra*, §11:17, *citing 511 West 232nd Owners Co. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002), *quoting Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 389 (1995).
40. G. Banks, note 6 *supra*, §6:23, *citing Oppenheimer & Co. Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685,695 (1991).
41. 97 N.Y.2d 195 (2001).
42. 937 F.2d 780 (2d Cir. 1991).
43. *See* G. Banks, note 6 *supra*, §11:20, *citing Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1 (1988) (implied covenant cannot be used to interpret away rights expressly given to parties under a contract).
44. G. Banks, note 6 *supra*, §11:17, *citing Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 407, *certified question accepted*, 7 N.Y.3d 837, 824 (2006).
45. Howard Hunter, MODERN LAW OF CONTRACTS §8:8 (2011), *discussing Gross v. Empire Healthchoice Assurance, Inc.*, 126 Misc. 3d 112(A) (Sup. Ct. N.Y. Cty. 2007).
46. See section on German law in Squire Sanders, *The Notion of Contractual Good Faith: Perspectives from Comparative Law*, *available at* http://larevue.ssd.com/The-Notion-of-Contractual-Good-Faith-Perspectives-from-Comparative-Law_a1010.html.
47. *Id*.

48. J. Cartwright, note 8 *supra*, at 59.

49. *Id*. at 60.

50. *See* Polkinghorne & Korman, *Paris Energy Series No. 3*, *available at* http://www.whitecase.com/files/ Publication/04a3da7b-fef6-40ee-88a0-8340c02c68a3/Presentation/PublicationAttachment/7d60a026-379c-42ce-8c0c-889a36bb7ea4/article_ParisEnergySeries%20_Disputes_No3.pdf.

51. J. Cartwright, note 8 *supra*, at 69.

52. 52 N.Y.2d 394 (1981).

53. Miller, note 11 *supra*.

54. 751 F.2d 69 (2d Cir. 1984).

55. 64 F.2d 344 (2d Cir. 1933).

56. Polkinghorne and Kirkman, *The Paris Energy Series No. 4*, *available at* http://www.whitecase.com/files/ Publication/83c9518e-90da-48b1-8ec3-3b6b3d8dbee4/Presentation/Publication Attachment/f260d894-23ee-4728-8471-3c6bdbe29c2f/The_Paris_Energy_Series_No_4.pdf.

57. *U.S. v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

58. G. Banks, note 6 *supra*, §20:18.

59. J. Cartwright, note 8 *supra*, at 241, *citing Davis Contractors Ltd v. Fareham UDC*, [1956] AC 696 (HL) 729.

60. Polkinghorne and Kirkman, note 56 *supra*.

61. *Id*., at 8.

62. No. CIV.A.18373.2001 WL (Westlaw) 675330 (Del. Ch. 18 June 2011).

63. *See* Kirsten Birkett, PLC, *Untying the Knot: Material Adverse Change Clauses, available at* http://corporate. practicallaw.com/6-101-6634.

64. G. Banks, note 6 *supra*, §20.14, *citing Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987); and *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 1984 WL 677 (S.D.N.Y. 1984), *aff'd*, 782 F.2d 314 (2d Cir. 1985).

65. *See* Kirsten Birkett, note 63 *supra*; Suhrud Mehta (Milbank), *Material Adverse Change Clauses in Adverse Markets*, *available at* http://www.milbank.com/images/content/7/8/783/Material_Adverse_Change_Clauses_Mehta .pdf.

66. *Meinhard v. Salmon*, 249 NY 458, 463-464 (1928).

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68. Judge Friedman, writing for the majority, determined that, for a stock warrant purchase agreement, a provision dealing with the effect of stock splits and reverse stock splits was an "essential term" which the court should supply. *Marvin M. Reiss et al. v. Financial Performance Corporation*, 279 A.D.2d 13 (1st Dep't 2000).

69. 309 A.D.2d 288, 298-302 (1st Dep't 2003).

