

Contract Drafting, Analysis and Negotiation (LL.M. Students) – Spring 2021

Professors: Stephen Yamaguchi
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Office Hours: After class or by appointment

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Classroom: LAW 12

Schedule: Mondays 10:00 a.m. to 11:40 a.m. (subject to adjustment based on academic calendar)

Units: 2 Unit Course – For Grade Only (no CR/D/F option)

Course Materials: Fox, Charles M., *Working With Contracts* (2nd Edition)
Kuney, George W., *The Elements of Contract Drafting – With Questions and Clauses for Consideration* (5th Edition)
On Reserve: Stark, Tina L., *Negotiating and Drafting Contract Boilerplate*
Negotiation materials, which will be distributed prior to each negotiation session, must be brought to class.
The textbooks can be purchased online through the University Bookstore's website (www.uscbookstore.com/textbooks).

Course Description:

This class is an introductory course in drafting and analyzing contract language and negotiation principles.

During the semester you will learn about the fundamental components of business contracts and become familiar with basic contract structure, common contract provisions and boilerplate language. You will also be assigned two contract drafting exercises.

Approximately one-third of the course will cover certain fundamental principles of contract negotiation, including preparation and strategy. The focus will be on practical concepts of negotiation, rather than on theoretical or psychological analysis. There will be several mock negotiation exercises in which all students will participate.

While this class is geared towards foreign lawyers, legal professionals and students of foreign legal systems, the concepts discussed will be based on an American style of contract drafting and negotiation. Although this is an introductory course, foreign lawyers and legal professionals with practical experience should still benefit by becoming more expert in technical legal terminology and by gaining a deeper and more detailed understanding of familiar contract provisions.

Students without practical legal experience should benefit by becoming familiar with the common structure of a contract, the manner in which contractual provisions are organized, and the common language found in most contracts.

Grading:

Class Attendance – 10% of your final grade will be based on class attendance.

Class Participation – 30% of your final grade will be based on active participation in class discussion and presentations. This element is the most critical aspect of the grading.

Homework Assignments – 10% of your final grade will be based on timeliness and effort of homework assignments. No deductions will be made for incorrect answers.

Final Exam – 50% of your final grade will be based on an open book final exam.

Since the majority of learning in this course will be through class lectures and participation in exercises and discussion in class, attendance and active participation are crucial. Please join the class on time. A limited number of absences can be made up with make-up assignments.

Homework Assignments:

Analysis and Drafting of Specific Contract Provisions. Throughout the semester, seven (7) homework assignments will be issued. The list of assigned contract provisions is attached to this syllabus as Exhibit A. These assignments consist of completing an assignment grid. A blank assignment grid and a sample assignment grid are attached to this syllabus as Exhibit B and Exhibit C, respectively. The assignment grid can be completed by searching for sample language in contracts found on the Internet, in the contracts provided on Blackboard, and in sample contracts found in the textbooks. You are encouraged to work on homework assignments in small groups.

All students must be prepared to discuss their homework assignment during an in-class review. For each assignment, students whose names appear on the on-call list will lead the in-class discussion. Assignments will be announced at the end of each class and are listed in the schedule below. Assignments will not be marked and returned, but will be reviewed and discussed in class. If you wish to review an assignment individually, you may request an appointment.

Contract Drafting Exercises. During the semester you will also be given two (2) contract drafting exercises. The contract drafting exercises will not be marked and returned, but will be reviewed and discussed in class. In addition, sample answers to these drafting exercises will be posted on Blackboard. If you wish to review an assignment individually, you may request an appointment.

Unless otherwise noted, assignments and contract drafting exercises will be due no later than Friday 10:00 a.m. after the assignment or contract drafting exercise is issued and must be submitted via Blackboard. Instructions for submitting papers using Blackboard are attached to this syllabus as Exhibit D.

Weekly Topics. Class sessions will be comprised of the following:

1. Lectures
2. Review of Homework Assignments
3. Negotiation Exercises

In addition, the following topics will be covered in lectures. The following is a general plan of topics covered and homework and reading assignments. It will be modified during the semester depending on the pace of discussion.

Week 1 – August 23 (Monday)

Course Introduction

READING ASSIGNMENT: Kuney pp. 1-29, 31-43, 197-212

Week 2 – August 30 (Monday)

The Basics of Contracts

Basic Requirements for a Contract

Why Enter Into a Written Contract?

