

COMMERCIAL CONTRACT DRAFTING***Responsible Faculty Instructor:***

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Assistant Professor

Credits: 4

Credits Type: Law

Cross-registration: N/A

Pre-requisites: Law of Contract I & II

COURSE DESCRIPTION (COURSE VISION):

This course has been offered in Jindal Global Law School since 2015 and has been ideated and developed over the past decade by Prof. Manasi Kumar.

We live in an increasingly shrinking world, with commercial transactions permeating almost every element of our daily lives. Odds are that each one of the law students will be faced with the task of reading and interpreting a contract at some point in the very first year of their practice. As a legal practitioner, our clients expect us to advise them every step of the way from formulating and drafting an agreement through to the litigation of rights and obligations under the agreement. A mere conceptual understanding of contracts is insufficient. A practitioner must understand the significance of the contractual language used, the layout of a contract, the importance of so-called “boilerplate terms”, and the various laws and conventions that could apply to international commercial agreements.

In addition to working with the Indian Contract Act, 1872, and the Indian Sale of Goods Act, 1930, the course will also expose the students to UK and US contract principles, and international conventions such as the UN Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC), and the Principles of European Contract Law (PECL).

TEACHING METHODOLOGY:

This course will focus on applying the general principles learned through Contracts I and Contracts II courses. It will build on students’ existing knowledge of fundamental principles to hone their understanding of how these principles interact and work together in a contract. The students will perform specific writing exercises to develop these skills, and also to engage in creative problem-solving. These exercises will further solidify the students’ ability to draft and interpret contracts.

INTENDED LEARNING OUTCOMES:

Course Learning Outcomes	Intended Weightage in %	Teaching and Learning Activities
A. Demonstrate knowledge	50%	

Course Learning Outcomes	Intended Weightage in %	Teaching and Learning Activities
and understanding of the relevant considerations of drafting practice and be able to discuss the effects of various drafting choices.		A. Readings related to relevant drafting tips, cases, statutes, and other legal materials. Students are expected to read the wide range of materials included in the Course Manual.
B. Apply drafting practices in a consistent and thoughtful manner.	30%	B. Students will acquire basic knowledge on common drafting challenges, and various drafting tips to address these challenges. Students will learn how to critically and carefully evaluate contracts in order to identify uncertainty of language and devise alternate drafting solutions. Lectures are especially important for this component and students are expected to attend all lectures.
C. Demonstrate knowledge and understanding of different harmonization texts' treatment of some common contract challenges, and the drafting techniques that address such challenges.	20%	C. Most sections covered in this course will have a corresponding workshop where students will put into practice the concepts explored and get immediate in-class feedback by way of class discussions.

READING LIST (upto 10 select readings):

The following are in addition to the relevant provisions of Indian Contract Act and seminal cases used to de construct the provisions.

1. Adams, Kenneth. A Manual of Style for Contract Drafting (2nd Ed.).
2. Stark, Tina. Drafting Contracts. Austin: Aspen Publishers, 2007.
3. Manasi Kumar and Nishtha Pant. *Construing the Written Warranty*. 43(2) Liverpool Law Review (2022) (redacted, pp. 3-10, 17-21).
4. Goh Yihan, *Contractual Interpretation in Indian Evidence Act Jurisdictions: Compatibility with Modern Contextual Approach*. 13(1) Oxford University Commonwealth Law Journal 17 (2013)
5. Kumar, Manasi and Mysoor, Poorna, *The Duty of Good Faith*, in Foundations of Indian Contract Law
6. Bortolotti, Fabio. Drafting and Negotiating International Commercial Contracts: A Practical Guide. Paris: International Chamber of Commerce, 2008
7. Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Sixth Edition) (KluwerLaw International 2021)
8. E Allan Farnsworth, "Meaning" in the Law of Contracts' (1967) 76 Yale LJ

