

USC Gould

School of Law

**ARBITRATION CLAUSE
DRAFTING
LAW 822
FALL, 2024 SYLLABUS**

Units: One (1)

Term: Fall, 2024

Day—Time: Tuesdays – 6:00 PM to 8:00 PM (through Oct. 8)

Location: Room 118

Instructor: Thomas H. Petrides

Office Hours: By Appointment

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(310) 245-7462

Course Description

Alternative dispute resolution (“ADR”) is an efficient and pragmatic means to address and resolve disputes. ADR should be carefully considered and utilized by transactional lawyers to be part of a transaction contract to govern potential disputes, by employment lawyers to govern employment disputes, by commercial lawyers to govern standard form consumer contracts, and by litigation attorneys to govern actual disputes. When negotiating and crafting an ADR agreement, it is important to understand that merely using basic or generic ADR language may not be sufficient to meet the desired goals of your client. Instead, drafting an ADR clause should be an opportunity to design and define a process particularly suiting the context and needs of the parties. Careful lawyers should identify and draft ADR clauses recognizing not only anticipated, but the potential for unanticipated, consequences of a contemplated transaction or actual dispute and the nature of the parties and their relationship. This course teaches students essential ADR skills to identify, negotiate and draft ADR clauses specific to transactions or agreements, employment relationships, consumer relationships and pending disputes, as a method for resolving actual disputes without having to litigate the dispute in state or federal court and in lieu of conducting a court or jury trial.

Learning Outcomes

This one unit course explains the required essentials for drafting ADR agreements and teaches basic lawyering skills for the negotiation, design and drafting process of such ADR clauses.

Students will obtain practical (hands-on) skills in every phase of the arbitration clause drafting process.

By the end of the course, students will be expected to: (1) understand and articulate the general purpose of Alternative Dispute Resolution (“ADR”), including Arbitration and Mediation, and their role in our legal processes; (2) know and understand, and be able to draft, a legally compliant ADR clause or agreement; and (3) know what is and is not an enforceable agreement to arbitrate.

Prerequisite(s); co-requisite(s): None

Required Materials

Cases, statutes and materials will be posted or distributed in class.

Description and Assessment of Assignments

Students will learn the practical and legally required approaches to arbitration clause drafting, as a means of alternative dispute resolution. Students will be assigned reading, to be discussed in class and then applied in practical (hands-on) experiences/settings. Students will be assessed based on in-class exercises and assignments.

Class Attendance, Participation and Behavior

Class discussion will commence with the assumption that everyone is thoroughly familiar with the assigned materials and is prepared to participate in discussions in a professional manner.

Regular and punctual attendance is expected of all students. Please note that all communication and entertainment devices such as cell phones, iPods, and iPads are to be turned off and kept off throughout the class session. However, students are permitted to take notes on laptops during class. Students are expected to conduct themselves professionally at all times and are not permitted to record any classes, for any reason, at any time.

Credit and Grading

One unit -- CR/D/F (“Pass/Fail”); option of number grade for LLM students

Grading Criteria

There will be several written exercises and in-class assignments, typically paired with another student or students at the “opposing side”. There will also be a final in-class assignment, to be conducted on an individual basis, to identify potential issues of concern in a sample arbitration agreement. These exercises, together with class attendance and active and meaningful contributions to class discussion, will provide the basis for determining pass-fail for the class.

Use of AI Text Generation Tools In This Course Is Not Permitted

Except where expressly permitted by the instructor, all work submitted for this course, including any exams and papers, must be completed by you, personally. Use of artificial intelligence (AI) tools to generate text as part of preparing your work is strictly prohibited. Submission or presentation of material generated by AI, including summarizing, paraphrasing, or editing such material, will be considered a violation of Academic Integrity. For additional information, please refer to the Academic Integrity and Plagiarism portions of the Gould Student Handbook and the USC Student Handbook.

Course Evaluations

Students will have an opportunity to complete a course evaluation at the end of the course and at the mid-way point. Time will be allocated in class to prepare the evaluation. Student are encouraged to complete the evaluation, which will be greatly appreciated, because we value student feedback and will use it to improve the course.