70. *See* Yeo Ting Min, *A Note on Differences in English Law, New York Law, and Singapore Law*, *available at* http://linklibrary.smu.edu.sg/sol_research/365.

71. Keilhack, *Third Party Rights: A Comparison of English and German Law with Respect to the UNIDROIT Principles on International Commercial Contracts*, Section B(II), *available at* http://www.grin.com/en/e-book/22898/third-party-rights-a-comparison-of-english-and-german-law-with-respect#inside.

72. G. Banks, note 6 *supra*, §8:6, *citing Seaver v. Ransom*, 224 N.Y. 233 (1918).

73. *Id*. §8:6, *citing 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).

74. *Id*. §8:7.

75. Sale of Goods Act 1979 §61(1); French Civil Code Art. 1583.

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79. *See* THE RESTATEMENT 2D OF CONTRACT LAW §260(2).

80. G. Banks, note 6 *supra*, §22:1.

81. J. Cartwright, note 8 *supra*, at 271.

82. Cafaggi, *Creditor's Fault: In Search of a Comparative Frame*, text accompanying footnotes 9 and 23, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551825.

83. Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. OF WELLINGTON L. REV. 817-841 (2001), *available at* http://trove.n/a.gov.au/version/167133.811.

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85. (1854) 9 Ex. 341.

86. J. Cartwright, note 8 *supra*, at 267.

87. [2008] UKHL 48.

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102. *See* Consilium: *Contract Management—Liquidated Damages and Penalty Clauses: A Comparison Between The Common Law and Civil Law Jurisdictions*, *available at* http://www.consilium404.com/pdfs/Newsletter07.pdf.

103. For New York law, see *Marathon Enterprises Inc. v. Schroter GMBH & Co.*, 2003 WL 355238 (S.D.N.Y. 2003); G. Banks, note 6 *supra*, §17.17. For English law, see *Boone v. Eyre*, (1777) 1 HBL 273.

104. *American List Corp. v. U.S. News & World Report*, 75 N.Y.2d 38 (1989).

105. *See SK Shipping (5) Pte Ltd. V. Petroexport Ltd.* [2009].

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111. 10 C.B. 665, 138 Eng. Rep. 263 (C.B. 1851.)

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113. *See also* Murray, *History and Development of the Bill of Lading*, 37 U. MIAMI L. REV. 689 (1983).

114. *See* Indira Carr, INTERNATIONAL TRADE LAW 175-176 (4th ed. 2010).

115. *See* McGuire Woods, *Security Interests in Accounts Receivable and Inventory in Common Law and Civil Law Jurisdictions*, *available at* http://www.mcguirewoods.com/news-resources/publications/financial_services/banking 03.pdf.

116. *See generally id*.

117. *See generally id*.

118. *See* Pejovic, note 83 *supra*, Section IV(E).

119. *See id*. Section IV(C).

120. This is not to gainsay the importance of the Recommendation of the Litigation Subcommittee of the Task Force on New York Law and International Matters regarding the adoption of special chambers within the Commercial Division of the New York Supreme Court that could apply a variety of rules of procedure, including those of London or Paris. As the Task Force Report emphasizes, New York courts are very familiar with applying the substantive law of other countries, in accordance with the governing law clauses of the contracts that may come before them. Having the ability to apply diverse procedural rules would enhance the international character of the New York courts and allow parties the greatest flexibility and autonomy in making choices that may combine what contracting parties may see as the best advantages of one system for governing law and another system for civil procedure.

121. *See* G. Banks, note 6 *supra*, §2:18-2:22.

122. 09 Civ. 10559 (S.D.N.Y. 01/18/11) (Hellerstein, J.).

123. *See* Eisenberg and Miller, *The Flight to New York, An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); Miller, note 11 *supra*.

124. Miller, note 11 *supra*, Section II, at 2.

125. *Reiss et al. v. Financial Performance Corporation*, 279 A.D.2d 13 (1st Dep't 2000), *rev'd*, 97 N.Y.2d 195 (2001).

