

Washington & Lee University  
School of Law

---

## CONTRACTS & LEGAL WRITING

Fall 2017, Section 3

4 credits

M, Tu 9-10:25 am

W 9-9:55

Classroom G

Legal Writing

2 credits

W 12:30-1:25 (occasional, only when specified)

Classroom B

Professor Mark A. Drumbl

Sydney Lewis Hall #4004

School of Law

Tel: 540-458-8531

drumblm@wlu.edu

### OUTLINE

This course exposes you to the law governing voluntary commercial exchanges. Such exchanges are referred to as “contracts.” Every person’s ability to freely contract with others grounds the individual liberty and equal opportunity that underpin civil society. Accordingly, exploring the practical and philosophical limits to freedom of contract is a thread that runs throughout our course.

Over the next few months, you will learn how a valid contract is made. We will then consider what happens when one party to a contract does not properly comply with its terms – called a “breach.” In the event of a breach, what recourse does the law offer? We will then discuss the principles of contract interpretation to which courts resort in order to avoid breach and to try to keep both parties, who may dispute as to the meaning of certain terms, bound together in a mutually beneficial arrangement. We will then explore what is meant by performing a contract and then review when performance fails and a breach results, thereby permitting remedies to be triggered. The course then shifts gears and considers when courts will not enforce an otherwise validly completed contract. This brings us into a broader discussion of fairness, morality, and economic efficiency. We will then look at what happens when a contract cannot be completed because of events beyond the control or contemplation of the parties. We will also consider the doctrine of

promissory estoppel – where informalized commitments or incomplete bargains may be enforced.

Contracts will be taught on a conceptual basis. What does this mean? Simple: the major thing you will learn from this course is how to think like a contracts lawyer and how to identify and competently approach a contracts law issue. Because the course is taught at a conceptual level, you will be reading cases and articles from all over the United States as well as from foreign jurisdictions. In order to reflect the inexorable globalization of legal practice (particularly commercial law practice), international law will routinely constitute a reference point of this course. Moreover, we will consistently include modern commercial practices, e-commerce, cyber-business, and analyze the intersection between technology and the law.

Your grade for contracts will be evaluated by a final exam. The quality of your class participation also will count. For the examination, you are responsible for all of the readings together with all issues covered in class. There will be no evaluation of your performance by any exam other than the final exam. The exam will involve essay (fact-spotting) questions.

I may adjust your grade up or down one step in the grading pattern (*i.e.* from B to B+ or from B- to C+) based on your participation and performance in class.

This course also serves as the foundation for your Legal Writing class. Accordingly, we will complete several pieces of objective, *predictive* writing. These include a case brief, a client letter, a mock exam, and two office memoranda – one closed, one open – plus a rewrite of the open memorandum. I will discuss both of the office memoranda with you in a conference session after I return them to you. The mock mid-term will not be assessed, or individually discussed, but we will review it together as a group in class.

Legal Writing will be graded separately according to the following matrix (some of the assignments will involve word limits rather than page limits, but the page approximations are provided below)):

Case Brief:	1 page	5%
Client Letter:	2 pages	15%
Closed Office Memorandum:	5 pages	20%
Mock-Mid Term	3 pages	No grade
Open Office Memorandum:	7 pages	25%
Open Office Memorandum Rewrite:	7 pages	25%
Burks Scholar Bluebooking Grade:		10%

Submission deadlines for each assignment are fixed. A late submission will result in a grade reduction of 10% per day of delay.

**Your required reading materials are:**

- ◆ Randy E. Barnett and Nathan Oman, *CONTRACTS: CASES AND DOCTRINE*, Sixth Edition (Aspen Law and Business) (2017).
- ◆ E. Allan Farnsworth et al., *SELECTIONS FOR CONTRACTS* (Foundation Press) (2016).
- ◆ Mark Drumbl, *CONTRACTS: SUPPLEMENTAL MATERIALS* (2017).
- ◆ Neumann, Margolis, and Stanchi, *LEGAL REASONING AND LEGAL WRITING* (Eighth Edition, 2017, Aspen)

I may occasionally distribute additional material in class.

**Recommended reading materials (these are *purely optional*) are:**

- ◆ Marvin A. Chirelstein, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* [provides a helpful, brief overview of the law of contracts].
- ◆ E. Allan Farnsworth, *CONTRACTS* [the most comprehensive treatise on contract law, provides detailed explanations and summaries of all areas of the law which can help clarify difficulties].
- ◆ Claude D. Rohwer and Anthony M. Skroki, *CONTRACTS NUTSHELL*

**IMPORTANT PROCEDURES**

Contracts is a challenging course. It is critically important not to fall behind in your reading. I will distribute a detailed schedule of all of the issues covered in our course, the dates on which these are to be covered, as well as the specific readings for that date. **READINGS LISTED FOR A SPECIFIC DATE MUST BE COMPLETED PRIOR TO THE CLASS HELD ON THAT DATE.**

Class does not involve my lecturing and your taking notes. It involves a dialogue between us. This means active participation on your part. As a result, during class I will randomly call upon you to expose the facts of the cases you will have read for that date, discuss the holdings, comment on the development of the law, and share your thoughts with your colleagues. This will comprise part of your class performance evaluation.