Course Outline

Class # 1 (8/27/2024): Introduction to Clause Drafting

- The Origins of Alternative Dispute Resolution:
 - Was King Solomon an Arbitrator, Mediator, or Judge?
- The Dispute Resolution Landscape
 - Settlement Negotiations
 - Mediation
 - Court-appointed mediation
 - Private mediation
 - “Med-arb”
 - Court-conducted settlement conference
 - Contrast mediation and settlement conference
 - Early neutral evaluation (ENE)
 - Contrast ENE, settlement conference, mediation
 - Arbitration
 - Non-binding arbitration; compare to mediation (mediator proposal)
 - Court-connected arbitration
 - Binding private arbitration

- International arbitration
 - Litigation/trial
 - Contrast arbitration and trial
- Prior to the Federal Arbitration Act of 1925, most courts would not compel the parties to private arbitration.
- The Federal Arbitration Act established a national policy as set forth in the statute requiring the courts to consider and enforce binding arbitration agreements entered into between private parties pursuant to the terms of the agreement to arbitrate.
- Despite nearly 100 years of existence of the FAA, California state courts are often reluctant to enforce binding arbitration agreements, especially in the employment and consumer settings, and will often look for ways to deny arbitration if the agreement to arbitrate does not comply with the requirements of California law.

Class # 2 (9/03/2024): Analysis of the Federal Arbitration Act (FAA)

- Basic terms and provisions of the FAA
- Decisions regarding motions to compel arbitration under the FAA
- Decisions regarding defenses to arbitration
- Class Action Waivers
 - In class exercise comparing typical arbitration agreements to the FAA.

Class # 3 (9/10/2024): Drafting Pre-Dispute Clauses (General Terms)

- A. Deconstructing an ADR Clause:
 - Parties to Arbitration Agreement
 - Scope of Arbitration
 - Institutional v. Non-Administered Arbitration
 - Choice of Arbitration Rules
 - Sole Arbitrator v. Tripartite Arbitration Panel
 - Delegation Clause
 - Governing Law
 - Venue
 - Discovery
 - Fees and Costs
 - Court/Appellate Review
 - Enforcement of Arbitration Award
 - Employment Arbitrations (legal differences)
 - Consumer Arbitrations (legal differences)
 - “Bells and whistles” [binding agreement; modification; severability; successors and assigns; waiver of court/jury trial; electronic signature is binding, etc.]
- B. Arbitration Clause Builders – Institutional Arbitration Providers (AAA, etc.)

Class # 4 (9/17/2024): Drafting Pre-Dispute Clauses in a Transaction Agreement

- A. Ways in Which Parties may Direct Process Choices
 - Pre-dispute transactional examples
 - Process mediation (“guided choices”)
 - Dispute design as a concept

- B. Written Exercise (Negotiate and Draft an Arbitration Clause for a Transaction)
 - Teams of two will negotiate and draft a “term sheet” with another team for the dispute resolution provision to be included in a transactional document
 - Debrief in class
 - Finalize your clause

Class # 5 (9/24/2024): Drafting Pre-Dispute Clauses in the Employment and Consumer Context

- Special Protections Available to Employees
 - Armendariz v. Foundation Health Care, 24 Cal. 4th 83 (2000)
 - Unconscionable agreements will not be enforced, but it requires both procedural and substantive unconscionability not to be enforced
 - Effect on Class Action Waivers
 - Effect on PAGA disputes

- Written Exercise (Draft an Arbitration Agreement for an Employer)
 - Teams of two will draft an arbitration agreement in the employment setting that protects the employer but does not overreach so as to be unenforceable
 - Debrief in class
 - Finalize your agreement

Class # 6 (10/01/2024): Additional ADR Clause Drafting Provisions

- Delegation Clause - Deciding whether an Arbitrator or a Judge should decide preliminary (“gateway”) issues of enforceability of the arbitration agreement
- Drafting arbitration clauses for Consumer Agreements with class action waivers
- Drafting Post-Dispute ADR Agreements for Submitting a Dispute to ADR in the absence of a prior arbitration agreement
- Other miscellaneous arbitration provisions

Class # 7 (10/08/2023): Review ADR Clause Drafting Requirements and Final Assignment

- Review of ADR Clause Drafting Requirements to Comply with the FAA

- Final In-Class Assignment – Review and edit an ADR Agreement to have it comply with the FAA and applicable law

Statement on Academic Conduct and Support Systems

Academic Integrity:

The University of Southern California is a learning community committed to developing successful scholars and researchers dedicated to the pursuit of knowledge and the dissemination of ideas. Academic misconduct, which includes any act of dishonesty in the production or submission of academic work, compromises the integrity of the person who commits the act and can impugn the perceived integrity of the entire university community. It stands in opposition to the university's mission to research, educate, and contribute productively to our community and the world.

All students are expected to submit assignments that represent their own original work, and that have been prepared specifically for the course or section for which they have been submitted. You may not submit work written by others or “recycle” work prepared for other courses without obtaining written permission from the instructor(s).

