

Advanced Contract Law and Economics

European Master in Law and Economics Program

2nd term, Ghent University

Mitja Kovac

February – March 2023

Contents and Purpose

One of the central areas of the law is the law of consensual agreements. As with all central areas of law, economic analysis has had a significant effect on our understanding of contracts in the last thirty years. This short course will summarize and evaluate the economic analysis of contract law, but mainly develop more complex problems and analyze more advanced topics than what you have heard in the first term.

The readings that we shall be discussing and for which you will be responsible are noted below. For the whole course the central reading will be Chapter 8 and 9 of Robert D. Cooter & Thomas S. Ulen, *Law and Economics* (the 6th edition is available online at: <http://scholarship.law.berkeley.edu/books/2/>). For each section of the course you should read and review the relevant sections of that text. In fact, you should be familiar with these two chapters. Each section below also lists additional readings, which support the two book chapters and which are instructive for specific problems that we will discuss in class. Moreover, we will make accessible much more literature than is listed below. Our hope is that you will indulge in it and continue exploring the literature according to your own interests. Note that these additional readings are, of course, not the entire universe of relevant literature in contract law and economics. Our archive is merely a sample of topics that we hope will put you on a path of ongoing discovery. All of the readings (and more) will be made available to you in an electronic form.

Requirements and Evaluation

As a master class, this course is problem oriented. The focus is on discussion rather than frontal teaching. We also prefer student-teacher and student-student interaction over content delivery. Therefore, we are looking forward to hear your thoughts, ideas, and critique and hope that classroom discussion among you will be a cornerstone of the course, even if that slows down the course.

Moreover, we are convinced that writing a classroom exam will not test the skills that will prepare you for the third term and for writing your thesis. Therefore, the evaluation will require you to analyze contract law and economics problems in a real-world application context. We will also provide you with plenty time to think about what you write, rather than putting you under time-pressure in a classroom exam.

Specifically, the final grade will consist of two parts. The first part will require you to write a short analysis of a real-world case. This case analysis will count 40% towards your final case. The second part will confront you with a real-world problem that you could encounter in a law firm or other some consulting business. To develop a solution to this problem, you will

likely need some more time and space and, therefore, this part will count 60% to your final grade (seminar paper).

More administrative details (such as cases, deadlines, scope of the paper, submission, etc.) will be announced and discussed during our first lecture).

Schedule of Classes

1. Introduction and recap of basic concepts 13 February • Classroom 5.4 Paddenhoek 1 • 13:00 – 15:00

Lecturer: Mitja Kovac

Readings:

- Eisenhardt (1989), “Agency Theory: An Assessment and Review”, *Academy of Management Review*, 14(1), 57-74
- Braun and Guston (2003), “Principal-Agent Theory and Research Policy: An Introduction”, *Science and Public Policy*, 30(5), 302-306
- Stauvermann (2004), “Application of Principal-Agent Models in Science Policy”, Unpublished Manuscript
- Muthoo (2000), “A Non-technical Introduction to Bargaining Theory”, *World Economics*, 1(2), 145-166
- Sutton (1986), “Non-cooperative Bargaining Theory: An Introduction”, *Review of Economic Studies*, 53(5), 709-274

2. Contract formation I 15 February • Classroom 5.4 • 10:00 – 12:00

Lecturer: Mitja Kovac

Readings:

- De Geest and Kovac (2009), “The Formation of Contracts in the Draft Common Frame of Reference”, *European Review of Private Law*, 17(2), 113-132
- Kovac (2019), “Culpa in Contrahendo, Promissory Estoppel, Pre-contractual Good Faith, and Irredeemable Acts”, *Asian Journal of Law and Economics*, 10(1), 1-19
- Kovac and Vandenberghe (2021), “Pre-contractual Liability *sensu strictu* or *sensu lato*: Illuminating the Pre-contractual Liability Conundrum,” *European Journal of Comparative Law and Governance*

3. Contract formation II 20 February • Classroom 5.4 • 13:00 – 15:00

Lecturer: Mitja Kovac

Readings:

- Katz (1990), “The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation”, *Michigan Law Review*, 89(2), 215-295
- Tiersma (1986), “The Language of Offer and Acceptance”, *California Law Review*, 47(1), 189-232
- Craswell (1996), “Offer, Acceptance, and Efficient Reliance”, *Stanford Law Review*, 48(3), 481-554

- Kovac (2022), “The Rise of the Mail-box Rule and Formation of Contracts in English, French, and German Law”, *Liverpool Law Review*

4. Strategic contract drafting I

21 February • Auditorium F • 9:00 – 11:00

Lecturer: Mitja Kovac

Readings:

- Cheung (1969), “Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements”, *Journal of Law and Economics*, 12(1), 23-42
- Shavell (2003), “Economic Analysis of Contract Law”, Harvard Law School John M. Olin Discussion Paper, Nr. 403
- Ayres & Schwartz (2014), “The No-Reading Problem in Consumer Contract Law”, *Stanford Law Review*, 66(3), 545-610
- Ben-Shahar & Schneider (2011), “The Failure of Mandated Disclosure”, *University of Pennsylvania Law Review*, 159(3), 647-750

5. Strategic contract drafting II

22 February • Classroom 5.4 • 13:00 – 15:00

Lecturer: Mitja Kovac

Readings:

- Shavell (2003), “Economic Analysis of Contract Law”, Harvard Law School John M. Olin Discussion Paper, Nr. 403
- Shavell (2006), “On the Writing and the Interpretation of Contracts”, *Journal of Law, Economics, and Organization*, 22(2), 289-314

6. Performance and performance excuses I

23 February • Classroom 5.4 • 10:00 – 12:00

Lecturer: Mitja Kovac

Readings:

- Kovac (2013), “Unforeseen Contingencies in English and French Law”, *Journal of Comparative Law*, 8, 1-37
- Kovac (2018), “Frustration of purpose and the French Contract Law reform: the challenge to the international commercial attractiveness of English law?”, *Maastricht Journal of European and Comparative Law*, 25(3), 288-309
- Aubrecht & Kovac (2019), “‘Brexit’ and the Boilerplate Clauses in Commercial Contracts”, *Business Law Review*, 40(6), 249–257

7. High-velocity Labor Market Contracts, Non-disclosure, and Confidentiality Agreements

24 February • Classroom 5.4 • 10:00 – 12:00

Lecturer: Mitja Kovac

Readings:

- Kovac (2022), “Contract Drafting: Strategic, Behavioral, and Economic Concepts”, EMLE Materials (by handout)

8. Applications and case studies:

Performance and performance excuses II 27 February • Classroom 5.4 • 13:00 – 15:00

Lecturer: Mitja Kovac

Readings:

- Kovac (2014), "Unilateral Cancellation of Contracts in French, English, and Chinese Law", *Global Journal of Comparative Law*, 3(1), 1-33
- Kovac and Vandenberghe (2015), "Regulation of Automatic Renewal Clauses: A Behavioral Law and Economics Approach", *Journal of Consumer Policy*, 38(3), 287-313

9. Behavioral contract law and economics

27 February • Classroom 5.4 • 15:00 – 17:00

Lecturer: Mitja Kovac

Readings:

- Hoppe & Schmitz (2015), "Do Sellers Offer Menus of Contracts to Separate Buyer Types? An Experimental Test of Adverse Selection Theory", *Games and Economic Behavior*, 89, 17-33
- Hoppe & Schmitz (2018), "Hidden Action and Outcome Contractibility: An Experimental Test of Moral Hazard Theory", *Games and Economic Behavior*, 109, 544-564

10. & 11. Collaborative contracts for innovation

2 March • Classroom 5.4 • 10:00 – 11:00

Lecturer: Mitja Kovac

Readings:

- Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 *COLUM. L. REV.* 431 (2009)
- Dyer, J. H. (1996). How Chrysler created an American keiretsu. *Harvard Business Review* (July-August)
- Handouts

Paper presentations and roundtable discussions

2 March • Classroom 5.4 • 11:00 – 14:00

Lecturer: Mitja Kovac