Any student with a disability seeking accommodation should approach the Dean of Students.

Contracts is a fascinating area of the law. It is all the more interesting when undertaken in a lively and spirited class. Discussion is welcome. No question is too silly to ask. Discussion is healthy only when it is based on respect. Respectful discussion does not take the form of belittling your classmates (or anyone, for the matter).

All my classes are recorded. Pursuant to recommendation by the university's legal counsel, the following policies apply:

*Law classes are recorded, subject to the permission of the professor, and are available through a password protected web portal. These recordings are in the Windows Media Video format available as wmv steaming files and playable on both PC and MAC computers with the appropriate plugin (you should be prompted for the plugin which will be downloaded to you from our server) installed. This is the preferred method for class recording in the Law School.*

*Students may not make an audio or video recording of a class without receipt of written permission from the instructor in advance of the class. Subject to such receipt and the terms of the permission, students may use such recording only for class purposes, may not distribute the recording, and are expected to destroy any recording at the conclusion of the course.*

I wish you a warm welcome to W & L and look forward to spending a rewarding semester with you. I hope it will begin a rewarding career in the law.

## **SYLLABUS**

### **A.**

### **INTRODUCTION TO CONTRACT LAW**

August 21

Introduction to Contract Law  
Review of Syllabus, Course Outline, and Course Expectations  
What Kinds of Promises Will the Law Enforce?  
Regret, Changing Your Mind  
**Barnett, pp. 14-16**  
***Baby M case, Johnson v. Calvert* (to be distributed)**  
Surrogacy article from [NY Times](#)

August 22

Introduction to Contract Law  
What Kinds of Promises Will the Law Enforce?  
Regret, Changing Your Mind

**Barnett pp. 1047-1062**

**Skim Farnsworth et al., pp. 622-628 (Baby M contract)**

Common Law Legal Method

Regimes Governing Contract Law

- ◆ The common law
- ◆ The Restatement (Second)
- ◆ The Uniform Commercial Code (UCC)
- ◆ Vienna Convention on the International Sale of Goods (CISG)
- ◆ UNIDROIT Principles of International Commercial Contracts

**Farnsworth et al: Compilers' Note to UCC (pp. 315-316); UCC §2-102, §2-105(1); Compilers' Note to the U.N. Convention on Contracts for the International Sale of Goods (CISG) (pp. 509-510); CISG Arts. 1(1), 2, 3, 4, 6, and 10; Compilers' Note to the UNIDROIT Principles (pp. 535-538); Handout**

**B.**

**REACHING AN AGREEMENT: OFFER, ACCEPTANCE, AND CONSIDERATION**

August 23

Reaching an Agreement

Objective Theory of Assent

**Barnett, pp. 243-256, 262-263**

**Problem on p. 248 (in class)**

**CISG, Art. 8**

August 23 (*immediately after class*) Legal Writing

Briefing a Case

**Barnett, pp. 9-11**

**Neumann, pp. 3-7, 23-25**

**FIRST ASSIGNMENT: Case-Brief of *Newman v. Schiff*, Supplemental Materials, pp. 1-7  
1 page DUE Friday, August 25 at noon by email to [priced@wlu.edu](mailto:priced@wlu.edu)**

August 28

NO CLASS

August 29

NO CLASS

August 30

Reaching an Agreement

The Offer

Preliminary Negotiations

**Barnett, pp. 263-266, 269-274**

Written Memorial and Revocation

**Barnett, pp. 274-278, 295-302**

*Texaco v. Pennzoil* case (to be distributed)

CISG, Art. 16, UNIDROIT, Art. 2.1.4

Watch Video:

<http://www.youtube.com/watch?v=ZdackF2H7Qc>

August 30

Legal Writing

Discussion of Briefs

Acceptance by Promise, Counter-Offers

**Barnett, pp. 302-309**

*Morrison v. Thielke*, 155 So. 2d 889 (1963)

CISG, Art. 18(2)