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Appendix A

Treatises, Books, Articles and Other Sources Cited in Text

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Appendix B

Sample New York Governing Law and Choice of Forum Clauses Adapted from the Sample Clauses of the NYSBA Task Force on New York Law and International Matters[1]

Part I: Sample New York Governing Law Clauses

Dispute resolution agreements and clauses are found across a wide section of transactional contracts—from complex merger documents to royalty agreements, oil exploration contracts and joint venture agreements.

At its best, the drafting of a dispute resolution clause is the convergence of the business lawyer's negotiating skills and ability to foresee difficulties for the lawyer's client and the arbitration/litigation lawyers' insights about what clauses work best in what types of agreements and circumstances.

At its worst, drafting is a haphazard, last-minute guessing exercise by transaction lawyers at the eleventh hour of a deal's closing—which down the road can cost the client significantly in terms of outcome and costs.

Assuming the parties wish to submit any disputes to the New York courts, and provided the parties want their contract to be governed by New York, the provisions in this and the next two parts may be considered for adaptation to the circumstances of a particular international agreement.

A. Governing Law—General Contract

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to conflicts or choice of law rules that would result in the application of the substantive laws of any other jurisdiction.

B. Governing Law for Contracts for International Sale of Goods[2]

(1) Contract for International Sale of Goods Where Application of CISG is Desired and All Parties Have Their Place of Business in Jurisdictions That Are Parties to the Convention:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, it being assumed for all purposes of this Agreement that the 1980 United Nations Convention on Contracts for the International Sale of Goods is an integral part of the law of contracts of the State of New York with regard to international sales transactions governed by the said Convention.

(2) Contract for International Sale of Goods Where Application of CISG is Desired but One or More Parties Have Places of Business in Jurisdictions That Are Not Parties to the CISG:[3]

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, it being assumed for all purposes of this Agreement that the 1980 United Nations Convention on Contracts for the International Sale of Goods (the "Convention") is incorporated as an integral part of the law of contracts of the State of New York with regard to international sales transactions governed by the Convention, without regard to whether (or to what extent) any jurisdiction in which any party to this Agreement has its place of business or otherwise has authority to resolve a dispute hereunder has ratified or acceded to the Convention or made any declaration under Article 95 thereof.

(3) Contract of International Sale of Goods Where Application of the CISG Is Not Desired:

First Alternative:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply and without application of the 1980 United Nation Convention on Contracts for the International Sale of Goods (the "Convention") as if none of the jurisdictions in which parties to this Agreement have their places of business are parties to the Convention.

Second Alternative:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law rules that may cause the substantive law of another jurisdiction to apply, provided, however, that the parties hereto agree that the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods are excluded in their entirety.

C. Governing Law for Trusts and Wills[4]

First Alternative (Trusts):

I hereby direct, pursuant to Section 7-1-10 of the New York Estates, Powers & Trusts Law, that the law of the State of New York shall apply to the validity, effect and interpretation of all provisions of this Agreement in so far as they govern property located in New York State as well as property located outside of New York State.

Second Alternative (Wills):

I direct that this Will be submitted for, and I request that this Will be admitted to, original probate in the State of New York and I hereby elect, pursuant to Section 3-5.1(h) of the Estates, Powers and Trusts Law of the State of New York, that the formal validity, interpretation and effect of this Will with respect to all property of mine situated in New York as well as all property of mine situated anywhere else outside of New York State shall be governed by the laws of the State of New York and that my estate shall be governed by and under said laws.

Part II: Sample New York Dispute Resolution Clauses (Submission to Jurisdiction and Governance of Proceedings)

A. General Submission to the New York Courts

The parties agree that the New York Supreme Court (_____ County) and the United States District Court for the _____ District of New York shall be the exclusive forums for the resolution of any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, termination or validity thereof, submit irrevocably to the exclusive jurisdiction of the said Courts and irrevocably waive any objections thereto based on lack of personal or subject matter jurisdiction, improper venue, or the doctrine of forum non conveniens.

