ARCHITECTING DEALS: A FRAMEWORK OF PRIVATE ORDERINGS

What is a transaction? What are its characteristics? What do transactional or “deal” lawyers do? How can lawyers successfully design and structure a transaction? These are some of the questions that this course will consider in introducing students to the fundamentals of how lawyers “architect deals” — both to best represent their clients’ interests and to increase the likelihood of a transaction’s success.

The aim of the course is to equip students with the essential tools and techniques that lawyers apply in a wide variety of commercial contexts to evaluate, structure and execute a commercial transaction, irrespective of the industry or market.

The course will be taught in two parts. The first reflects on the general nature of transactions and examines the attributes and unique role of the transactional lawyer. The second explores the elements of a theory or framework of “private orderings”. The framework covers the economic and business considerations that drive the analysis of which contracting principles should apply and how risks and benefits are allocated between the parties. The course explores how the framework of private orderings can apply to guide the assessment of transactions and the choice of contracting constructs and regimes.

Short case studies will be used throughout and references to substantive law will be drawn from common law jurisdictions. Students are expected to contribute actively in discussing the case studies and reading materials during the seminars.

Contact Hours: 39 hours (13, three-hour seminars)

Mode of Assessment: 25% Seminar Performance / Contribution – 25% Written Assignment; Mid/Term Exam (week 7) – 50% Take Home Exam

SEMINAR 1: Thinking Like a Lawyer v. Thinking like a Deal Lawyer

• Karl S. Okamoto, Teaching Transactional Lawyering, 1 Drexel Law Review 69, 69-87 (2009);
• V. Fleischer, Deals: Bringing Corporate Transactions into the Law School Classroom, 2002 Colum. Bus. L. Rev. 475, 475-490 (2002);

SEMINARS 2 & 3: The Multiple Roles and Hats of a Deal Lawyer

• Stephen L. Schwarz, Explaining the Value of Transactional Lawyering, 12 Stan. J.L. Bus. & Fin. 486 (2007);

SEMINAR 4: The Multiple Roles, Shapes and Purposes of a Contract

• Kaplow & Shavell, Contracting, pp. 2-11.

SEMINARS 5-11: Theory of Private Orderings
Students will explore how common sets of business considerations and economic challenges drive the analysis of which contractual principles should apply in a given transaction to deal with each of those problems.

A. Adverse Selection:
Klausner, “Ex Ante” Information Asymmetry—Adverse Selection

B. Moral Hazard
Shavell, Contracting, Appendix 1: Information Theory and Bargaining;
Klausner, Moral Hazard and Incentive Contracts

C. Consideration/Money
• Design of Money Flows
• Credit

D. Relational/Long Term Contracts
Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089 (1981), pp. 1089-95; 1100-06; 1011; and 1130-34.
Robert B. Thompson, Value Creation by Lawyers within Relational Contracts and in Noisy Environments, 74 Or. L. Rev 315-320 (1995);

E. Control
• Decision-making
• Triggers
• Operational control

F. **Standards**
  • Specific v. generic
  • Investment in crafting standards v. likelihood of litigation/costs

G. **Exogenous Risks**
   Klausner, Price Adjustments in Long-Term Contracts

H. **Asset Specificity**
   Klausner, Governance Mechanisms in Long-Term Contracts (2 cases)

I. **Other Risk/Business Considerations**
   • Enterprise Architecture
   • Tax
   • Regulatory

J. **Exit Strategies**
   Tina Stark, Drafting Contracts, pp. 191-207.
   • Friendly
   • Unfriendly

K. **Dispute Resolution**
   • Arbitration v. Litigation
   • Venue
   • Money flows
   • Enforcement Considerations
**SEMINAR 12:** Challenges to Architecting a Deal

Gilson & Mnookin, Foreword: Business Lawyers and Value Creation for Clients, 74 Or. L. Rev. 1 (1995);
- “Difficult” clients or clients that do not take “ownership” of the deal;
- Who is the “client”
- Negotiation process is time consuming/expensive negates potential surplus or leads to no consummation of transaction.
- “Negotiator’s dilemma”—more focused on maximizing slice of pie rather than enlarging the pie (result of information asymmetry—need to share info, but afraid will lose leverage or be exploited)
- Agent/Principal misalignment
- Psychological Barriers – overconfidence, loss aversion, heuristics
- Reactive devaluation of other party’s concessions

**SEMINAR 13:** Summary Lecture