Basic Issues to Consider Before Drafting and Negotiating

Top of the Contract

Bottom of the Contract

HOMEWORK: Assignment No. 1

READING ASSIGNMENT: Kuney pp. 63-76; Fox pp. 1-34

Week 3 – September 13 (Monday)

Recitals / Definitions

Attachments / Exhibits / Schedules

Making Changes to Drafts

Emphasizing Major Points

HOMEWORK: Assignment No. 2; Prepare for Negotiation Exercise No. 1

READING ASSIGNMENT: Kuney pp. 45-62; Fox pp. 35-66

Week 4 – September 20 (Monday)

Duties / Obligations / Rights

Negotiation Exercise No. 1 (Parker v. Gibson)

Negotiating Styles

HOMEWORK: Assignment No. 3

READING ASSIGNMENT: Fox pp. 67-83

Week 5 – September 27 (Monday)

Important Concepts and Styles in Negotiating

Zone of Reasonable Opportunities (ZORO)

Best Alternative Reasonable Transaction (BART)

Underlying Interests, Factors, and Options (“UFO” Model)

HOMEWORK: Assignment No. 4; Prepare for Negotiation Exercise No. 2

READING ASSIGNMENT: Kuney pp. 177-187; Fox pp. 84-117

Week 6 – October 4 (Monday)

Negotiation Exercise No. 2 (Tendley Contract)

Term

HOMEWORK: Assignment No. 5

READING ASSIGNMENT: Fox 118-142

Week 7 – October 11 (Monday)

Termination

Rights/Obligations Following Termination

HOMEWORK: Contract Drafting Exercise No. 1

READING ASSIGNMENT: Kuney pp. 95-134; Fox pp. 143-170

Week 8 – October 18 (Monday)

Representations & Warranties

HOMEWORK: Prepare for Negotiation Exercise No. 3

READING ASSIGNMENT: Kuney pp. 87-93; Fox pp. 171-219

Week 9 – October 25 (Monday)

Negotiation Exercise No. 3 (Wiley Contract)

Representations & Warranties and Covenants

HOMEWORK: Assignment No. 6

READING ASSIGNMENT: Kuney pp. 135-175; Fox pp. 220-244

Week 10 – November 1 (Monday)

Remedies for Breach

HOMEWORK: Contract Drafting Exercise No. 2

READING ASSIGNMENT: Kuney pp. 213-221; Fox pp. 245-265

Week 11 – November 8 (Monday)

Methods to Ensure Ability to Pay

Swords and Shields (Offensive and Defensive Contract Language)

HOMEWORK: Assignment No. 7

READING ASSIGNMENT: Kuney pp. 189-196

Week 12 – November 15 (Monday)

Overview of Litigation

Critical Provisions in Litigation

Alternative Dispute Resolution (“ADR”) Procedures

READING ASSIGNMENT: Article – Contracts Illustrated

Week 13 – November 22 (Monday)

Review of Contract Drafting Exercises

Negotiation Debriefing

Week 14 – November 29 (Monday)

Catch Up on Class Contents Final

Exam Review

HOMEWORK ASSIGNMENTS

ASSIGNMENT	ASSIGNED CONTRACT PROVISION	TYPE OF CONTRACT	ON-CALL (GROUP A)	ON-CALL (GROUP B)
1	Counterparts – Facsimile	Loan Agreement	Lender	Borrower
1	Assignment – Delegation	Services Agreement	Provider	Customer
1	Successors and Assigns	Lease Agreement	Landlord / Lessor	Tenant / Lessee
2	Third Party Beneficiaries	Construction Agreement	Contractor	Customer
2	Attorney’s Fees	Licensing Agreement	Licensor	Licensee
2	Force Majeure	Supply Agreement	Supplier	Customer
3	Transaction Costs	Merger Agreement	Seller	Buyer
3	Confidentiality	Employment Agreement	Employer	Employee
3	Further Assurances	Asset Purchase Agreement	Seller	Buyer
4	Entire Agreement – Merger	Services Agreement	Provider	Customer
4	Compliance with Laws (Covenant)	Asset Purchase Agreement	Seller	Buyer
4	Disclaimer of Warranties	Agreement for Purchase of Goods	Seller	Buyer
4	Notices	Asset Purchase Agreement	Seller	Buyer
5	Enforceability – Blue lining	Employment Agreement	Employer	Employee
5	Severability	Services Agreement	Provider	Customer
5	Survival	Merger Agreement	Seller	Buyer
5	Waiver of Jury Trial	Agreement for Purchase of Goods	Seller	Buyer
6	Meet and Confer	Employment Agreement	Employer	Employee
6	Mediation	Employment Agreement	Employer	Employee
6	Arbitration	Asset Purchase Agreement	Seller	Buyer
6	Venue – Jurisdiction	Loan Agreement	Lender	Borrower