Neumann pp. 39-40, 183-188, 397-400

**SECOND ASSIGNMENT: Client Letter – Mailbox Rule**

**2 pages, DUE Monday, September 4 at 9am in hard copy**

September 4

Reaching an Agreement

The Acceptance by Performance – Unilateral Contracts

Acceptance by Silence

**Barnett, pp. 309-313, 322**

**Supplemental Materials, pp. 8-11**

**Restatement ¶30, ¶32, ¶54, ¶69**

September 5

Reaching an Agreement

E-Commerce and Mutual Assent

**Barnett, pp. 335-353**

September 6

Legal Writing

**\*\*\*\*8:00 am Rm G.**

Discussion of Client Letters

**Neumann, pp. 49-56, 105-110, 159-165, 201-219, 385-391**

**THIRD ASSIGNMENT: Closed Office Memorandum: Unilateral Contracts, Offers, Advertisements, Acceptance by Performance**

**5 pages, DUE Monday, September 18 at 9am in hard copy**

September 6	<u>Reaching an Agreement</u> What is Consideration? <b>Barnett, pp. 579-583, 586-602, 638-640, 642-645</b>
September 11	<u>Reaching an Agreement</u> Moral Consideration <b>Barnett, pp. 604-607, 615-619</b> Pre-existing Promises as Consideration <b>Barnett, pp. 622, 623-627, 632-637</b> <b>Restatement ¶86</b> <i>Optional read:</i> Barnett pp. 608-612, 627-632
September 12	NO CLASS
September 13	NO CLASS
<u>C.</u>	<b><u>WHEN THINGS GO WRONG: DAMAGES, BREACH, AND REMEDIES</u></b>
September 18	<u>When Things Go Wrong</u> Expectation, Reliance and Restitution Damage Interests <b>Barnett, pp. 34-44</b> <b>Problem on pp. 43-44 (in-class only)</b>
September 19	<u>When Things Go Wrong</u> Expectation, Reliance and Restitution Damage Interests <b>Barnett, pp. 50-57, 67-68</b> <b><i>Tongish</i> case (to be distributed)</b> <i>Skim Supplemental Materials, pp. 12-26</i>
September 20	<u>When Things Go Wrong</u> Limitations to Damages – Remoteness/Foreseeability <b>Barnett, pp. 68-72, 80-87</b> <b>CISG, Art. 74; UNIDROIT, Art. 7.4.4</b> <b>Supplemental Materials, pp. 27-28</b>
September 25	<u>When Things Go Wrong</u> Limitations to Damages – Certainty of Harm <b>Barnett, pp. 87-93, 100-103</b> <b><i>Mistletoe</i> case (to be distributed)</b> <i>(optional: for a discussion of race and boxing and its impact on the Dempsey case, read pp. 94-98)</i>

September 26                      When Things Go Wrong  
Limitations to Damages – Avoidability of Harm, Lost Volume Rule  
**Barnett, pp. 110-113, 120-129, 131-138**  
**CISG, Art. 77**

September 27                      When Things Go Wrong  
Can Parties Contract Around the Damages Rules?  
Express Limitations and Penalty Clauses  
**Barnett, pp. 138-152**  
Arbitration  
**Barnett, pp. 1027-1034, 1040-1047**

**CONFERENCES: Tuesday 26<sup>th</sup>, Wednesday 27<sup>th</sup>, Thursday 28<sup>th</sup>, and Friday 29<sup>th</sup>**

**FALL BREAK**

October 4                          NO CLASS  
But read [‘Arbitration Everywhere, Stacking the Deck of Justice’](#)

October 9                          When Things Go Wrong  
Alternatives to Damages as a Remedy  
Courts of Equity and the Common Law  
Specific Performance and Injunctions  
Land, Goods, and Personal Services  
**Barnett, pp. 153-172**  
**CISG, Arts. 28, 46; UNIDROIT, Arts. 7.2.2, 7.2.3, 7.2.4**

October 10                        When Things Go Wrong  
Alternatives to Damages as a Remedy  
Specific Performance and Injunctions  
Personal Services  
**Barnett, pp. 172-176, 193-205**

October 11                        When Things Go Wrong  
Alternatives to Damages as a Remedy  
Restitution  
**Barnett, pp. 205-226**

**FOURTH ASSIGNMENT: MOCK-MID TERM on DAMAGES**  
**(3 pages, notes and structure, no grade, reviewed collectively in class on October 18)**



October 16                      When Things Go Wrong  
Alternatives to Damages as a Remedy  
Restitution  
**Supplemental Materials, pp. 41-46**  
**CISG, Art. 81(2)**  
Alternatives to Damages as a Remedy  
The Intersection of Contract and Tort  
Intentional Interference with Contractual Performance  
**Barnett, pp. 226-240**

October 17                      When Things Go Wrong  
Alternative Remedies  
Promissory Estoppel  
**Barnett, pp. 685-686, 750-753, 770-781**  
**Supplemental Materials, pp. 89-105**  
**Restatement ¶90**