B. Submission to New York Supreme Court, Commercial Division, Waiver of Right to Remove to Federal Courts

The parties agree that the New York Supreme Court (_____ County), Commercial Division, shall be the exclusive forum for the resolution of any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, termination or validity thereof, submit irrevocably to the exclusive jurisdiction of the New York Supreme Court (_____ County) Commercial Division, and irrevocably waive any objections thereto based on lack of personal or subject matter jurisdiction, improper venue or the doctrine of forum non conveniens, as well as any right to seek to remove any such proceedings to the Federal courts of the United States of America, whether based on diversity of the parties, Federal subject matter jurisdiction or any other basis.[5]

C. Optional Additional Clauses

Having included the provisions of paragraphs A or B above, the parties may wish to add some or all of the following:

(1) *Service of Process*:

The parties agree that service of process shall be complete if timely, made by delivery a copy of same upon _____, whose address is _____, _____, New York.

(2) *Jury Trials:*

The parties to this Agreement hereby irrevocably waive the right to trial by jury.

(3) *Damages:*

In any action arising out of or related to this Agreement, the parties irrevocably waive the right to recover punitive or exemplary damages and stipulate hereby that the court shall not be empowered to award any such damages.

(4) *Discovery:*

In any action arising out of or related to this Agreement, the parties waive the right to discovery as follows:

(i) There shall be no interrogatories or requests to admit;

(ii) ***First Alternative:***

There shall be no discovery depositions except as shall be authorized by the Court upon a showing of good cause shown and, in the event such depositions are permitted by the court, there shall be no more than _____ (__) depositions per side, with no deposition to exceed _____ (__) hours in length;

Second Alternative:

There shall be no pre-trial depositions except (1) depositions of witnesses for whom there is a reasonable basis to believe they will not be able to testify at trial or for whose testimony there may be otherwise a compelling need to preserve and (2) depositions of such witnesses whose pre-trial testimony any Court seized with responsibility for adjudicating a dispute hereunder shall determine is necessary in order to avoid mani-

fest injustice or a significant waste of Court resources.[6]

(iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain and shall not include broad phrases such as "all documents directly or indirectly related to…"

(5) Enforcement of Judgments:

The parties agree that a final judgment against it in any action, suit or proceeding taken in any Court to whose jurisdiction the parties have entrusted the resolution of any dispute shall be conclusive and may be enforced in any jurisdiction in the world by suit on the judgment, a certified copy of which judgment shall be conclusive evidence thereof, or by any other means provided by law.

D. E-Disclosure

Given the special considerations that may be required with respect to any request by a party for electronic records, the parties may wish to tailor the following provisions to the circumstances of the action:

In any action arising out of or relating to this Agreement:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the parties consent and stipulate that the court shall either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

Part III: Sample New York Arbitration and ADR Clauses

International agreements most frequently contain arbitration clauses for the resolution of disputes since parties generally wish to avoid the risk of litigating in the courts of an unfamiliar jurisdiction. Arbitral institutions offer "standard" arbitration clauses for inclusion in such contracts, but the better practice is to adapt arbitration clauses to the particular circumstances of the business relationship reflected in the overall agreement. The following provisions are a starting point for the adaptation process.

A. Simple Agreement—Arbitration

Any and all disputes, controversies and claims arising out of or relating to this Agreement, including the formation, interpretation, breach or termination thereof, and also including whether the claims asserted are arbitrable, and any transactions pursuant thereto, shall be finally determined by arbitration in accordance with the [insert institutional arbitration rules]. The Tribunal shall consist of [one/three] arbitrator[s]. The place of the arbitration shall be New York, New York. The language of the arbitral proceeding, including the parties' written submissions, shall be English. Judgment upon the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof.

B. Additional Provisions—More Complex Arbitration Agreement

(1) Enforcement of Awards:

Without limiting the foregoing, the parties to this Agreement agree that any Award rendered by arbitration may be entered in the Courts of the State of New York, and the said parties hereby submit to the non-exclusive jurisdiction of the said Courts in any proceeding for the recognition and enforcement of the Award and hereby designate _____, whose address is _____, _____, New York, as each such party's agent for purposes of service of process in connection with any such proceeding.