9. Adams, Kenneth, *A lesson in drafting contracts: What’s up with ‘representations and warranties’?* 15(2) Business Law Today, Nov/Dec 2005.
10. Stark, Tina, *Nonbinding opinion.* 15(3) Business Law Today, Jan/Feb 2006. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886357

WEEKLY READING PLAN (WEEKLY OUTLINE):

A weekly plan is provided below:

MODULES	WEEK(S)
<p>MODULE 1: <u>THE STRUCTURE OF A CONTRACT</u></p> <p>In the first part of our course, we will go through the general structure of contracts, paying special attention to the preliminary sections – preamble, recitals, and definitions. The scope, design, and requirement of the terms are essential for correct interpretation.</p> <p>Questions: Must the contract be in writing? What should be the format? Is the purpose of the contract relevant?</p>	1
<p>MODULE 2: <u>Covenants and conditions</u></p> <p>Every contract contains promises to do or to abstain from doing something. These promises are called covenants. They create a duty to perform. Sometimes, a condition is placed upon a party’s duty to perform. Conditions provide that a particular situation or circumstance must exist before a particular contractual consequence will follow. Where a condition is placed upon a party’s obligation to perform, upon occurrence of that condition, that party is obligated to perform, and conversely, if such a circumstance does not exist, the duty to perform is not triggered.</p> <p>In this section, we will explore covenants, and the resultants rights and obligations, as well as conditions, paying special attention to conditions to covenants.</p> <p>Questions:</p> <ul style="list-style-type: none"> ○ How would you differentiate between a covenant and a condition? ○ How are the rights of the parties affected? ○ How is a breach of a covenant different from a failure of condition in the context of remedies? 	2
<p>MODULE 3: <u>REPRESENTATIONS & WARRANTIES</u></p> <p>A representation is a statement of fact of past or present fact, made as of a moment in time. A warranty is either a promise that a representation is true, or a promise that a present fact will remain true into the future. In this section, we will explore the differences</p>	3 and 4

<p>between the two, paying special attention to the remedies that flow from a false representation or warranty.</p> <p>Questions:</p> <ul style="list-style-type: none"> ○ How does one identify a representation and a warranty? What is the difference between them? ○ Should representations and warranties be given for all situations? ○ How do you draft representations and warranties for your client? 	
<p style="text-align: center;">MODULE 4: <u>DISCRETIONARY AUTHORITY & DECLARATIONS</u></p> <p>Sometimes the parties agree to provide one with discretion as to whether to act or not in a given situation. This is called discretionary authority. Declarations are statements of fact or policy that govern the contract, that are not intended to induce a party into a contract. They are the catch-all, i.e. statements that are not covenants, conditions, representations warranties, or provisions containing discretionary authority.</p> <p>Questions:</p> <ul style="list-style-type: none"> ○ When do you choose to grant discretionary authority to a party? ○ What is an implied grant of discretionary authority? 	5
<p style="text-align: center;">MODULE 5: <u>TERMINATION AND REMEDIES</u></p> <p>The end of a contract may come in various ways. The following are just a few: (1) the parties perform their respective obligations, and are discharged from all duties under the contract; (2) the parties simply walk away from the contract, (3) the death of a party, (4) a legally significant change in circumstances; (5) a party’s wrongful conduct in the formation of a contract; or (6) there is a breach committed by a party, entitling the aggrieved party to remedies.</p> <p>In this section, we will explore various termination provisions that may be included in a contract, including the remedies that may be provided for breach.</p> <p>Questions:</p> <ul style="list-style-type: none"> ○ Would you consider termination clauses to be standard, i.e. one-size-fits-all, or would you customize them to the commercial arrangement at hand? ○ What is the difference between damages and liquidated damages? Which does your client prefer? ○ What is the difference between liquidated damages and limitations of liability? Which does your client prefer? 	6
<p style="text-align: center;">MODULE 6: <u>SPECIFIC CONTRACT LANGUAGE</u></p>	7

