**Construction Industry Contracting and Dispute Resolution Practices Guide**

*General information*

The sample syllabus proposes a course to be offered in one of three alternative structures: first, an upper-level writing course for law students; second, an advanced course for students in an engineering, architecture, construction management, or related program who have already taken an introductory course in the legal aspects of construction; and third, an interdisciplinary course for law students and students in engineering, architecture, construction management or related programs. The same basic structure applies to each of these alternatives, although the details of the lessons, projects, and exercises will vary.

The sample syllabus recommends devoting substantially equal time and attention to three distinct lessons. Lesson 1 (Industry Contracting Practices) uses projects and exercises to engage students in analyzing and drafting terms based on common clauses or standard industry contracts. The students explore contractual aspects of alternative project delivery systems, learn to apply basic contract drafting principles, and engage in drafting exercises and projects. Lesson 2 (Negotiating) introduces fundamental principles of contract and settlement negotiations and uses exercises and projects to simulate negotiations involving common circumstances that industry participants encounter in structuring and managing projects. Lesson 3 (Construction Industry Dispute Resolution Practices) uses exercises and projects to simulate the processes of preparing for and attempting to resolve disputes through negotiation, mediation, arbitration, and litigation.

Depending on the program in which the course is offered and the instructor’s specific goals, assigned readings and exercises may be limited to the basics of contracting practices, negotiating principles, and dispute resolution processes or they may introduce the students to more advanced and complex circumstances. For example, a course for industry professionals may focus primarily on the differences in risk allocation under alternative project delivery systems and approaches to discrete issues reflected in a few sample contracts. An upper-level writing course for law students may engage the students in drafting commonly negotiated contract terms, settlement agreements, and selected mediation, arbitration, and litigation submissions. An interdisciplinary course with both law students and students in construction and design programs may target contract provisions involving professional services, negotiations relating to contract administration, stepped dispute resolution processes, and the role of experts in mediations, arbitrations, and litigation.

In my teaching, this course remains a work in progress. Accordingly, this guide merely offers tentative ideas for reading assignments and exercises.

*Reading assignments*

Those wishing to use selected industry form contracts (American Institute of Architects, ConsensusDocs, Engineers Joint Contract Documents Committee, Design-Build Institute of America, etc.) should request permission from the relevant organization. Policies and practices concerning use of these documents for teaching purposes vary from one organization to another and may change from time to time.

Aside from, or in addition to, using form documents, an extensive body of materials is readily available. Assuming that the students have access to the databases that law students commonly use (or that the instructor otherwise addresses copyright restrictions), I recommend selecting reading assignments from the list below (shown here in no special order), all of which are available on Westlaw. For most courses, between 6 to 12 reading assignments can serve to introduce the students to the basics of industry contracts, negotiating principles, and alternative dispute resolution procedures and can also provide the bases for exercises.