Exhibit A

7	Governing Law	Supply Agreement	Supplier	Customer
7	Liquidated Damages	Construction Agreement	Contractor	Customer
7	Irreparable Harm	Licensing Agreement	Licensor	Licensee
7	No Consequential Damages	Supply Agreement	Supplier	Customer
Make-Up (1)	Time is of the Essence	Construction Agreement	Contractor	Customer
Make-Up (1)	Controlling Provisions / Conflict of Provisions	Services Agreement	Provider	Customer
Make-Up (1)	Right of First Negotiation	Lease Agreement	Landlord / Lessor	Tenant / Lessee
Make-Up (1)	Termination	Merger Agreement	Seller	Buyer
Make-Up (2)	Number and Gender	Loan Agreement	Lender	Borrower
Make-Up (2)	Most Favored Nations	Supply Agreement	Supplier	Customer
Make-Up (2)	Right of First Refusal	Shareholders' Agreement	Company	Shareholder
Make-Up (2)	Relationship of the Parties	Services Agreement	Provider	Customer

ASSIGNMENT GRID

Title of Provision	
Example of Actual Contract Language (sample provision)	
Description of Provision. What does it do?	
How would this provision be helpful and who does it benefit? Give one example.	
How would this provision be harmful and who does it harm? Give one example.	
How could you modify the example provision to make it less harmful? What are some of the ways you can modify the language?	

**ASSIGNMENT GRID
(SAMPLE)**

Title of Provision	Counterparts and Facsimile
Example of Actual Contract Language (sample provision)	<p>This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.</p> <p>The parties to this agreement agree that facsimile signatures of this Agreement shall be deemed a valid and binding execution of this Agreement.</p>
Description of Provision. What does it do?	<p>This provision allows for the execution and signing of the agreement through multiple counterparts, or duplicate copies of the original. These counterparts or faxes will have the binding power of the original. Each of the counterparts is deemed an original, but all of them together constitute one agreement. When parties consent to this provision, the parties need not sign “one original contract” signed by all parties. It permits or forbids a contract to be executed with each side signing its own copy, rather than signing a single copy. Often respective copies are faxed back and forth, with each side retaining a copy of the signed document.</p>
How would this provision be helpful and who does it benefit? Give one example.	<p>To facilitate commercial transactions by permitting the execution of contracts between parties in different locations and on different signature page.</p> <p>Clarifies legal status of counterparts by indicating in the contract which document shall become the original, and in case there are more than one originals, how they shall be valued.</p> <p>Facsimile – Provides for effectiveness of facsimile copies at closing.</p>
How would this provision be harmful and who does it harm? Give one example.	<p>It may cause disputes between parties regarding which version is the original agreement.</p> <p>It is difficult to verify that the counterparts which not be pieced together in fact came from the same parchment.</p>
<p>How could you modify the example provision to make it less harmful?</p> <p>What are some of the ways you can modify the language?</p>	<p>This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. <u>Original counterparts must be received within 5 business days of execution, the failure of which shall void this Agreement.</u></p> <p>The parties to this Agreement agree that facsimile signatures of this Agreement shall be deemed a valid and binding execution of this Agreement <u>so long as original executed pages are exchanged with 5 business days of execution of this Agreement.</u></p>

INSTRUCTIONS FOR SUBMITTING PAPERS USING BLACKBOARD

**Contract Drafting, Analysis and Negotiation
Professor Stephen A. Yamaguchi / Professor Nicolai M. Schwarz-Gondek**

All of your assignments must be submitted electronically through *Blackboard*. **Neither e-mail nor hard copy submissions will be accepted.** Please note that *Blackboard* provides an accurate time-stamping feature, which allows us to determine when your assignment was submitted.

1. **Submitting Assignments through Blackboard.** To submit assignments through *Blackboard*, please use the following procedure:

i. Go to the *Blackboard* site for this class and click on “Assignments” in the column on the left side of the course home page.

ii. Click on the name of the assignment you are submitting. For example, for the assignment due Friday, September 4, you will click on “Assignment No. 1.” **To submit a test document by 10:00 a.m. on Friday, August 27, as explained further below, click on the folder labeled “Test Assignment.”**

iii. Next to “Attach File,” click on “Browse My Computer.” In the window that appears, find the file on your computer.

iv. Double-click on the file, or select it and click the “Open” or “Upload” button. The name of your file should now appear next to “Attached Files.”

v. Click the “Submit” button. You will see a “Submission History” page that shows the date and time when your assignment was submitted. **IMPORTANT: The Submission History page will say that the “assignment is complete” even if you have not attached a file. To verify that you properly attached your document, go to the “Review Submission History” part of the page, which includes a section “Submission Materials.” You will be able to see the name of your document under “Attached Files” if you properly attached it.** Click “OK” to exit the assignment submission area.

