

NEW YORK

Contract Law:

A Guide for Non–New York Attorneys

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 **NORTON ROSE FULBRIGHT**



NEW YORK STATE BAR ASSOCIATION

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

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

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

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

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

—G.B.

FOREWORD

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

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

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

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

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

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

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

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

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

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

ABOUT THE AUTHOR

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

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

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

Any comments you might have on this book would be welcome. Please email your comments to glen.banks@nortonrosefulbright.com.