

USC Gould

School of Law

Contract Drafting, Analysis and Negotiation (LL.M. Students)
Fall 2022

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| Professors: | Mehdi Sinaki |
| Office Hours: | By appointment |
| Email: | msinaki@law.usc.edu; msinaki@mrlp.com |
| Classroom: | CPA 207 |
| Schedule: | Wednesday 5:00 p.m. to 6:50 p.m. |
| Units: | 2 Unit Course – For Grade or CR/D/F |
| Course Materials: | Fox, Charles M., <i>Working with Contracts</i> (2 nd Edition) Kuney, George W., <i>The Elements of Contract Drafting – With Questions and Clauses for Consideration</i> (5 th Edition) Negotiation materials, which will be distributed prior to each negotiation session, must be brought to class. Recommended/Optional. <i>Getting to Yes: Negotiating Agreement Without Giving In</i> 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, standard contract provisions, and boilerplate language. You will also be assigned 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. In addition, there will be several mock negotiation exercises in which all students will participate.

Although this is an introductory course, foreign lawyers and legal professionals with practical experience should still benefit by becoming more experts 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 discussions and presentations. This element is the most critical aspect of the grading.
- Homework Assignments:* 10% of your final grade will be based on the 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 a final exam.

Homework Assignments:

Analysis and Drafting of Specific Contract Provisions. Throughout the semester, homework assignments will be issued. The list of assigned contract provisions is attached to this syllabus. These assignments consist of completing an assignment grid. A blank assignment grid and a sample assignment grid are attached to this syllabus. The assignment grid can be completed by searching for sample language in contracts found on the Internet 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 assignments during an in-class review. 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. You may request an appointment if you wish to review an assignment individually.

Contract Drafting Exercises. You will also be given two (2) contract drafting exercises during the semester. 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. You may request an appointment if you wish to review an assignment individually. Unless otherwise noted, assignments and contract drafting exercises will be due no later than Sunday at 12:00 p.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.

Weekly Topics. Class sessions will be comprised of the following: (1) Lectures, (2) Review of Homework Assignments, and (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.

Course Schedule

Week 1.

Course Introduction

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

Week 2.

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.

Recitals / Definitions

Attachments / Exhibits / Schedules Making Changes to Drafts Emphasizing Major Points

HOMEWORK: Assignment No. 2;

Prepare for and Conduct Negotiation Exercise No. 1

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

Week 4.

Duties / Obligations / Rights

Negotiation Exercise No. 1 (Parker v. Gibson) – Debriefing Negotiating Styles

HOMEWORK: Assignment No. 3

READING ASSIGNMENT: Fox pp. 67-83

Week 5.

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 and Conduct Negotiation Exercise No. 2

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

Week 6.

Negotiation Exercise No. 2 (Tendley Contract) – Debriefing Term

HOMEWORK: Assignment No. 5

READING ASSIGNMENT: Fox 118-142

Week 7.

Termination

Rights/Obligations Following Termination

HOMEWORK: Contract Drafting Exercise No. 1

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

Week 8.

Representations & Warranties

HOMEWORK: Prepare for and Conduct Negotiation Exercise No. 3

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

Week 9.

Negotiation Exercise No. 3 (Wiley Contract) – Debriefing Representations & Warranties and Covenants

HOMEWORK: Assignment No. 6

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

Week 10.

Remedies for Breach

HOMEWORK: Contract Drafting Exercise No. 2

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

Week 11.

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.

Overview of Litigation

Critical Provisions in Litigation

Alternative Dispute Resolution (“ADR”) Procedures

READING ASSIGNMENT: Article – Contracts Illustrated

Week 13.

Review of Contract Drafting Exercises Negotiation Debriefing

Week 14.

Catch Up on Class Contents Final Exam Review

HOMEWORK ASSIGNMENTS

| ASSIGNMENT | ASSIGNED CONTRACT PROVISION | TYPE OF CONTRACT | (GROUP A) | (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 – Bluelining | 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 |
| 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.</p> <p>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 are not pieced together in fact came from the same parchment.</p> |
| How could you modify the example provision to make it less harmful? What are some of the ways you can modify the language? | <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><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 Mehdi Sinaki

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 Sunday, August 28, you will click on “Assignment No. 1.” **To submit a test document by 12:00 p.m. on Sunday, August 28, 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 12:00 p.m. on Sunday, August 28.** 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 me 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: Food Insecurity (<https://studentbasicneeds.usc.edu/resources/food-insecurity/>) Housing Insecurity (<https://studentbasicneeds.usc.edu/resources/housing-insecurity/>) 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/>