Other violations of academic integrity include, but are not limited to, cheating, plagiarism, fabrication (e.g., falsifying data), collusion, knowingly assisting others in acts of academic dishonesty, and any act that gains or is intended to gain an unfair academic advantage.

The impact of academic dishonesty is far-reaching and is considered a serious offense against the university. All incidences of academic misconduct will be reported to the Office of Academic Integrity and could result in outcomes such as failure on the assignment, failure in the course, suspension, or even expulsion from the university.

For more information about academic integrity see [the student handbook](#) or the [Office of Academic Integrity's website](#), and university policies on [Research and Scholarship Misconduct](#).

Please ask your instructor if you are unsure what constitutes unauthorized assistance on an exam or assignment, or what information requires citation and/or attribution.

Students and Disability Accommodations:

USC welcomes students with disabilities into all of the University's educational programs. [The Office of Student Accessibility Services](#) (OSAS) is responsible for the determination of appropriate accommodations for students who encounter disability-related barriers. Once a student has completed the OSAS process (registration, initial appointment, and submitted documentation) and accommodations are determined to be reasonable and appropriate, a Letter of Accommodation (LOA) will be available to generate for each course. The LOA must be emailed to the Student Affairs office, and to ensure anonymity where possible, the Student Affairs office will communicate with faculty as needed. For classroom accommodations, the student can work directly with faculty to determine how best to implement the modification. This should be done as early in the semester as possible as accommodations are not retroactive. More information can be found at osas.usc.edu. You may contact OSAS at (213) 740-0776 or via email

at osasfrontdesk@usc.edu. You can also contact Student Affairs for more information about accommodations in the law school (studentcare@law.usc.edu).

Support Systems:

Counseling and Mental Health - (213) 740-9355 – 24/7 on call

Free and confidential mental health treatment for students, including short-term psychotherapy, group counseling, stress fitness workshops, and crisis intervention.

988 Suicide and Crisis Lifeline - 988 for both calls and text messages – 24/7 on call

The 988 Suicide and Crisis Lifeline (formerly known as the National Suicide Prevention Lifeline) provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week, across the United States. The Lifeline is comprised of a national network of over 200 local crisis centers, combining custom local care and resources with national standards and best practices. The new, shorter phone number makes it easier for people to remember and access mental health crisis services (though the previous 1 (800) 273-8255 number will continue to function indefinitely) and represents a continued commitment to those in crisis.

Relationship and Sexual Violence Prevention Services (RSVP) - (213) 740-9355(WELL) – 24/7 on call

Free and confidential therapy services, workshops, and training for situations related to gender- and power-based harm (including sexual assault, intimate partner violence, and stalking).

Office for Equity, Equal Opportunity, and Title IX (EEO-TIX) - (213) 740-5086

Information about how to get help or help someone affected by harassment or discrimination, rights of protected classes, reporting options, and additional resources for students, faculty, staff, visitors, and applicants.

Reporting Incidents of Bias or Harassment - (213) 740-5086 or (213) 821-8298

Avenue to report incidents of bias, hate crimes, and microaggressions to the Office for Equity, Equal Opportunity, and Title for appropriate investigation, supportive measures, and response.

The Office of Student Accessibility Services (OSAS) - (213) 740-0776

OSAS ensures equal access for students with disabilities through providing academic accommodations and auxiliary aids in accordance with federal laws and university policy.

USC Campus Support and Intervention - (213) 740-0411

Assists students and families in resolving complex personal, financial, and academic issues adversely affecting their success as a student.

Diversity, Equity and Inclusion - (213) 740-2101

Information on events, programs and training, the Provost's Diversity and Inclusion Council, Diversity Liaisons for each academic school, chronology, participation, and various resources for students.

USC Emergency - UPC: (213) 740-4321, HSC: (323) 442-1000 – 24/7 on call

Emergency assistance and avenue to report a crime. Latest updates regarding safety, including ways in which instruction will be continued if an officially declared emergency makes travel to campus infeasible.

[USC Department of Public Safety](#) - UPC: (213) 740-6000, HSC: (323) 442-1200 – 24/7 on call
Non-emergency assistance or information.

[Office of the Ombuds](#) - (213) 821-9556 (UPC) / (323-442-0382 (HSC)

A safe and confidential place to share your USC-related issues with a University Ombuds who will work with you to explore options or paths to manage your concern.

[Occupational Therapy Faculty Practice](#) - (323) 442-2850 or otfp@med.usc.edu

Confidential Lifestyle Redesign services for USC students to support health promoting habits and routines that enhance quality of life and academic performance.