**Advanced Contracts**

*Fall 2020*

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Course Description: Each course segment will consider in depth a foundational tenet of contract law, but applied to a new and modern fact pattern. For example, does an agreement to exchange one kidney for another (as in the increasingly common kidney paired donation) involve consideration? Is it void as against public policy? What is the obligation of airlines, hotels, and third-party providers (such as Expedia) to honor “mistake fares” in an age when technology allows potentially millions of purchases before the offeror discovers the error?

We’ll begin each segment with a modern fact pattern in which the law is unclear or in flux. We’ll read the classic contracts cases and scholarly articles on point, with application to the new fact pattern in mind. Are the old doctrines still a good fit for the new world? Are the public policy rationales behind the law still relevant? What new considerations are present?

The fact patterns are designed to hit on the essential elements of contract law, but force the students into roles of problems-solvers, policymakers, or judges considering real-life, current disputes. There will be substantial writing, teamwork, and oral presentations.

**Topics and Readings**

**Week 1 (August 27)**: *Introduction and Background: A Look Back At Dominant Contract Law Theories*

(1) Douglas Baird, *Reconstructing Contracts,* “Introduction: The Young Astronomer”

(2) Fried, Charles, “Contract as Promise Thirty Years On”, *Suffolk University Law Review*, Vol. 45, Issue 3 (2012), pp. 961-978

(3) Eric Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?," 112 *Yale Law Journal* 829 (2003).

**Week 2 (Sept 3):** *Impossibly, Impracticability, Frustration of Purpose*

\***Asynchronous content – listen in advance of class**: Podcast interview with Eric Posner on impossibility, impracticability, force majeure and related international law doctrines at the *Clauses & Controversies* podcast. Available from  [iTunes](https://podcasts.apple.com/us/podcast/clauses-controversies/id1528208049),  [Soundcloud](https://soundcloud.com/clauses-controversies), and [Overcast](https://overcast.fm/itunes1528208049/clauses-controversies)

(1) Eisenberg, Melvin A. "Impossibility, impracticability, and frustration." Journal of Legal Analysis 1.1 (2009): 207-261.

(2) Goldberg, Victor P. "Excuse Doctrine: The Eisenberg Uncertainty Principle." J. Legal Analysis 2 (2010): 359.

(3) Eisenberg, Melvin A. "Impossibility, Impracticability, and Frustration—Professor Goldberg Constructs an Imaginary Article, Attributes it to Me, and then Criticizes it." Journal of Legal Analysis 2.1 (2010): 383-396.

**Week 3 (Sept 10):** *Covid and* *Force majeure in corporate transactions*

*\*\* Professor Jennejohn will join our class discussion via zoom, so please be prepared to ask him questions about the paper*

Jennejohn, Matthew and Nyarko, Julian and Talley, Eric L., *COVID-19 as a Force Majeure in Corporate Transactions* (April 1, 2020). Columbia Law and Economics Working Paper No. 625, Available at SSRN: [https://ssrn.com/abstract=3577701](https://ssrn.com/abstract%3D3577701) or <http://dx.doi.org/10.2139/ssrn.357770>

**Week 4 (Sept 17):** *Current litigation and disputes regarding business slowdowns and Covid-19*

*\*\* We’ll be joined by Gabrielle S. Brussel****,*** *Current Executive Vice President, Business Development & Properties, and former General Counsel, JCDecaux North America*

(1) Coordinated Street Furniture Program Agreement Between The City of Chicago and JCDecaux Chicago, LLC, focus on Section 12.5, “Excusable Events and Schedule and Fee Adjustments”

(2) Douglas Baird, *Reconstructing Contracts*, “Excuse,” pp. 102-109.

(3) In re Hitz Rest. Grp. (Bankr. N.D. Ill. June 2, 2020)

(4) Lantino v. Clay LLC (S.D.N.Y. May 8, 2020)

**Week 5 (Sept 24):** *The Social Cost of Contract*

*\*\* Professors Hwang & Hoffman will join our class discussion via zoom, so please be prepared to ask them questions about the paper*

(1) \***Asynchronous content – listen in advance of class**: Promises, Promises: Hanford v. Connecticut Fair Association, <https://open.spotify.com/episode/3Prx9tOLdiCKAQ3WZw76rX> (also available on iTunes)

(2) Hoffman, David A. and Hwang, Cathy, The Social Cost of Contract (June 25, 2020). Columbia Law Review, Forthcoming, U of Penn, Inst for Law & Econ Research Paper No. 20-42, Available at SSRN: [https://ssrn.com/abstract=3635128](https://ssrn.com/abstract%3D3635128) or [http://dx.doi.org/10.2139/ssrn.3635128](https://dx.doi.org/10.2139/ssrn.3635128)