**D.**                                      **CONTRACT INTERPRETATION: MAKING AGREEMENTS**  
**WORK SO AS TO AVOID BREACH**

October 18                      Contract Interpretation  
Ambiguity: Subjective or Objective Interpretation?  
**Barnett, pp. 359-360, 371-385**  
**UCC § 1-303**  
Filling Gaps  
**Barnett, pp. 391-392, 394-398, UCC §2-306**

October 18                      Legal Writing  
Review of Mock Mid-Term  
**Neumann pp. 67-79, 81-85, 93-96**  
**Revisit readings for class of September 27.**

**FIFTH ASSIGNMENT: Open Memorandum, arbitration and punitive damages**  
**7 pages, DUE Wednesday November 1 in hard copy at 9am**

October 23                      NO CLASS

October 24	<u>Contract Interpretation</u> Contracts of Adhesion <b>Barnett, pp. 408-419</b> Conflicting Writings: The “Battle of the Forms” <b>Barnett, pp. 419-433</b> <b>CISG, Art. 19</b>
October 25	<u>Contract Interpretation</u> Conflicting Writings: The “Battle of the Forms” <b>Barnett, pp. 433-449</b>
October 25	Guest Lecture (Prof David Jenkins, alum in Legal Writing Section)
October 30	<u>Contract Interpretation</u> Written Contracts and Verbal Modifications: The Parol Evidence Rule <b>Barnett, pp. 451-468</b> <b>MCC Marble, 144 F.3d 1384 (excerpts – to be distributed)</b> <b>CISG, Arts. 8(3), 11; UNIDROIT, Arts. 1.2, 3.1.2</b>
October 31	<u>Contract Interpretation</u> When are Writings Required? The Statute of Frauds <b>Barnett, pp. 475-485, 494-499</b> <b>Restatement ¶ 131</b> <b>CISG, Arts. 11, 12, 29</b>
November 1	<u>Contract Interpretation</u> The Importance of Good Faith <b>Barnett, pp. 793-805, 808</b> <b>UCC §1-201(b)(20); §1-304</b> <b>CISG, Art. 7(1)</b> <b>UNIDROIT, Arts. 1.7, 2.1.15, 2.1.16</b>

**E.**                      **POLICING THE BARGAIN AND LIMITING FREEDOM OF CONTRACT: WHEN COURTS WON'T ENFORCE**

**CONFERENCES on OPEN MEMORANDUM: Monday 6<sup>th</sup>, Tuesday 7<sup>th</sup>, Wednesday 8<sup>th</sup>, Thursday 9<sup>th</sup>**

When Courts Won't Enforce  
Lack of Contractual Capacity  
Incompetence and Infancy  
**Barnett, pp. 931-932, 937-953**  
Restatement ¶14, CISG, Art. 4  
UCC §1-103  
Misrepresentation  
**Barnett, pp. 961-968, 971-975**

When Courts Won't Enforce  
Misrepresentation, Passive Acquiescence, Duty to Disclose  
**Supplemental Materials, pp. 47-63**  
**Restatements ¶¶ 160, 161**  
Duress and Undue Influence  
**Barnett, pp. 976-985, 988**  
**Supplemental Materials pp. 64-73**  
**Restatement ¶177**

When Courts Won't Enforce  
Unconscionability  
**Barnett, pp. 1001-1009 (problem in class), 1018-1027**  
**Supplemental Materials, pp. 78-88**  
**CISG, Art. 4, UNIDROIT, Arts. 2.1.20, 3.2.7, 7.1.6**

***F.***

### **WHEN THINGS FALL APART – WHO BEARS THE COST?**

November 8 (Legal Research time) When Things Fall Apart  
Mistakes – Mutual  
**Barnett, pp. 1065-1074, 1081-1090**  
**Supplemental Materials, pp. 106-110**  
**Restatement ¶153**

November 13 NO CLASS

November 14 NO CLASS

November 15 NO CLASS

**REWRITES OF OPEN MEMORANDUM DUE, HARD COPY by Friday November 17  
noon to Debbie Price  
LEGAL WRITING COURSE ENDS**

November 27

When Things Fall Apart

Impossibility, Impracticability, and Frustration

**Barnett, pp. 1098-1099, 1103-1119**

**Excerpts from Eastern Airlines v. Gulf (to be distributed)**

**CISG, Art. 79, UNIDROIT, Arts. 6.2.2, 6.2.3, 7.1.7**

November 28

When Things Fall Apart

Allocation of Risk in Long-term Contracts

**Barnett, pp. 1126-1146**

Q and A on Contracts Course Overview/Exam