* On basic contract drafting: Tina L. Stark, Contract Drafting Basics: Translating the Business Deal into Contract Concepts, 20150930A NYCBAR 27 (2015 WL 6394812); Tina L. Stark & George W. Kuney, Transactional Skills Training: Contract Drafting-the Basics, 2009 Transactions: Tenn. J. Bus. L. 139.
* On aspects of construction industry contracts: Construction Contracts Deskbook (especially for treatment of specific clauses and issues); Daniel D. McMillan, Construction Contracts and Alternative Dispute Resolution: Choosing the Right Shoe Size and Style, Prac. Law., February 2023, at 23; Carl J. Circo, Building A Better Construction and Design Contract (with Sample Provisions), Prac. Law., July 2000, at 21.
* On negotiating principles: The Havard Program on Negotiation (<https://www.pon.harvard.edu/>); Charles B. Craver, Classic Negotiation Techniques, 52 Idaho L. Rev. 425 (2016).
* Selected assignments from Bruner & O’Connor Construction Law (Chapter 5, Standard Construction Contract Forms: Analysis of the AIA General Conditions; Chapter 9 (Warranties); Chapter 10 (Indemnity and Contribution); Chapter 14 (Differing Site Conditions); Chapter 18 (Contract Breach and Termination); and Chapter 19 (Remedies and Damage Measures). Note: assignments from this comprehensive treatise may be most helpful in an upper-level writing course for law students, although brief excerpts may be appropriate for other courses or for students in other programs.
* Allen L. Overcash, Introducing a Novel ADR Techique for Handling Construction Disputes: Arbitration, 35 Construction Lawyer 22 (Winter 2015).
* Eric B. Travers & Peter A Berg, Forum-Selection Clauses after Atlantic Marine, 34 Construction Lawyer 6 (Summer 2014).
* Kimberly A. Smith, Differing Site Conditions and Metcalf: Judicial shifting of the Risks, 34 Construction Lawyer 35 (Summer 2014).
* Buck Beltzer, et al., “It’s Getting Better All the Time”: Best Practices in Presenting Delay Claims Bench Trial/Arbitration/Jury Trial, 37 Construction Lawyer 6 (Fall 2017).
* Shiva S. Hamidinia, The Misadventures of Shared Design Risk in the New Design-Build World: Managing Design Risk and Responsibility on Federal Design-Build Projects, 38 Construction Lawyer 7 (Spring 2018).
* Justin L. Weisberg & Raymond M. Krauze, Opening Communication Lines: Evolving Project Delivery Methods to Promote Collaboration, 38 Construction Lawyer 14 (Spring 2018).
* Anthony J. LaPlaca, On the Effective Use of Liquidating Agreements, 39 Construction Lawyer 20 (Summer 2019).
* Patricia D. Galloway, The Art of Allocating Risk in an EPC Contract to Minimize Disputes, 38 Construction Lawyer 26 (Fall 2018).
* Neale T. Johnson & Kristen Rectenwald Wang, Anticipating and Allocating Risks in the 2017 AIA Owner-Contractor Agreement, 39 Construction Lawyer 35 (Fall 2019).
* Ben Wheatley & Caleb Trotter, Assignment Issues in Construction Contacts, 36 Construction Lawyer 27 (Winter 2016).
* James Duffy O’Connor, Uncertainty, Doubt, and Rules of Unlearning in the Mediation of Construction Disputes, 40 Construction Lawyer 6 (Spring 2020).
* Adrian L. Basitianelli III, et al., Strategies for Successfully Navigating Cultural Differences in Construction Negotiation and Mediation, 40 Construction Lawyer 11 (Spring 2020).
* Benjamin F. Sturgeon, Fiduciary Duties in Cost-Plus Contracts for Construction, 34 Construction Lawyer 24 (Winter 2014).
* Fredric L. Plotnick, Rewriting the CPM Scheduling Specification to Better Support the Project Owner, 35 Construction Lawyer 31 (Summer 2015).
* Jean M Terry, E. Mitchell Swann & Carmela Mastianni, Managing Integrated Project Delivery, 42 Construction Lawyer 5 (Summer 2022).
* John P. Ahlers, Cameron Sheldon, Hanna Lee Blake, Management of Contract Terminations from Multiple Perspectives, 42 Construction Lawyer 23 (Summer 2022).
* John I. Spangler & Deborah Cazan, Construction Joint Ventures—Essential Terms, Representation Issues and Potential Claims, 42 Construction Lawyer 5 (Fall 2022).
* Shelly L. Ewald & Julia M. Fox, Introduction of Construction Scheduling Expert Testimony: An Overview of the Current Standards in Federal and State Courts and Administrative Boards, 37 Construction Lawyer 26 (Fall 2017).
* Michael H. Rubin, The Ethics of Negotiations for Construction Lawyers: Are There Any?, 42 Construction Lawyer 14 (2023).
* Christian C. Trevino & Robert J. MacPherson, I Know What I Know—Really Reminds Me of Money*,* 43 Construction Lawyer 9 (Spr. 2024).
* Eric A. Berg, Wendy F. Klein Keane, & Kevin r. Garrison, Mastering MSAS, 43 Construction Lawyer 28 (Spr. 2024).
* Carl J. Circo, The Evolving Role of Relational Contract in Construction Law, 32 Construction Lawyer 16 (Fall, 2012).
* Allen L. Overcash, Will the New Contract Forms for Integrated Project Delivery Make Conflict Obsolete? (Or Are We Still Lost in Our Contract Obsession?), 3 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2009).
* Paul M. Lurie, Guided Choice: Early Mediated Settlements and/or Customized Arbitrations, 7 No. 2 J. of Amer. Coll. of Construction Lawyers (August 2013).
* Patrick J. O’Connor, Jr., How to Draft a Construction Contract Insurance Provision, 8 No. 1 J. of Amer. Coll. of Construction Lawyers J. of Amer. Coll. of Construction Lawyers (Febr. 2014).
* W. Alexander Moseley, Drafting the Arbitration Clause to Avoid Common Complaints, 8 No. 1 J. of Amer. Coll. of Construction Lawyers (Febr. 2014).
* Karen Bain & Philip W. Lamparella, Indicate Precisely What You Mean to Say: Routine Clauses and Phrases: Overlook at Your Peril?, 10 No. 2 J. of Amer. Coll. of Construction Lawyers (Aug. 2016).
* Joel D. Heusinger, Ambiguity Breeds Conflict: The Importance of Defining “Design-Assist” in the Construction Industry, 11 No.1 J. of Amer. Coll. of Construction Lawyers (Winter 2017).
* Ava J. Abramowitz, How Collaborative Negotiators Settle Without Upending the Table, 14 No. 2 J. of Amer. Coll. of Construction Lawyers (Summer 2020).
* Dean B. Thomson, Early Mediator Engagement: Lessons from Master Mediators, 15 No. 1 J. of Amer. Coll. of Construction Lawyers (2021).
* Stephen A. Hess, The Sanctity of Construction Contracts, 15 No. 1, J. of Amer. Coll. of Construction Lawyers (Winter 2021).
* Charles Sink, Drafting Disputes and Damages Clauses to Avoid Both, 15 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2021).
* Adrian L. Bastianelli, III & Joseph N. Frost, Alternative Alternative Procedures to Reslove Construction Disputes, 15 No. 2 J. of Amer. Coll. of Construction Lawyers (Summer 2021).
* James J. Hartnett, Construction Contract Dispute Resolution—A Practical Guide, 17 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2023).
* Danielle Meyer, Rowan Mason, & Bryan Van Lenten, Ways to Address Cost Escalation and Supply Chain Issues, 17 No. 1 J. of Amer. Coll. of Construction Lawyers (Winter 2023).