(2) Allocation of Costs and Fees:

In any arbitration arising out of or related to this Agreement, the arbitrators may [shall] include in their award an allocation to the prevailing party of

all or part of such costs and expenses, including arbitrators' fees, attorneys' fees and expert witness fees and disbursements, as the arbitrators shall deem reasonable.

(3) *Punitive Damages*:

In any arbitration arising out of or related to this Agreement, the arbitrators are not empowered to award punitive or exemplary damages, and each party hereby waives any right to seek or recover punitive or exemplary damages with respect to any dispute resolved by arbitration.

(4) *Disclosure—Exchange of Evidence*:

The parties shall be entitled to reasonable production of relevant and material, non-privileged documents carried out expeditiously. If the parties are unable to agree on such production, the arbitral tribunal shall have the power, upon application of any party, to make all appropriate orders for production of relevant and material, non-privileged documents by any party. There shall be no other form of disclosure or discovery, including pre-hearing depositions upon oral examination [nor shall there by any disclosure or discovery requests to any third parties].

(5) *E-Discovery*:

(i) There shall be production of electronic documents only from sources used in the ordinary courses of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties shall not produce metadata, with the exception of a header fields for email correspondence.

(iii) The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

(6) *Confidentiality*:

The parties and the arbitrator(s) shall use only for the purposes of the arbitration and keep confidential all awards in the arbitration, together with all arbitral proceedings, all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party or arbitrator by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court or other judicial authority.

(7) *Provisional Measure—Interim Relief*:

The arbitrator(s) shall be empowered to grant injunctive relief, including restraining orders and orders for specific performance, in addition to monetary damages. Nothing in this Agreement shall prevent either party from seeking provisional measures, including, but not limited to, pre-award attachments and injunctive relief, from any court of competent jurisdiction and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(8) *Time Limits*:

Notwithstanding any provision to the contrary in the Rules otherwise applicable to any arbitration arising out of or related to this Agreement, the parties shall complete all necessary steps in any arbitration, including the hearing on the merits, within [12] months of the commencement of the proceeding. The arbitrator(s) shall render a final award within [30] days of the close of the hearings. The arbitrators may determine that the interest of justice or the complexities of the arbitration requires that these time limits be extended.

(9) *Multi-Step or Phased Dispute Resolution, Including Negotiation, Mediation and Arbitration*:

The parties shall promptly attempt to resolve amicably by negotiation between party representatives, with authority to settle the dispute, any dispute arising out of or related to this Agreement, including the existence, validity, termination or breach thereof. If the dispute has not been resolved within [30] calendar days after any party requested in writing negotiation under this provision, then the parties shall promptly proceed to mediation as described below.

The parties shall promptly attempt to resolve amicably by mediation any dispute, not resolved by negotiations described above, arising out of or related to this Agreement, including the existence, validity, termination or breach thereof, under the [designated] Mediation Rules in New York, New York. If the dispute has not been resolved within [60] calendar days after any party requested in writing mediation under this provision, then the parties shall promptly proceed to arbitration as described below.

All communications during the negotiation and mediation described above shall be treated as made in the course of compromise and settlement negotiations for purposes of any applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.

(10) Reasoned Awards:

Any Award hereunder shall be in writing and shall set forth the reasons for supporting the Award in writing.[7]

(11) Scope of Arbitrators' Authority

The arbitrators shall be empowered to sit as "*amiable compositeurs*" and shall [not] be bound to apply strictly the law that would otherwise govern the resolution of any dispute hereunder.[8]