**Week 6 (Oct 1):** *Force majeure and impracticability in historical perspective: Pandemics, legal orders, 9/11, and natural disasters*

*\*\* We’ll be joined by Lee C. Buchheit, who retired in 2019 after a 43-year career with Cleary Gottlieb Steen & Hamilton LLP.*

1. Lee C. Buchheit & Elizabeth Karpinski, Grenada’s Innovations, Journal of International Banking and Regulation, Issue 4 (2006), available at <https://www.iiiglobal.org/sites/default/files/LeeBuccheit.pdf>
2. Robin Wigglesworth and Colby Smith, ‘Hurricane clause’ in bonds helps countries struck by disaster, Financial Times (June 4 2019)
3. *Phelps v. School District No. 109, Wayne County*, 302 Ill. 193, 198 (1922)
4. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp*., 532 F.2d 957, 996 (5th Cir. 1976) (**read only the pages not crossed out**)
5. *Bush v. Protravel Int’l, Inc*., 192 Misc.2d 743, 750 (N.Y. Civ. Ct. 2002)

**Week 7 (Oct 8):** *Presentations of First Assignment*

**\*\*\*We’ll need to modify the logistics of this, in our “new normal” world on zoom. Let’s discuss in class.**

**Week 8 (Oct 15):** *Public Policy*

(1) Friedman, David Adam. "Bringing order to contracts against public policy." *Fla. St. UL Rev.* 39 (2011): 563.

(2) United States. National Organ Transplant Act: Public Law 98-507. US Statut Large. 1984 Oct 19;98:2339-48. PMID: 11660818. **Title III,** **Prohibition of Organ Purchases**

(3) Charlie W. Norwood Living Organ Donation Act, Public Law 110-144;42 U.S.C. 201, 273b, 274e and 301 **(**2007)

(4) Review the NKR/UMMC contract, with a view toward possible tensions with law or public policy

**Week 9 (Oct 22):** *Understanding the Transaction*

**\*\*Visit from Dr. Michael Rees,** Founding Director of The Alliance For Paired Donation; Director of Renal Transplantation, University of Toledo Medical Center; Professor of Urology, University of Toledo Medical Center

(1) Review the NKR/UMMC contract, with a view toward questions you’d like to ask Dr. Rees about the business operations of the contracting parties, the mechanics of kidney exchange and matching algorithms, the contract design, and related matters (not about the law)

(2) Watch a short video (I’ll post a link to Sakai or email you the link) explaining kidney paired donation and kidney chains

**Week 10 (Oct 29):** *Moral Judgment in breach of contract*

\*\**We’ll be joined via zoom by* ***Professor Wilkinson-Ryan (Penn Law)****, so please be prepared to ask her questions about the papers*

(1) Wilkinson‐Ryan, Tess, and Jonathan Baron. "[Moral judgment and moral heuristics in breach of contract](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1772&=&context=faculty_scholarship&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C34%2526q%253Dtess%252Bwilkinson%252Bryan%252Bjonathan%252Bbaron%2526oq%253D#search=%22tess%20wilkinson%20ryan%20jonathan%20baron%22)." *Journal of Empirical Legal Studies* 6.2 (2009): 405-423

(2) Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 Mich. L. Rev. 633 (2010).
Available at: <https://repository.law.umich.edu/mlr/vol108/iss5/1>

**Week 11 (Nov 5):** *Liquidated Damages*

\*\**We’ll be joined via zoom by* ***Professor Scott (Columbia Law)****, so please be prepared to ask him questions about the papers*

(1) Goetz, Charles J., and Robert E. Scott. "Liquidated damages, penalties and the just compensation principle: Some notes on an enforcement model and a theory of efficient breach." *Columbia Law Review* 77.4 (1977): 554-594.

(2) Scott & Triantis, Embedded Options and the Case Against Compensation in Contract Law, 104 Colum. L. Rev.1428 (2004).

(2) Review the NKR/UMMC contract, with a view toward liquidated damages and possible penalty issues

**Week 12 (Nov 12):** *Specific Performance*

1. Eisenberg, Theodore, and Geoffrey P. Miller. "Damages versus specific performance: lessons from commercial contracts." *Journal of Empirical Legal Studies* 12.1 (2015): 29-69.
2. Review the NKR/UMMC contract, with a view toward possible specific performance issues

**Week 13 (Nov 19):** *Presentations of Final Assignment*

First Assignment: Force Majeure and Covid-19 (25% of final grade)

The recent outbreak of COVID-19 has significantly affected most businesses and individuals at an unprecedented level. As a result of the global pandemic, consumers have dramatically reduced spending, supply chains have been disrupted, and many businesses have temporarily closed (either voluntarily or by governmental mandate) or reduced operations.