<p>As an attorney, precision in the use of your words is an utmost priority. Several words commonly used in contracts, and which may appear innocuous to a layperson, can have great significance for your contract. We will visit a few of the usual suspects.</p> <p>Questions: What are some of the common instances of uncertainty in a contract?</p>	
<p style="text-align: center;">MODULE 7: <u>BOILERPLATE PROVISIONS</u></p> <p>Every contract has a list of standard provisions put towards the end of the contract. Some of these provisions have become so commonplace that they are called, simply, “boilerplate”. However, it is crucial for the contract drafter to be aware of the significance of these provisions, because they can be a trap for the unwary.</p> <p>Questions: Keep considering the various provisions we discuss in this section, i.e. clauses regarding Notice, Assignment, Severability, Arbitration (Alternative Dispute Resolution), Jurisdiction, Choice of Law, Indemnity, Costs and Attorney Fees, Waiver, Force Majeure, Entire Agreement. Do these clauses need contract-specific tailoring or they can simply be copied from any other contract?</p>	<p>8 to 10</p>
<p style="text-align: center;">MODULE 8: <u>NEGOTIATION</u></p> <p>We will spend discuss generally how contract negotiations take place, highlighting some of the key negotiating tactics used by parties.</p> <p>It is important to take note of a new method of contracting that is also gaining momentum – relational or collaborative contracting – which is yielding some striking initial results. We will discuss its implications for contract negotiations and drafting.</p>	<p>11</p>
<p style="text-align: center;">MODULE 9: <u>CONTRACT CONSTRUCTION IN INDIA</u></p> <p>Contract interpretation is the process by which the factfinder (whether the court, an arbitrator or other adjudicator) ascertains the meanings of the words used, i.e. the text, to glean the parties’ common intention. However, the text is rarely self-explanatory and is usually required to be understood within the context in which it is used. The courts have developed various tools to help them resolve such situations, and while drafting any contract, attorneys should be cognizant of these various canons of interpretation used by courts.</p> <p>It is a bit more controversial when the parties fail to address an issue that is material to the feasibility of the commercial transaction. In such instances, the factfinder may permit ever more context to imply certain terms into the contract as clearly intended by the parties, although not stated. It is meaningless to speak of ‘interpretation’ here, as the parties’ intentions have not been manifested by way of</p>	<p>12</p>

<p>words or symbols. Yet, their intention is being gleaned through the text in conjunction with the context of the transaction and the parties’ interactions. This tussle between the text and context is an on-going tension in contract law that throws up questions about the scope of the context that is permitted to be considered in ascertaining the parties’ intention.</p> <p>The combination of interpretation with such implication of terms, and other means of assigning meaning, has been referred to by the broader umbrella term of ‘contract construction.’</p>	
<p style="text-align: center;"><u>MODULE 10: CURRENT CHALLENGES IN CONTRACT LAW AND DOCTRINE</u></p> <p>The classical understanding of a contract is that it is that which the parties have consented to - no more and no less. However, modern contracting practices may throw into question whether the parties have truly negotiated and consented to all that is written. A readily recognized example is within the area of consumer contracts, where the consumer’s proclivity to not read the contract (simply clicking ‘I agree’ to access the services, or purchasing goods without reading the fine print) is so well accepted that legislatures around the world have intervened to enact consumer protection statutes. Our own Consumer Protection Act, 2019 is one such legislative intervention. Such concerns also lie in commercial transactions, even between sophisticated parties who are heavily represented by lawyers, as all contracts have unspoken elements or under-scrutinized elements. This may be especially true in transactions that include a multitude of parties and a multitude of contracts, with an extensive use of templates. With such possible disparity between the text and the parties’ understanding of the agreement, modern jurists ask – what is the contract?</p>	<p style="text-align: center;">13 and 14</p>
<p style="text-align: center;">REVISION WEEK</p>	<p style="text-align: center;">Week 15</p>