Endnotes

1. This set of sample clauses substantially replicates but expands on the clauses contained in Exhibits C and D to the Report of the NYSBA Task Force on New York Law and International Matters issued on 25 June 2011. Modifications, additions and annotations are by Michael W. Galligan, Partner, Phillips Nizer LLP. The additions include sample clauses for contracts for the international sale of goods and also for trust agreements and wills; additional clauses for choice of New York courts as a forum for dispute resolution and limitation of discovery, and some additional clauses for choice of arbitral procedures. For an excellent overview and additional sample clauses, see Pollack, *Drafting an International Contract: Jurisdiction and Arbitration Clauses*, First Annual Fundamentals of International Practice at 183-199 (NYSBA CLE Dept., 2009).
2. For helpful guidance, see Drago and Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, The Metropolitan Corporate Counsel at 9 (May 2002).
3. NY UCC § 1-105 provides, under certain circumstances, that parties to a sales transaction may apply the law of a state or nation other than New York. It is unclear to what extent this provision precludes a New York court from applying a choice of law provision electing the rules of an international treaty such as the UN Convention on the International Sale of Goods, especially where a party to a transaction has its place of business in a jurisdiction that is not a party to the Convention and the Convention, pursuant to the U.S. Declaration under Article 95 of the Convention, would not otherwise apply. Parties who nonetheless wish the Convention to apply may consider adopting this clause, but may also be well advised to elect to have disputes be governed by arbitration rather than by litigation. Please note that, pursuant to NY UCC § 1-105(2), if the Convention were to serve as governing judicial law strictly by private choice, it could not supplant the applicability of NY UCC § 2-402 (rights of creditors against sold goods).

   To ensure that this clause would be respected and applied in a judicial proceeding before a New York court, it would be best if NY UCC Section 1-1.05 were to be amended to provide that parties to contracts for the sale of goods with "reasonable connections" to both New York and other domestic and national jurisdictions may elect not only that their contracts be governed by the laws of the other relevant states or nations but by the 1980 Convention on the International Sale of Goods ("CISG").

   New York law, as a state of the United States, pursuant to the Supremacy Clause of the U.S. Constitution, must incorporate the law of any treaty to which the United States is a party. When the United States ratified the CISG, it entered a Declaration, as allowed by Article 95 of the Convention, to the effect that the Convention would only be applied by the United States to contracts of sale under which all contract parties had their businesses in countries that had ratified the Convention, even if the conflicts laws of another relevant jurisdiction not itself a party to the Convention should determine that the law of a state of the United States like New York should apply. Thus, in the case of a contract of sale between a French seller and a U.S. buyer located in New York, a New York court will apply the Convention rules because both France and the United States are parties to the Convention. But, in the case of a contract of sale between a UK seller and a New York buyer, it appears that, pursuant to NY UCC Section 1-105, a New York court is not required—and may not even be permitted—to apply the Convention rules, even if the parties have expressly agreed that the law of New York *incorporating the Convention rules* should apply, because the UK is not a party to the Convention.

   It would be well if the United States withdrew its Declaration under Article 95 of the CISG (ironically introduced into the Convention at the behest of certain "command-economy" states that have now converted to market economies), in order to effect a more stable and consistent set of rules for the international sale of goods throughout the world. (Singapore, one of the few market economy states other than the United States to make a similar Declaration, is said to be about to withdraw its Declaration). But in the meantime, an amendment to the New York UCC would be very helpful.
4. For some background, see *Buying USA: Minimizing US Transfer Taxes on US property Interests of Non-US Persons*, STEP**USA** at 11-15 (June 2007).
5. On the ability of parties to waive the right of removal to federal courts, see *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997); *Archdiocese of Milwaukee v. Underwriters at Lloyd's*, 955 F. Supp. 2d. 1066 (E.D.Wis., 1997).
6. This sample clause aims to replicate to a reasonable extent the approach that courts in England might take to pre-trial depositions. See Cohen, *Voyages of Discovery: Obtaining Orders for Discovery in England in Support of Proceedings in the U.S.*, Volume 220, N.J. Lawyer at 52-55 (Feb. 2003).
7. Compare with Article 1471 of the Code of Civil Procedure of France.
8. Compare with Article 1474 of the Code of Civil Procedure of France.