These events are increasingly impacting the ability of companies to meet their contractual obligations, prompting a flood of litigation. It is important to understand the concept of force majeure, material adverse change clauses, and related contractual defenses that could provide a basis to excuse performance.

Half of you are associates at Lemme, Outta, This & Associates (hereafter, “LemmeOut”),] which represents a number of businesses seeking to avoid or delay performance under their contracts. The other half of you are associates at the law firm of StickToIt, ByGod & Associates (hereafter, “StickToIt”),] which represents a number of businesses seeking to enforce contractual claims against counterparties claiming that their obligations are excused by Covid-19.

Although each contract varies in its particulars, the following clause is typical:

**Force Majeure.** Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting from acts beyond its reasonable control including, without limitation, acts of God, acts of war or terrorism, shortage of supply, breakdowns or malfunctions, interruptions or malfunction of computer facilities, or loss of data due to power failures or mechanical difficulties with information storage or retrieval systems, labor difficulties or civil unrest. Notwithstanding the foregoing, in the event of such an occurrence, each party agrees to make a good faith effort to perform its obligations hereunder.

Your firm has asked you to prepare a memo on the current and possible future contract claims, using the above clause for reference. Specifically, you have been asked to prepare a memorandum to the partners on possible claims of excused performance based on force majeure and the common law doctrines of impossibility/impracticability and frustration, detailing the basis for the claims, possible defenses, and the probabilities of success.

Because suits are expected in nearly every jurisdiction, do not apply the law of any particular state. Instead, apply the general common law of contracts that you have learned in this and other classes.

Your task is to prepare a memorandum outlining answers to these and, potentially, other questions to the partners of either LemmeOut or StickToIt, with a particular focus on either potential claims or potential defenses, depending on whether you work for LemmeOut or StickToIt, respectively. You should also include normative/policy arguments that the partners could use in subsequent litigation about **why** the court should rule for your client, such as the difficulty (or not) of defining foreseeability in the case of Covid, and arguments about what is or is not in the public interest, including public health and economic considerations.

The memorandum should be no longer than 7 pages (1.5 spacing), with a one-page executive summary or abstract at the front (making it 8 pages in total), using Times New Roman 12 font, 1-inch margins at the top and bottom of the page, and 1.25 inch margins on the sides.

Teams may be comprised of no more than three individuals. I will allow you to choose which firm you work for, but because the class must be evenly divided we may have to use some sort of lottery system if too many teams select the same firm. Needless to say, your grade does not depend on which firm you work for – it is the strength and creativity of your analysis that matters, not which side you represent.

You will have to do a presentation on October 8, revise your paper based on feedback from the class, and turn in your memo on or before 5 pm on October 12. Although the exact amount of presentation time will ultimately depend on how many groups are giving presentations, my hope is to allow 10-15 minutes for each presentation, followed by Q&A. We’ll adjust those estimates based on the total number of presentations in the coming weeks. Hopefully I can figure out how to allow you to upload your assignment directly to Sakai.

Second Assignment: Remedies in a nontraditional setting (50% of final grade)

Half of you represent the University of Maryland Medical Center (UMMC) and half of you represent KidneyLife Foundation Inc. d/b/a "National Kidney Registry", ("NKR") in connection with a breach of contract claim by NKR against UMMC. For purposes of this assignment, assume that UMMC admits that it did not make payments according to the contract schedule and that the issues presented are thus the amount and type of remedy, if any, and the validity of the damages provision and the contract as a whole. You have been provided with a copy of the complaint and the contract in question. Pay particular attention to paragraphs I. 3 and 4 and the Standard Reimbursements in Part IV. The contract is very difficult to follow, both because (IMHO) it is badly written and because the business of these two entities, as well as the subject matter of the contract, are highly unusual. We will spend class time going through it, though, and hopefully will be joined by the CEO of a transplant organization that competes with NKR to help us better understand the facts.

Your task is to draft a memo to either NKR or UMMC, detailing whether the contract is enforceable and why or why not and, if so, what sort of remedy, if any, NKR is entitled to. You are free to choose which organization you work for, subject to the usual caveat that I need a roughly equal number of teams on each side.

The memorandum should be no longer than 15 pages (1.5 spacing), with a one page executive summary at the front (making it 16 pages in total), using Times New Roman 12 font, 1-inch margins at the top and bottom of the page, and 1.25 inch margins on the sides.

Teams may be comprised of no more than three individuals.

You will have to upload a presentation to Sakai by 11:55 pm on Sunday, November 15, which we will all watch in advance of the final class. Your presentation should be no more than 15 minutes in length. The final day of class will be dedicated to discussion and Q&A. After you incorporate the feedback, turn in your final assignments prior to 11:55 pm on Monday November 30. Assignments and presentations can be posted directly to Sakai.