2. **Submitting a Sample Document on Blackboard.** To ensure that you understand the e-submission procedure prior to handing in your first assignment, you will be required to submit a sample document to the “Test Assignment” folder using the procedure outlined under 1 above **no later than 10:00 a.m. on Friday, August 27.** The sample document can be any document in Word format. It does not have to include any particular information, but it should not be completely blank.

Please let us know immediately if you have any questions about this procedure, and e-mail us immediately if you run into any problems using it.

STATEMENT ON ACADEMIC CONDUCT AND SUPPORT SYSTEMS

Academic Conduct:

Plagiarism – presenting someone else’s ideas as your own, either verbatim or recast in your own words – is a serious academic offense with serious consequences. Please familiarize yourself with the discussion of plagiarism in SCampus in Part B, Section 11, “Behavior Violating University Standards,” <https://policy.usc.edu/files/2020/07/SCampus-Part-B-2.pdf>. Other forms of academic dishonesty are equally unacceptable.

Support Systems:

COVID-19 Emergency Assistance Funds for Students

<https://we-are.usc.edu/faqs/faq-support-funds/>

USC has several resources available for students. Eligible students can apply for assistance from the COVID-19 Emergency Assistance Fund and the USC Student Basic Needs Department (<https://studentbasicneeds.usc.edu/>).

This webpage answers FAQs for each resource and describes important university resources for low-income students:

- 1) Food Insecurity (<https://studentbasicneeds.usc.edu/resources/food-insecurity/>)
- 2) Housing Insecurity (<https://studentbasicneeds.usc.edu/resources/housing-insecurity/>)
- 3) Tech Assistance (<https://studentbasicneeds.usc.edu/resources/technology-assistance/>)

Student Counseling Services (SCS) – (213) 740-7711 – 24/7 on call

Free and confidential mental health treatment for students, including short-term psychotherapy, group counseling, stress fitness workshops, and crisis intervention. <https://studenthealth.usc.edu/counseling/>.

See also this guide for Gould students to facilitate access to mental health resources on campus: <https://gould.usc.edu/assets/docs/directory/Mental-Health-Services-at-USC.pdf>

National Suicide Prevention Lifeline – 1 (800) 273-8255

Provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week. www.suicidepreventionlifeline.org

Relationship and Sexual Violence Prevention Services (RSVP) – (213) 740-4900 – 24/7 on call

Free and confidential therapy services, workshops, and training for situations related to gender-based harm. <https://studenthealth.usc.edu/sexual-assault/>

Sexual Assault Resource Center

For more information about how to get help or help a survivor, rights, reporting options, and additional resources, visit the website: <https://eeotix.usc.edu/>

Office of Equity and Diversity (OED)/Title IX Compliance – (213) 740-5086

Works with faculty, staff, visitors, applicants, and students around issues of protected class. <https://eeotix.usc.edu/>

Bias Assessment Response and Support

Incidents of bias, hate crimes, and micro-aggressions need to be reported allowing for appropriate

investigation and response. <https://eeotix.usc.edu/>

The Office of Disability Services and Programs

Provides certification for students with disabilities and helps arrange relevant accommodations. <https://dsp.usc.edu/>

Student Support and Advocacy

Campus Support and Information is where members of the Trojan Family go to seek support for themselves, for others, and for the community. It is a one-stop-shop for care and support, troubleshooting and advocacy. <https://cwci.usc.edu/campus-support-and-intervention/>

If you are concerned about a fellow Trojan challenged with personal difficulties, you can file a report through Trojans Care for Trojans. The form can be found at: <https://campussupport.usc.edu/trojans-care-4-trojans/>.

Diversity at USC

Information on events, programs and training, the Diversity Task Force (including representatives for each school), chronology, participation, and various resources for students. <https://diversity.usc.edu/>

Gould-specific information can be found at <https://gould.usc.edu/about/race-equity/> (Law, Race and Equity page) and <https://gould.usc.edu/students/diversity/>. Students can submit anonymous EDI-related comments/complaints through the law portal: <https://mylaw2.usc.edu/about/contact/anonymous-comments>

USC Emergency Information

Provides safety and other updates, including ways in which instruction will be continued if an officially declared emergency makes travel to campus infeasible. <https://emergency.usc.edu/>

USC Department of Public Safety – UPC: (213) 740-4321 – HSC: (323) 442-1000 – 24-hour emergency or to report a crime.

Provides overall safety to USC community. <https://dps.usc.edu/>