*Exercises*

As noted, I recommend developing exercises based on a select number of the reading assignments. If the course format permits, regularly having students work on exercises in small groups (especially for negotiations or presentations) can enhance experiential learning. The website’s Problems/Exercises/Simulations section also provides materials easily adaptable to exercises for a course based on the sample syllabus. A few specific ideas follow.

* Prepare a memorandum to a client or firm recommending a specific project delivery system for one or more hypothetical projects.
* Negotiate or draft (or negotiate and then draft) a specific contract provision (for example, one addressing differing site conditions, termination for convenience clause, no-damage for delay, cost escalation, indemnification, or assignability) tailored to a hypothetical project or a hypothetical firm’s circumstances.
* Negotiate or draft (or negotiate and then draft) an agreement to resolve a dispute under a differing site conditions clause for a hypothetical project.
* Starting with provisions from a standard industry contract, negotiate or draft (or negotiate and then draft) a detailed stepped claims and dispute process for a hypothetical project.
* Negotiate or draft (or negotiate and then draft) selected provisions of a Master Services Agreement.
* Negotiate or draft (or negotiate and then draft) the key terms of a proposed settlement agreement for a hypothetical dispute.
* Organize and conduct a meeting with a hypothetical client or firm deciding what dispute resolution steps and procedures to propose as a standard negotiating preference.
* Prepare a memorandum to a client or firm discussing the relative advantages and disadvantages of alternative processes for resolving a hypothetical dispute (mediation, arbitration, bench trial, jury trial).
* Starting from a sample agreement, negotiate or draft (or negotiate and then draft) modifications to one or more selected provisions based on a hypothetical project.